

# *Nova Law Review*

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# NOVA LAW REVIEW

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## INTRODUCTION: TRANSFORMING LEGAL EDUCATION

STEVEN I. FRIEDLAND

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For as long as we can remember, legal education has been delivered in essentially the same fashion, in buckets. Not literally, of course, but rather through an expert in a specific subject matter domain.<sup>1</sup> The expert mines a bucket of substantive law, such as Contracts or Torts, relating it to students through a book of appellate cases.<sup>2</sup> The students received this knowledge, studied it outside of class for its meaning, and then returned to class in a rather formalized linear structure to learn more about the nature and ethos of the bucket.<sup>3</sup> With a presumptive identity of teaching and learning—that is, if the teacher was teaching, the students must be learning—things such as learning science, cultural awareness, power structures, specific objectives about developing a variety of lawyering skill-sets, and measuring those developments formatively, were at best peripheral to the learning process.

The legal educational orthodoxy, however, is losing momentum—no longer an unquestioned beacon of educational superiority—and the rapidity and centrality of the potential changes have taken many people by surprise. The changes have been generated by forces located outside of the Academy, leading to the commoditization of legal education.<sup>4</sup> As related in the article by Professors SpearIt and Smith Ledesma, students are voting with their pocketbooks<sup>5</sup> and a shrinking number are applying to law school.<sup>6</sup> Further, the type of law jobs available in a globalized, tech-savvy legal market is evolving. The economic forces are also influenced by the clients and the lawyers who operate within the system. Clients are no longer blithely

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1. Traditional subject matter domains included Torts, Contracts, Civil Procedure and Property Law.

2. For one of the earliest casebooks, *see, e.g.*, C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

3. The irony is that a law graduate in the early 1900s might very well feel right at home in the law school classroom of the early 2000s, especially when leafing through the books used to facilitate core courses.

4. *See* Terrence Loose, *What You Should Do Instead of Law School*, YAHOO! EDUCATION, [http://education.yahoo.net/articles/best\\_law\\_school\\_alternatives.htm](http://education.yahoo.net/articles/best_law_school_alternatives.htm) (last visited Feb. 16, 2014).

5. It was believed for many years that attending law school was a good idea for many people as a background for other endeavors, even if they did not want to practice law.\*

6. There has been at least a double-figure percent decrease in students taking the LSAT in each of the past three years, according to the Law School Admission Council. *See LSATS Administered—Counts and Percent Increases by Admin and Year*, LSAC, <http://www.lsac.org/lisacresources/data/lisats-administered> (last visited Feb. 16, 2014).

accepting the fee structures of their lawyers, particularly institutional clients served by big firms; in-house lawyers are also responsible for managing fees, not just cases. The day of assigning multiple senior and junior lawyers in a law firm or business to a job, and clients paying the resulting fees without question, seems to be over. Consequently, the compact with the profession, through which law graduates are effectively given subsidized training by the lawyers that hire them, has been breached and may never return. Instead, a very public cost/benefit debate is occurring—is legal education worth its price?<sup>7</sup>

It is not just the legal profession that is changing, but law students as well. Born-digital students seem to prefer more flexibility, mobility, and different learning approaches than the singular, Socratic-style, in-class linearity of generations past. The idea of one size of learning fitting all is losing its appeal, especially for gamers and those living within a device-obsessed culture.

Despite all of the negativity swirling around legal education, there is, to some, a silver lining—this sea change brings opportunity.<sup>8</sup> There is now a huge chance to reframe legal education so it is stronger and better situated in the global marketplace. After all, it is hard to find a part of law that is so local it is not connected to or affected by a broader, if not global, stage.

This new path for legal education likely involves a different understanding of a law school's dual roles. One role is teaching about a specialized knowledge domain, *the law*, often short-circuited into a way of thinking called *thinking like a lawyer*.<sup>9</sup> This role provides law schools admission to the academy, the world of graduate education, through resemblance to other programs in length and rigor. The other role is teaching students to become professional lawyers, operating with and applying the knowledge learned in the marketplace. Any reconceptualization likely involves an education that is designed to transition students into law practice so that they not only pass the bar exam, but understand what it takes to succeed in their respective fields. The education probably will involve using learning science and experiential education throughout the educational process, not just sporadically, but in domain-specific applications to maximize its value. A new approach involves creating beneficial learning

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7. *E.g.*, Loose, *supra* note 4. This commoditization is economic-oriented, mostly looking at the value of legal education compared to other graduate programs or no extra schooling at all. *See, e.g., id.*

8. This opportunity is to effect lasting and beneficial modifications that adapt to the needs of the constituencies in the long-term, not simply a short-term increase in paying applicants.

9. This term has been over-used to justify what traditional law teachers do, without any specific data-driven outcomes analysis.

environments, those that are learner- and community-centered, and those that create engagement and not disinterest. It is technology-driven and empathy-motivated, paying attention to Yeats' famous quote, "education is not the filling of a pail, but the lighting of a fire."

This edition of the *Nova Law Review* at Nova Southeastern University, Shepard Broad Law Center illustrates how the changing world of legal education provides an opportunity to revise and adapt our understandings and assumptions as we go forward. The authors all use the theme of reframing—altering the pillars of legal education or even the law itself.

Professors SpearIt and Stephanie Smith Ledesma, in *Experiential Education As Critical Pedagogy: Enhancing the Law School Experience*, use critical pedagogy to examine the benefits of increasing the use of experience in legal education, particularly as a response to the downturn of law school applicants, law jobs, and publicity about the value of law school. The focus of the article is how changes in methodology serve not only to educate, but also to empower students. The article thus expands boundaries and offers an uncommon window into the power relationships that lie within the legal education arena. The authors view the empowerment of students through an experiential student-centered education not only as an intrinsic benefit, but one with various instrumental outcomes, especially if doctrinal faculty are engaged in the experiential process. The most significant outcome for the authors is the opportunity for students to experience justice and not simply read about it in a book.

Professors Curcio, Ward, and Dogra offer the very timely *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*. In light of the fact that the American Bar Association appears ready to adopt a learning outcomes model for its member schools, the authors suggest that competency in working across cultures, the importance of which is already understood in law practice in a multicultural world, should be adopted in a more systemic and systematic way in law schools. The authors go far beyond just opining about the usefulness of such a pedagogy however, and provide a sample survey that could identify and measure culturally competent learning outcomes. While law schools have been challenged by how to adapt curricula that blend together demands for a more modern and pragmatic education, the authors propose how their survey instrument and research can assist law schools in incorporating cultural sensitivity and specific learning outcomes within an existing curriculum, without starting from the beginning. Thus, this article has something for the entire legal community, speaking to professors, students, practitioners, and accreditors, all at the same time.

Professor Elizabeth Shaver infuses the domain of legal research and writing with creativity and alternative pedagogy in *LRW's The Real World: Using Real Cases to Teach Persuasive Writing*. Professor Shaver uses the MTV reality show, *The Real World*, to illustrate how to reposition teaching and learning in legal research and writing. In particular, she describes an exercise that utilizes actual briefs and judicial opinions to teach the different components of persuasive writing. Included in these components are the development of a theme, organization of the arguments, and effective use of case law as authority. Through the exercise, students become practitioners and importantly, learn how to spot and develop persuasive writing. Significantly, Professor Shaver thoughtfully organizes the order of learning for her students—knowledge of the rules and principles comes first, and then the application of that knowledge through judgment and evaluation about the components of persuasive advocacy follows. In describing the comprehensive exercise, Professor Shaver provides a roadmap to her thinking about learning and persuasive writing in general.

Ms. Feluren, in *Moving the Focus Away From the IQ Score Towards the Subjective Assessment of Adaptive Functioning: The Effect of the DSM-5 on the Post-Atkins Categorical Exemption of Offenders With Intellectual Disability From the Death Penalty*, writes about the impact of the new version of the Diagnostic and Statistical Manual (“DSM”)—the DSM-5, the authoritative resource for diagnosis used by psychiatrists and psychologists—on the death penalty for persons who have an intellectual disability. In *Atkins v. Virginia*,<sup>10</sup> a seminal case about the Eighth Amendment’s limits on the death penalty for the mentally disabled, the Supreme Court drew a line against imposing the death penalty against a person who was significantly impaired mentally.<sup>11</sup> Ms. Feluren analyzes the interface between the mental health system, as illustrated by the DSM-5, and the legal system, utilizing history and the textual changes to predict how the changes in the DSM-5 ought to be handled within the constitutional framework.

Ms. Duquette writes about products liability and mass shootings in the United States in *The Rx and the AR: A Products Liability Approach to the Mass Shooting Problem*. Ms. Duquette presents a different perspective on how to deal with the issue of mass shootings—using controls over the distribution of prescription medications, instead of focusing on guns. Ms. Duquette’s point is that many of the mass murderers were prescribed either antidepressant or antipsychotic medications and presumably were adversely

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10. 536 U.S. 304 (2002).

11. *Id.* at 321.



affected by them. As such, the pharmaceutical industry should be part of the calculus in efforts to remedy this problem.

These articles provide for wonderful reading on many levels, from thoughtful dispositions about topical and nuanced questions, to ways to ably respond to a rapidly transforming world, one where the entire nature of legal education and law could see more change in the next decade than it did in the previous century. Law review articles are sometimes criticized for their lack of utility, but this is one criticism that cannot be leveled at this volume. In fact, it is clear these articles will contribute to the national narrative about transforming legal education and law. The new narrative created by these pieces helps to pave the way for decades of tradition to give way to a different and stronger foundation built to withstand emerging contexts—leading to more suitable outcomes for a volatile and very challenging era for legal education and the rule of law.

## A SURVEY INSTRUMENT TO DEVELOP, TAILOR, AND HELP MEASURE LAW STUDENT CULTURAL DIVERSITY EDUCATION LEARNING OUTCOMES

ANDREA A. CURCIO, TERESA E. WARD, AND NISHA DOGRA\*

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\*Andrea A. Curcio is a Full Professor at Georgia State University College of Law; Teresa E. Ward is the Director for the Center for Higher Education Research and Analytics and Sr. Research Associate in the Office of Institutional Research, Georgia State University; Nisha Dogra, B.M. (Bachelor of Medicine) PhD, is a Professor of Psychiatry Education and Honorary Consultant in Children and Adolescent Psychiatry, Greenwood Institute of Health, University of Leicester, Leicester England. The authors thank Raquel Aldana for her thoughtful comments and Akilah Kinnison for her work on this piece. We also thank Pam Brannon, GSU law librarian, for her help locating sources and research materials and graduate research assistant Paul Petersen for his help with the final stages of this piece.

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*Legal education reformers are increasingly focused on an outcome-oriented approach to legal education. Law school accreditors are poised to adopt learning outcomes standards requiring each law school to identify the knowledge, attitudes, and skills its law graduates should possess. Among the skills suggested for inclusion in law school learning outcomes is the ability to work effectively across cultures. Despite the importance of cultural competence for effective legal practice, law schools have not yet developed a systematic method for helping students develop awareness of how cultural perspectives shape lawyer-client interactions, affect transactions, and influence the development of the law. This article identifies ways law schools might conceptualize learning outcomes that will enhance law students' abilities to effectively represent clients in today's multicultural world and global legal environment. It provides legal educators with a statistically valid and reliable survey instrument developed to help identify, and potentially measure, some of those learning outcomes. It discusses the survey design and findings. Finally, this article suggests several ways our survey instrument and research can help legal educators conceptualize ways to integrate the inclusion of cultural sensibility learning and learning outcomes into the law school curricula.*

#### INTRODUCTION

In recent years, law schools have been heavily berated for ill-preparing students for real-world law practice.<sup>1</sup> In response to widespread attacks on the legal education system, many U.S. law schools have begun rewriting their curricula.<sup>2</sup> Legal education reformers have placed increasing

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1. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1951–53 (2012). A. Benjamin Spencer has described this as “[the] perfect storm in legal education: Law school graduates are under-employed, over-indebted, and under-prepared for practice,” prompting an attack on legal education practices. *Id.*

2. See U. DENVER STURM C. LAW, <http://www.denverlawplan.com> (last visited Feb. 16, 2014); Brian Leiter, *Washington & Lee's Radical Transformation of the 3rd*

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emphasis on learning outcomes, sparking discussion about the value of an outcome-oriented approach to legal education as well as debate over which outcomes should be included in standard curricula.<sup>3</sup> Law school accreditors are poised to adopt learning outcomes standards requiring each law school to identify the knowledge, attitudes, and skills law graduates should possess.<sup>4</sup> Among the skills proposed for inclusion in the mandatory outcomes was the ability to work effectively across a range of cultures.<sup>5</sup>

Despite the fact that lawyers frequently deal with people from diverse backgrounds in the increasingly globalized practice of law, law schools have not yet developed a systematic method for helping students develop awareness of how cultural perspectives shape lawyer-client interactions, affect transactions, and influence the development of the law.<sup>6</sup> This aspect of education, often called *cultural competence*, has largely been relegated to the domain of clinical faculty or specialty courses. Law school

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*Year of Law School*, BRIAN LIETER'S L. SCH. REP. (Mar. 24, 2008), <http://www.leiterlawschool.typepad.com/leiter/2008/03/washington-lees.html>; Symposium Program, Ne. Univ. Sch. of Law, Experience the Future: Inaugural National Symposium on Experiential Education in Law (Oct. 26–28, 2012), <http://www.northeastern.edu/law/pdfs/academics/exp-future-papers/program-2012.pdf>.

3. See Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 225–26 (2011); Beverly Petersen Jennison, *Beyond Landgell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643 *passim* (2013). For a comprehensive discussion of the shift to learning outcomes in legal education, see Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976 (2012).

4. The proposed accreditation standard incorporating learning outcomes, Standard 302, is currently in its final phase of adoption, having been published for “notice and comment” by the American Bar Association Council of the Section of Legal Education and Admission to the Bar. The most recent version of proposed Standard 302 is available at Proposed Standards for Approval of Law Schools, Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/march2014councilmeeting/2014\\_02\\_compilation\\_of\\_proposed\\_changes\\_to\\_standards\\_clean.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_02_compilation_of_proposed_changes_to_standards_clean.authcheckdam.pdf).

5. See, e.g., Letter from Jackie Gardina, Co-President, Soc’y of Am. Law Teachers & Ngai Pindell Co-President, Soc’y of Am. Law Teachers, to Dean Jeffery E. Lewis, Chair, Am. Bar Ass’n Standards Review Comm. (Apr. 13, 2012), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/20120416\\_comment\\_general\\_salt\\_s211\\_212.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20120416_comment_general_salt_s211_212.authcheckdam.pdf).

6. Numerous legal educators have argued that cultural sensibility skills should be infused throughout the curriculum. See ANTHONY O’DONNELL & RICHARD JOHNSTONE, DEVELOPING A CROSS-CULTURAL LAW CURRICULUM 13 (1997); Nelson P. Miller et al., *Equality as Talisman: Getting Beyond Bias to Cultural Competence as a Professional Skill*, 25 T.M. COOLEY L. REV. 99, 111–13 (2008); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—a Case for Cultural Competency*, 38 S.U. L. REV. 1, 24–26 (2010).

accreditors have thus far declined to include *cultural competence* as one of the mandatory outcomes, in contrast to the accrediting bodies for medical and other professional schools.<sup>7</sup> Instead, the proposed accreditation standard allows individual law schools to decide whether *cultural competence* should be amongst the school's designated learning outcomes.<sup>8</sup> As schools respond to the demand for more experiential learning, and as they develop their list of learning outcomes, law schools should consider whether they should prepare students to become what we call a *culturally sensible lawyer*<sup>9</sup>—a lawyer who can work effectively across cultures.

This article discusses the theoretical and practical aspects of developing a *culturally sensible lawyer* and a statistically reliable survey instrument we developed to help law schools assess some baseline cultural sensibility knowledge, attitudes, and skills learning outcomes. Part I discusses why cultural sensibility should be a designated legal education learning outcome. It begins with a brief discussion about the paradigm shift to learning outcome accreditation standards. It then explains how the construct of cultural competence evolved into a construct of cultural sensibility. Emphasizing an open-mindedness about one's own and others' cultures, cultural sensibility education works toward helping students avoid making assumptions about other cultures or legal systems, as well as avoiding behaviors based upon impressions of cultural domination or superiority. This part then discusses why cultural sensibility is important for all lawyers, not just those engaged in international transactions or social justice issues. Using the cultural sensibility framework, Part II discusses how law schools and law professors might conceptualize knowledge, skills,

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7. See LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE 10 (2012), available at <http://www.lcme.org/publications/functions2012may.pdf> (requiring medical schools to document objectives relating to the development of skills in cultural competence); see also THE NAT'L ARCHITECTURAL ACCREDITING BD., INC., 2009 CONDITIONS FOR ACCREDITATION 22 (2009), available at [http://www.naab.org/accreditation/2009\\_conditions](http://www.naab.org/accreditation/2009_conditions) (listing cultural diversity as one of its student performance criteria).

8. See Proposed Standards for Approval of Law Schools, Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), *supra* note 4.

9. Some ideas in this article explicate thoughts originally expressed in earlier pieces. See Andrea A. Curcio et al., *Using Existing Frameworks to Develop Ways to Teach and Measure Law Students' Cultural Competence*, in THE LEGAL PROFESSION: EDUCATION AND ETHICS IN PRACTICE 21, 21 (David A. Frenkel ed., 2013) [hereinafter Curcio et al., *Using Existing Frameworks to Develop Ways to Teach and Measure Law Students' Cultural Competence*]; Andrea A. Curcio et al., *Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process*, 16 U. W. SYDNEY L. REV. 100, 104 (2012) [hereinafter Curcio et al., *Educating Culturally Sensible Lawyers*].

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and attitude learning outcomes related to the development of a culturally sensible lawyer. Part III explains theoretical models that explore the progression students experience as they develop their ability to work effectively across cultures. These models challenge the notion that anyone can ever become fully *culturally competent*, positing that culture—and our experience of culture—is an evolving and dynamic process<sup>10</sup> that occurs along a cultural sensibility learning continuum.

In light of the cultural sensibility learning outcomes and learning continuum, Part IV discusses a statistically reliable survey instrument we developed to measure some aspects of students’ cultural sensibility knowledge, attitudes, and skills. We explain the survey development and methodology and discuss the survey results. In Part V, we discuss how the survey can be used to inform teaching, and develop learning outcomes. Our survey results suggest that the focus of cultural sensibility teaching needs to be helping students understand that we all have multi-faceted cultural backgrounds and experiences that affect how we perceive and analyze legal problems and how we interact with clients and colleagues. Our results suggest legal educators can use the survey to develop learning outcomes tailored to their students and that the survey can serve as one measure of achievement of some of those cultural sensibility learning outcomes.

I.            WHAT IS CULTURAL SENSIBILITY AND WHY IS IT IMPORTANT?

A.            *Cultural Sensibility and the Law School Accreditation Context*

Historically, law school accreditors have focused on input measurements, requiring schools to provide substantial instruction with regard to certain kinds of knowledge, skills, and values.<sup>11</sup> In addition to focusing on specific types of instruction, assessing law schools based on input measurements means emphasizing factors such as “faculty-student ratios [and] per pupil expenditures.”<sup>12</sup> Law school accreditors’ input-oriented focus significantly differs from the focus of accreditors in other

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10.            Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1069 (2004); Doris Estelle Long, *Crossing the Innovation Divide*, 81 TEMPLE L. REV. 507, 541 (2008).

11.            CATHERINE L. CARPENTER ET AL., AM. BAR ASS’N, SECTION OF EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE 19 (2008), available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>; Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 610 (2010).

12.            Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 764 (2011).

professions,<sup>13</sup> and this approach has been widely criticized for failing to prepare students for legal practice.<sup>14</sup> For instance, an influential 2007 report by the Clinical Legal Education Association critiqued the input-oriented approach, stating: “In the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day in practice or to design a program of instruction to achieve those goals.”<sup>15</sup> Subsequently, the report noted, law school graduates were ill-prepared for practice, and law schools were guilty of doing a disservice to communities by failing to focus more on learning outcomes rather than educational inputs.<sup>16</sup>

The traditional focus on learning inputs, however, has been rapidly changing in recent years as law school educators and accreditors have increasingly acknowledged the importance of an outcome-oriented approach to legal education.<sup>17</sup> In 2007, the American Bar Association (“ABA”) Section on Legal Education and Admissions to the Bar appointed a Special Committee on Outcome Measures (“Outcomes Committee”), and in 2008, this Outcomes Committee released a report encouraging the section to “re-examine the current ABA Accreditation Standards and reframe them, as needed, to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”<sup>18</sup>

Since 2008, the ABA Standards Review Committee has been working to develop an accreditation standard that identifies mandatory learning outcomes.<sup>19</sup> The latest version of proposed ABA accreditation standards includes Standard 302, which is entitled “Learning Outcomes” and

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13. *Id.* at 763–64 & n.153.

14. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 1–5 (1st ed. 2007); Spencer, *supra* note 1, at 2009.

15. STUCKEY ET AL., *supra* note 14, at 3. For more discussion of the Best Practices Report and other background, see Carasik, *supra* note 12, at 743; Mary Crossley & Lu-in Wang, Essay, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 272 (2010); Fisher, *supra* note 3, at 225–30; Spencer, *supra* note 1, at 2009–10.

16. *See* STUCKEY ET AL., *supra* note 14, at 7–8; Spencer, *supra* note 1, at 2009–10.

17. *See* Crossley & Wang, *supra* note 15, at 269–73; Lynch, *supra* note 3 at 981–84; Spencer, *supra* note 1, at 2016–17.

18. Crossley & Wang, *supra* note 15, at 271–72.

19. CARPENTER ET AL., *supra* note 11, at 1. The outcome measures have undergone numerous revisions and been the subject of substantial debate within the academy. Crossley & Wang, *supra* note 15, at 271–72. For a thorough discussion of the debate within the academy, see generally, Lynch, *supra* note 3. The various iterations of the proposed Learning Outcomes Standards, and the public comments on those iterations, are available at *Notice and Comment*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment.html](http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html) (last visited Feb. 16, 2014).

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would require law schools to establish learning outcomes that demonstrate student competency in a number of areas.<sup>20</sup>

Learning outcomes have been defined as “something [the] students can do now that they could not do previously . . . [a change in people] as a result of a learning experience.”<sup>21</sup> Those advocating for an outcomes-based education argue that outcome-oriented assessment benefits students, law schools, and the community at large. Students benefit from having clearly stated learning goals and faculty and law schools are able to determine the effectiveness of the institution’s curriculum.<sup>22</sup> Further, they argue that law school accreditors protect consumers by encouraging educators to focus on institutional effectiveness and the training of competent lawyers.<sup>23</sup> While there are legitimate concerns about the effect and implementation of learning outcomes,<sup>24</sup> law school accreditors soon will join other professions and require schools to identify learning outcomes and demonstrate achievement of those outcomes.<sup>25</sup>

As law schools make the paradigmatic shift toward focusing on what students have learned rather than on areas or types of instruction, legal educators will need to identify learning outcomes both on a course and curricular level. Additionally, law school accreditors will be looking for ways to identify and analyze learning outcomes. Cultural sensibility—more commonly known as *cultural competency*—is amongst the learning outcomes schools may choose to establish to satisfy the requirement that schools prepare law students for “competent and ethical participation as a

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20. Standard 302 will require schools to establish learning outcomes that, at a minimum, include competency in the following: (a) knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Proposed Standards for Approval of Law Schools, Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), *supra* note 4. Interpretation 302-1 encourages schools to consider fulfilling the mandate of Standard 302(d) by designating and measuring a wide range of additional skills, including cultural competency and self-evaluation. *Id.*

21. Paul Watson, *The Role and Integration of Learning Outcomes Into the Educational Process*, 3 ACTIVE LEARNING HIGHER EDUC. 205, 208 (2002).

22. Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457, 461, 466–67 (2011).

23. *Id.* at 464; *see also* Steven I. Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947, 959, 962 (2012).

24. *See infra* text accompanying notes 105–08.

25. *See* Proposed Standards for Approval of Law Schools, Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), *supra* note 4.



member of the legal profession.”<sup>26</sup> Recognizing the importance of preparing students to work in our multi-cultural world, this article provides law schools with a method to conceptualize, and begin to measure, some cultural sensibility learning outcomes.

#### B. *Evolution from Cultural Competence to Cultural Sensibility*

Culture is a social construct, steeped in the history, politics, and economics of a given community,<sup>27</sup> and culture is not value-free.<sup>28</sup> Culture encompasses a wide range of factors that influence individuals’ perspectives and behaviors. The term *culture* itself has been the subject of great debate.<sup>29</sup> Although no singularly accepted definition of culture exists, some medical educators define culture as: “[I]ntegrated patterns of human behavior that include the language, thoughts, [communications], actions, customs, beliefs, [values], and institutions of racial, ethnic, social, or religious groups.”<sup>30</sup> By including the term *social groups*, this definition indicates that many aspects of culture exist, including but not limited to: Socio-economic status, sexual orientation, disability, gender, physical characteristics, marital status, role in family, religion, and age.<sup>31</sup> Of course, all members of a particular social group do not share all of the same experiences,<sup>32</sup> and people have multiple

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26. See Proposed Standards for Approval of Law Schools, Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), *supra* note 4.

27. O’DONNELL & JOHNSTONE, *supra* note 6, at 7–9.

28. Nisha Dogra & Khalid Karim, *Diversity Training for Psychiatrists*, 11 ADVANCES PSYCHIATRIC TREATMENT 159, 159 (2005); Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT’L L. 195, 217–19 (2004).

29. Raquel Aldana, *Cross-Cultural Legal Competence as Transformation* (n.d.) (unpublished manuscript) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 715 n.16 (1995); Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLINICAL L. REV. 183, 204–05 (2011).

30. ASS’N OF AM. MED. COLLS., CULTURAL COMPETENCE EDUCATION FOR MED. STUDENTS 1 (2005), available at <https://www.aamc.org/download/54338/data/>.

31. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 41 (2001); Adam B. Cohen, *Many Forms of Culture*, 64 AM. PSYCHOLOGIST 194, 194–95 (2009).

32. Bradley W. Bergey & Avi Kaplan, *What Do Social Groups Have to Do with Culture? The Crucial Role of Shared Experience*, FRONTIERS PSYCHOL., Nov. 2010, at 1, 1, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3153807/pdf/fpsyg-01-00199.pdf>; Bryant, *supra* note 31, at 41. See generally Alexis Anderson et al, *Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339 (2012) (discussing the need to train students to be aware of the risks of sameness and assumptions of sameness when lawyers interact with clients).

cultural backgrounds that all converge to influence perceptions and behaviors.<sup>33</sup> Thus, not only is the definition of culture elusive, one cannot assume that simply because someone has a particular cultural background they will act in a certain manner or hold certain beliefs.

The way educators conceptualize frameworks for teaching students to work effectively across cultures reflects evolving understandings of cultural complexity. Educators spanning numerous disciplines initially designated such work as *cultural competence* education.<sup>34</sup> Although valuable insights exist from many disciplines, we focus on the cultural diversity teaching and assessment developments in the health care fields because of the parallels between medical and legal education with regard to developing students' abilities to successfully work across cultures.<sup>35</sup>

Decades ago, health care educators recognized the need for *cultural competence* education because studies indicated there were significant disparities in health outcomes related to patients' race and ethnicity.<sup>36</sup> Early health care educational endeavors proceeded on the premise that certain races and ethnicities had particular attitudes, beliefs, or experiences that impacted the delivery of health care services.<sup>37</sup> This cultural competence model "emphasized a notion that clinicians and trainees need to develop expertise in particular cultures to be effective providers."<sup>38</sup> Based on this early conceptualization of cultural competence, students were expected to have a certain level of knowledge about particular cultures—e.g., knowledge about the culture's history and origin and beliefs of people belonging to that

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33. See Dogra & Karim, *supra* note 28, at 163; Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 133 (2006) [hereinafter Piomelli, *Cross-Cultural Lawyering by the Book*].

34. See, e.g., THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE 272–403 (Darla K. Deardorff, ed., 2009) (discussing developing intercultural competence in numerous disciplines).

35. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 80–81, 130–31 (1st ed. 2007) (discussing how legal educators can learn from our medical educator counterparts); Jennifer S. Bard, "Practicing Medicine and Studying Law": How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them, 10 SEATTLE J. FOR SOC. JUST. 135, 150–55 (2011) (discussing similarities and differences between legal and medical education efforts to develop students' practice skills).

36. Franklin A. Gevurtz, *Report Regarding the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence (The "Tahoe II" Conference)*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 63, 71 (2013).

37. Niranjana S. Karnik & Nisha Dogra, *The Cultural Sensibility Model: A Process-Oriented Approach for Children and Adolescents*, in 19 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA 719, 721 (Shashank V. Joshi & Andres J. Pumariega eds., 2010).

38. *Id.*

culture both generally and as they related to the provision of health care. Students were also expected to develop skills based upon that knowledge, including the ability to communicate with sensitivity, to understand the patient's perspective, and to develop culturally sensitive treatment plans.<sup>39</sup> Finally, students were expected to acquire attitudes that demonstrated an understanding of, and respect for, differences based upon cultural beliefs and practices.<sup>40</sup> However, little attention was devoted to examination of how one's own culture influences responses to these ideas.

As medical educators used the *cultural competence* framework to develop teaching materials and assess student-learning outcomes, they discovered shortcomings inherent in that framework. Although the impetus for development of cultural competence learning outcomes was to address health care disparities based upon race and ethnicity,<sup>41</sup> some commentators criticized the narrow conceptualization of culture used when measuring health care students' learning outcomes.<sup>42</sup> Additionally, early educational models were criticized for proceeding on the assumption that one could develop *expertise* in a particular culture simply by learning about broad generalizations related to cultural beliefs and practices.<sup>43</sup> Because culture is a complex, multi-faceted concept, and because all people have multiple cultural backgrounds and experiences that influence the lenses through which they see the world, it is impossible for anyone to become *competent* in another's culture.<sup>44</sup> It also became clear that given the number of different cultures that exist, the curriculum would become quickly overloaded with an emphasis on acquisition of specific cultural knowledge.<sup>45</sup>

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39. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 409–10 (1997) (discussing learning outcomes for mental health counselors); Karnik & Dogra, *supra* note 37, at 724 (discussing learning outcomes for medical students).

40. Karnik & Dogra, *supra* note 37, at 724.

41. Aysegul Gozu et al., Review, *Self-Administered Instruments to Measure Cultural Competence of Health Professionals: A Systematic Review*, 19 TEACHING & LEARNING MEDICINE 180, 181 (2007).

42. See Arno K. Kumagai & Monica L. Lybson, *Beyond Cultural Competence: Critical Consciousness, Social Justice, and Multicultural Education*, 84 ACAD. MED. 782 *passim* (2009); Zofia Kumas-Tan et al., *Measures of Cultural Competence: Examining Hidden Assumptions*, 82 ACAD. MED. 548 *passim* (2009).

43. Angela C. Jenks, *From "List of Traits" to "Open-Mindedness": Emerging Issues in Cultural Competence Education*, 35 CULTURE, MED., & PSYCHIATRY 209, 215 (2011).

44. Kumagai & Lybson, *supra* note 42, at 782–83; see also Kumas-Tan et al., *supra* note 42, at 552.

45. Elois Ann Berlin & William C. Fowkes, Jr., *A Teaching Framework for Cross-Cultural Health Care: Application in Family Practice*, 139 W. J. MED. 934, 938 (1983) (noting that it was "unrealistic to [believe] that health care providers [could] gain [an] in-depth

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To remedy the theoretical problems inherent in the cultural competency model, medical educators began talking about developing students' *cultural sensitivity* or *cultural humility*. These models defined culture more broadly and encompassed a much wider range of cultural factors, including race, ethnicity, gender, religion, sexual orientation, socio-economic status, and other factors that influenced people's worldviews.<sup>46</sup> Educators also examined developing students' awareness of the role that culture plays in the delivery of health care services and using that awareness as a communication tool when treating patients.<sup>47</sup> A *culturally sensitive* or *culturally humble* medical practitioner was taught to be aware that others may come from a different belief system or perspective and that they needed to respect that belief system and develop an appropriate treatment plan in light of the patient's cultural background.<sup>48</sup> Students also were taught to be self-reflective about their own biases and stereotypes and how those might affect the ways in which they interacted with and treated patients.<sup>49</sup> They were encouraged to reflect upon their own preconceptions and to respect differences between their worldview and that of their patient to optimize patient care.<sup>50</sup>

Clinical legal educators adopted this culturally sensitive approach, encouraging law students to be self-reflective about their own cultural experiences and how those experiences affected the students' interpretation of client interactions and behaviors.<sup>51</sup> Students were encouraged to be

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knowledge about . . . health-affecting beliefs and practices of every ethnic or cultural group they [were] likely to encounter").

46. Lisa Bliss et al., *Client and Patient Relationships: Understanding Cultural and Social Context*, in POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 125, 147 (Elizabeth Tobin Tyler et al. eds., 2011); see also Melanie Tervalon & Jann Murray-Garcia, *Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education*, 9 J. HEALTH CARE FOR POOR & UNDERSERVED 117, 120 (1998).

47. Tervalon & Murray-Garcia, *supra* note 46, at 119–20; see also Bliss et al., *supra* note 46, at 148, 150.

48. Bliss et al., *supra* note 46, at 146, 148.

49. *Id.* at 148.

50. Naser Z. Alsharif, *Cultural Humility and Interprofessional Education and Practice: A Winning Combination*, AM. J. PHARMACEUTICAL EDUC., Sept. 10, 2012, at 1, 1.

51. The seminal work in this area was done by Professors Susan Bryant and Jean Koh Peters. *E.g.*, Bryant, *supra* note 31. Their 2001 article paved the way for clinical legal educators grappling with how best to teach law students to account for the role culture plays in the lawyering process. *Id.* Since then, many clinical educators have addressed how to help students understand the impact cultural experiences have on the lawyer-client relationship. *See, e.g.*, Bliss et al., *supra* note 46, at 148; Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37, 43–44 (2008); Miller et al., *supra* note 6, at 111–12; Piomelli,

sensitive to cultural practices that differed from their own and to approach interactions with humility rather than hubris.<sup>52</sup> However, this humility or sensitivity approach did not account for the fact that cultural experiences vary over our lifetimes and did not necessarily include encouraging students continuously to examine whether their own worldviews or beliefs might need to shift. This approach also had the potential to encourage passive or blind acceptance of what the practitioner is told about other cultures. Female genital mutilation—as an extreme example—might not be challenged for fear of being disrespectful of another’s culture.<sup>53</sup> Similarly, this approach could lead to unexamined acceptance of cultural practices as a defense to charges of domestic violence.<sup>54</sup> As educators continue to reflect upon—and improve—how to teach students to work effectively in today’s multicultural society, they develop new models. For example, recently, doctors Karnik and Dogra proposed moving from a *cultural sensitivity* model to a *cultural sensibility* model. They describe *cultural sensibility* as “an openness to emotional impressions, susceptibility, and sensitiveness” that allows one to reflect and change because of his or her interactions with people from different cultural backgrounds.<sup>55</sup> This conceptual framework emphasizes that everyone has a cultural background that affects his or her perceptions,

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*Cross-Cultural Lawyering by the Book*, *supra* note 33, at 141; Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 384 (2002). Professors Bryant and Koh have brought their work with law students to the attention of practicing lawyers, who confront these same issues. See Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering—Introduction*, ILL. LEGAL ADVOC., [http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp\\_content&contentID=5985](http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp_content&contentID=5985) (last updated Oct. 2007).

52. Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 418 (2012); Sedillo López, *supra* note 51, at 45–48, 68; Liwen Mah, Comment, *The Legal Profession Faces New Faces: How Lawyers’ Professional Norms Should Change to Serve a Changing American Population*, 93 CALIF. L. REV. 1721, 1754 (2005).

53. Some cultural relativists argue that one must respect the cultural practice of female genital mutilation while others argue that this practice violates basic human rights. For insights into this debate see Henriette Dahan Kalev, *Cultural Rights or Human Rights, The Case of Female Genital Mutilation*, 51 SEX ROLES 339, 347 (2004), available at [http://www.intact-network.net/intact/cp/files/1296997267\\_Cultural%20Rights%20or%20Human%20Rights.pdf](http://www.intact-network.net/intact/cp/files/1296997267_Cultural%20Rights%20or%20Human%20Rights.pdf).

54. For a very thoughtful analysis of the tensions between acceptance and challenging culturally based defenses in domestic violence cases, see Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 *passim* (1995).

55. Karnik & Dogra, *supra* note 37, at 723 (laying out the cultural sensibility framework). This work was based upon research originally outlined by Dr. Dogra in 2003. Nisha Dogra, *Cultural Expertise or Cultural Sensibility? A Comparison of Two Ideal Type Models to Teach Cultural Diversity*, 5 INT’L J. OF MED. 223, 224–226 (2003).

beliefs, and actions.<sup>56</sup> The cultural sensibility framework focuses on students' understanding that culture is a complex compilation of numerous influences and emphasizes developing students' understanding of how culture, in turn, influences interactions or knowledge.<sup>57</sup> This approach considers whether students are able to use their understanding of culture to develop constructive and positive relationships or skills.<sup>58</sup> Finally, the model looks at whether students are willing to be self-reflective about the role culture plays in interactions and use information they have learned to be open to re-examining, and potentially changing, their own perspectives, behaviors, and attitudes.<sup>59</sup> At the heart of this framework is the notion that cultural experiences are not static. Students and practitioners continue to develop; and their experiences continue to influence their worldviews.<sup>60</sup>

This cultural sensibility framework, focused on the need to develop cultural self-awareness, compliments the work of many clinical legal educators,<sup>61</sup> as well as views expressed by legal educator experts at the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence.<sup>62</sup> This framework focuses on the need to teach students to recognize the influence their own cultural backgrounds and perspectives have on how they interpret legal rules and how they interact with others.<sup>63</sup> The goal of cultural sensibility education is to build self-awareness and to move students away from looking at those with different cultural experiences as the *Other*.<sup>64</sup> Cultural sensibility education seeks to create an open-mindedness that allows students to avoid making assumptions about other cultures or legal systems,<sup>65</sup> teaching students to avoid behaviors based upon cultural domination or superiority,<sup>66</sup> and encouraging them to be open to reconsidering, and potentially altering, their own way of viewing lawyer-client interactions and legal problems.

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56. Dogra & Karim, *supra* note 28, at 159–60.

57. *Id.* at 163–64 tbl.1; Karnik & Dogra, *supra* note 37, at 726–28 tbl.1.

58. Karnik & Dogra, *supra* note 37, at 726–28 tbl.1.

59. *Id.*

60. *Id.*

61. See, e.g., Bryant, *supra* note 31, at 40; Jacobs, *supra* note 39, at 405–06; Sedillo-Lopez, *supra* note 51, at 47–48; Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 374–75 (2005).

62. See generally Gevurtz, *supra* note 36.

63. See Bryant, *supra* note 31, at 40; Weng, *supra* note 61, at 390, 396.

64. See Weng, *supra* note 61, at 396–98 (discussing the need for students to become culturally self-aware and to recognize that a person's culture shapes his or her attitudes, values and assumptions about the law and legal processes).

65. Gevurtz, *supra* note 36, at 79–82.

66. *Id.* at 82.

### C. *Why Cultural Sensibility is Important for Lawyers*

Cultural experiences underpin how we read and interpret legal principles and rules and how we apply those rules to facts.<sup>67</sup> Cultural experiences also account for the way we understand and communicate information.<sup>68</sup> Cultural perspectives permeate transnational transactions and cross-border disputes as well as domestic legal issues and interactions. Additionally, different countries and cultures have different views about attorneys' functions in society and in particular situations.<sup>69</sup>

Lawyers working in an international law context, be it in a large law firm's business practice or on international human rights issues, should understand the role culture plays in their work.<sup>70</sup> Likewise, understanding how to effectively work across cultures is important to lawyers who deal with cross-border disputes and transactions in many different legal specialties such as immigration law,<sup>71</sup> environmental law,<sup>72</sup> family law,<sup>73</sup>

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67. Over a decade ago, Professor Marjorie Silver eloquently argued that law students should be taught that all lawyering is cross-cultural and that our cultural perspectives inform our legal and factual analysis. See Marjorie Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219 (2002). Others have noted that culture permeates legal interpretation. See, e.g., Kris Franklin, *Pedagogy, "Theory Saved My Life"*, 8 N.Y. CITY L. REV. 599, 607 (2005) (noting "interpretation is both a basic human activity and wholly historically and culturally conditioned"); see Dan M. Kahan, *Essay, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 420 (2009).

68. See Tae-Seop Lim, *Language and Verbal Communication Across Cultures*, in HANDBOOK OF INTERNATIONAL AND INTERCULTURAL COMMUNICATION 69, 70, 73–76 (William B. Gudykunst & Bella Mody eds., 2d ed. 2002); Peter A. Andersen et al., *Nonverbal Communication Across Cultures*, in HANDBOOK OF INTERNATIONAL AND INTERCULTURAL COMMUNICATION 89, 90–91 (William B. Gudykunst & Bella Mody eds., 2d ed. 2002).

69. Gevurtz, *supra* note 36, at 75.

70. In the law firm context, see John Barkai, *What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 44 (2008); Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 642, 655–60 (2010). For application in the human rights context, see Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y.L. SCH. L. REV. 445, 446 (2011–2012).

71. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273 *passim* (2003); Gevurtz, *supra* note 36, at 74.

72. Gevurtz, *supra* note 36, at 74.

73. Annie Bunting, *Elijah and Ishmael: Assessing Cultural Identity in Canadian Child Custody Decisions*, 42 FAM. CT. REV. 471, 472–73 (2004); Gevurtz, *supra* note 36, at 74.

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criminal law,<sup>74</sup> and employment law,<sup>75</sup> as well as in equity, property, and torts issues.<sup>76</sup> However, the need to understand how cultural experiences affect the legal process is not limited to those engaging in international or cross-border transactions and disputes. Most lawyers will encounter colleagues, judges, jurors, and clients whose cultural perspectives and experiences differ from their own. Failure to understand the role culture plays can limit a lawyer's ability to meet critical legal needs and provide access to justice as well as impede client representation generally.<sup>77</sup>

Global competence, competently representing domestic clients, and access to justice issues all require lawyers to understand the role culture plays in the lawyering process. Thus, scholars and educators working to develop students' intercultural legal competence have identified two reasons for doing so: (1) to enable law graduates to successfully represent clients in transactions and litigation situations that involve different countries, cultures or legal systems,<sup>78</sup> and (2) to better serve those from underrepresented cultures and countries, providing greater access to justice.<sup>79</sup>

Developing law students' abilities to work effectively across cultures is important because lawyers' failure to recognize and account for culturally different approaches to communication and problem solving may result in

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74. See Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 883–84 (2008); see also Gevurtz, *supra* note 36, at 74.

75. Gevurtz, *supra* note 36, at 74.

76. O'DONNELL & JOHNSTONE, *supra* note 6, at 24, 66, 105 (suggesting ways to incorporate cultural sensibility teaching into a range of doctrinal courses); see also Gevurtz, *supra* note 36, at 74.

77. For a discussion of the need for cultural sensibility to improve access to justice, see Gevurtz, *supra* note 36, at 74–75; see also Holdman & Seeds, *supra* note 74, at 894, 896 (discussing how cultural competency is critical in capital cases involving clients from underserved and outsider communities); Ascanio Piomelli, *Sensibilities for Social Justice Lawyers*, 10 HASTINGS RACE & POVERTY L. J. 177, 185–86 (2013) [hereinafter Piomelli, *Sensibilities for Social Justice Lawyers*] (discussing the need for social justice lawyers to pay attention to class, race and gender to recognize, and account for, cultural encapsulation). For a discussion of the need for cultural sensibility skills in general client representation, see *infra* text accompanying notes 80–85.

78. Gevurtz, *supra* note 36, at 71; Catherine J. Iorns Magallanes, *Teaching for Transnational Lawyering*, 55 J. LEGAL EDUC. 519, 520 (2005) (noting cultural competence is “key to so many other methods of thinking and problem-solving that it should be taught as foundational to transnational lawyering”).

79. Gevurtz, *supra* note 36, at 71; Nelson Miller & Victoria Kremski, *Who Is the Customer and What Are We Selling? Employer-Based Objectives for the Ethical Competence of Law School Graduates*, 33 J. LEGAL PROF. 223, 236–37 (2009); Piomelli, *Sensibilities for Social Justice Lawyers*, *supra* note 77, at 185–86; Rose Voyvodic, *Lawyers Meet the Social Context: Understanding Cultural Competence*, 84 CANADIAN B. REV. 563, 581–82 (2006).



misunderstandings,<sup>80</sup> misapplication of the legal rules and principles to facts,<sup>81</sup> failed international and cross-border transactions,<sup>82</sup> the development and interpretation of laws and legal rules that fail to account for differing perspectives,<sup>83</sup> and, in some cases, the continued marginalization of those who do not belong to the dominant culture.<sup>84</sup> In all practice areas, cultural misunderstandings may impede lawyers' abilities to effectively interview, investigate, counsel, negotiate, litigate, and resolve conflicts.<sup>85</sup>

Helping law students understand the role culture plays in the lawyering process serves both lawyer and client. As one health care educator noted, improved doctor-patient communications leads to more accurate diagnosis and treatment, increased patient satisfaction, and ultimately fewer malpractice claims.<sup>86</sup> The same reasoning applies to lawyers. Studies show that client satisfaction often relates as much to how lawyers communicate as to actual results achieved in a given case.<sup>87</sup> Effective lawyers must be able to recognize, and appropriately respond to, their own and others' cultural perceptions and beliefs because these often play a central role in lawyer-client communications.<sup>88</sup>

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80. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 510–12 (2008); see also Bryant, *supra* note 31, at 42; see generally RICHARD BRISLIN, UNDERSTANDING CULTURE'S INFLUENCE ON BEHAVIOR (1993).

81. Bryant & Peters, *supra* note 51 (noting that “[l]awyers in cross-cultural settings may have greater difficulty sorting out when they are making assumptions and when they are using facts”).

82. Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT'L J. LEGAL INFO 22, 22–23 (2011) (relaying story of failed international business transaction because of lawyer's lack of awareness of cultural practices and expectations).

83. O'DONNELL & JOHNSTONE, *supra* note 6, at 1.

84. Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 837 (2008) (arguing that “the failure to train civil rights and poverty lawyers in practices of cross-cultural and difference-based identity analysis perpetuates stigma-induced marginalization in law and society”).

85. Sternlight & Robbennolt, *supra* note 80, at 437, 442, 509–12.

86. Wendy Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 J. AM. MED. ASS'N 553, 558 (1997).

87. Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 FORDHAM URB. L.J. 193, 203 (2005) (noting that studies found professional negligence claims often were not based upon case outcome but instead related to lawyer-client communication failures, including lawyers' “failure to listen to the client, to ask appropriate questions, and to explain relevant aspects of the matter”).

88. Bliss et al., *supra* note 46, at 141–43.

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                 *CULTURAL DIVERSITY EDUCATION LEARNING OUTCOMES*II.      IDENTIFYING LEARNING OUTCOMES RELATED TO THE  
                 DEVELOPMENT OF A CULTURALLY SENSIBLE LAWYER

Educators committed to helping law students become culturally sensible professionals must consider how best to develop students' abilities to work effectively across cultures. Before designing a course or curriculum, it is useful to identify what students should learn in order to best design assignments, teaching methods, and assessments.<sup>89</sup> One way to focus on student learning is to articulate learning outcomes. Learning outcomes can help measure student progress.<sup>90</sup> Learning outcomes can also provide valuable feedback about gaps in the course or curriculum and whether particular teaching modules or methods should be modified.<sup>91</sup>

As mentioned above, learning outcomes are “something [the] students can do now that they could not do previously. . . . [A change in people] as a result of a learning experience.”<sup>92</sup> The shift to learning outcomes is an educational paradigm shift in which the focus is upon what students have learned rather than on areas or types of instruction.<sup>93</sup> The focus is on learner achievements rather than teacher intentions.<sup>94</sup> Learning outcomes commonly consist of three aspects of student learning: (1) the acquisition of knowledge (what instructors want students to know), (2) attitudes (the professional values or attitudes instructors want students to demonstrate), and (3) skills (what instructors want students to be able to do).<sup>95</sup> These concepts constitute the knowledge–attitudes–skills framework used to develop student learning outcomes in other disciplines. Although specific outcomes are often categorized separately, there is frequently some overlap and linkage. As a group of medical school deans noted, “[i]nvariably there is overlap between the different domains with some outcomes being

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89.      MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 37 (2009); GRANT WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* 13–14 (2d ed. 2005).

90.      Fisher, *supra* note 3, at 237.

91.      *Id.* at 236–37; *see also* Deborah Maranville et al., *Lessons for Legal Education from the Engineering Profession's Experience with Outcomes-Based Accreditation*, 38 WM. MITCHELL L. REV. 1017, 1032–33 (2012); Lynch, *supra* note 3, at 995–97.

92.      Watson, *supra* note 21, at 208.

93.      CARPENTER ET AL., *supra* note 11, at 16–17; Friedland, *supra* note 23, at 960.

94.      STEPHEN ADAM, *LEARNING OUTCOMES CURRENT DEVELOPMENTS IN EUROPE: UPDATE ON THE ISSUES AND APPLICATIONS OF LEARNING OUTCOMES ASSOCIATED WITH THE BOLOGNA PROCESS* 14 (2008), *available at* [http://www.ond.vlaanderen.be/hogeronderwijs/bologna/BolognaSeminars/documents/Edinburgh/Edinburgh\\_Feb08\\_Adams.pdf](http://www.ond.vlaanderen.be/hogeronderwijs/bologna/BolognaSeminars/documents/Edinburgh/Edinburgh_Feb08_Adams.pdf).

95.      *Writing Learning Outcomes*, AM. ASS'N. L. LIBR., <http://www.aallnet.org/Archived/Education-and-Events/cpe/outcomes.html> (last visited Feb. 16, 2014).

common to more than one domain, but such duplication serves to illustrate the inextricable links and interdependence between the different elements comprising a competent and reflective practitioner.”<sup>96</sup>

Learning outcomes may be designed by individual faculty members for a specific course and outcomes may be curricular in light of expectations of the knowledge–attitudes–skills graduates should demonstrate.<sup>97</sup> Learning outcomes vary depending upon course or curricular content or individual faculty members’ learning objectives. Both curricular and course learning outcomes are shaped by educators’ own world views and educational philosophies,<sup>98</sup> and it is useful for educators to consider the reasons they choose particular approaches and the rationale for their preferences.<sup>99</sup>

Because learning outcomes seek to provide information to students and teachers about student learning, they should be specific, measurable, achievable, relevant, and realistic.<sup>100</sup> With that said, learning outcomes are difficult to draft because all learning is part of a continuum<sup>101</sup> and the level and depth of learning depends upon context, teacher knowledge, and understanding as well as student knowledge and understanding.<sup>102</sup> Very broad or general learning outcomes may provide learners little guidance and be difficult to measure.<sup>103</sup> On the other hand, overly precise learning outcomes may too narrowly prescribe learning.<sup>104</sup>

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96. J.G. Simpson et al., *The Scottish Doctor—Learning Outcomes for the Medical Undergraduate in Scotland: A Foundation for Competent and Reflective Practitioners*, 24 MED. TCHR. 136, 137 (2002).

97. RICHARD JOHNSTONE & SUMITRA VIGNAENDRA, AUSTRALIAN UNIV. TEACHING COMM., LEARNING OUTCOMES AND CURRICULUM DEVELOPMENT IN LAW 110–11 (2003), available at [http://www.cald.asn.au/docs/AUTC\\_2003\\_Johnstone-Vignaendra.pdf](http://www.cald.asn.au/docs/AUTC_2003_Johnstone-Vignaendra.pdf) (discussing curricular based learning outcomes); Carolyn Grose, *Outcomes-Based Education One Course at a Time: My Experiment with Estates and Trusts*, 62 J. LEGAL EDUC. 336, 343–44 (2012) (discussing course-based learning outcomes).

98. Grose, *supra* note 97, at 340 (noting that in determining learning outcomes, educators identify their goals for the class, the desired outcomes and how those will be assessed, and the teaching methods best suited to the achievement of those outcomes).

99. *Id.* at 345.

100. Declan Kennedy et al., *Writing and Using Learning Outcomes: A Practical Guide*, in *EUA BOLOGNA HANDBOOK: MAKING BOLOGNA WORK*, 1, 18 available at [http://sss.dcu.ie/afi/docs/bologna/writing\\_and\\_using\\_learning\\_outcomes.pdf](http://sss.dcu.ie/afi/docs/bologna/writing_and_using_learning_outcomes.pdf); Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming “The Form Book Problem,”* 38 U. DAYTON L. REV. 195, 203 (2012).

101. Trevor Hussey & Patrick Smith, *Learning Outcomes: A Conceptual Analysis*, 13 TEACHING HIGHER EDUC. 107, 109 (2008).

102. *Id.*

103. Ian Scott, *The Learning Outcome in Higher Education: Time to Think Again?*, WORCESTER J. LEARNING & TEACHING, Jan. 2011, available at <http://www.worc.ac.uk/adpu/documents/WJLTIssue5PersonalperspectivesIScott.pdf>.

104. *Id.*

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Some have correctly noted that not all aspects of what law professors teach can be reduced to an easily measurable learning outcome.<sup>105</sup> Additionally, there is a danger that quantification of learning outcomes may oversimplify the complexity of what students should learn.<sup>106</sup> Although raising valid points, these critiques should not lead to a wholesale rejection of legal education learning outcomes. The danger is not in identifying learning outcomes. Rather, the dangers lay in reliance upon one instrument or one assessment method to quantify student learning,<sup>107</sup> and in rigid adherence to a set of pre-determined learning outcomes rather than use of learning outcomes as part of an iterative process that guides, rather than dictates, student learning and curriculum development.<sup>108</sup>

The process of identifying learning outcomes is relatively new to most law professors. Therefore, to suggest cultural sensibility learning outcomes in the legal education context, we use work done by medical educators,<sup>109</sup> clinical legal educators,<sup>110</sup> and a group of legal education

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105. See, e.g., Lynch, *supra* note 3, at 986–90 (addressing concerns that a move to learning outcomes will result in a diminution of intellectual and conceptual classroom teaching and discussions).

106. See Maranville et al., *supra* note 91, at 1035.

107. See, e.g., Stefan H. Krieger & Serge A. Martinez, *Performance Isn't Everything: The Importance of Conceptual Competence in Outcome Assessment of Experiential Learning*, 19 CLINICAL L. REV. 251 *passim* (2012) (arguing that outcomes assessment in experiential legal education should go beyond a checklist approach and encompass techniques designed to evaluate student reasoning as they engage with clients and cases).

108. Angela Maher, *Learning Outcomes in Higher Education: Implications for Curriculum Design and Student Learning*, J. HOSPITALITY, LEISURE, SPORT & TOURISM EDUC., Nov. 2004, at 46, 50.

109. The theoretical constructs from medical educators were based upon the work of doctors Dogra, Karnik, and Karim. See generally Dogra & Karim, *supra* note 28; Karnik & Dogra, *supra* note 37. We also reviewed learning outcomes drafted by a blue ribbon commission of physicians and medical educators. ASS'N OF AM. MED. COLLS., TOOL FOR ASSESSING CULTURAL COMPETENCE TRAINING (TACCT) (2010), available at [https://www.aamc.org/download/54344/data/tacct\\_pdf.pdf](https://www.aamc.org/download/54344/data/tacct_pdf.pdf) [hereinafter ASS'N OF AM. MED. COLLS., TOOL FOR ASSESSING CULTURAL COMPETENCE TRAINING (TACCT)]. We also reviewed survey instruments developed by numerous health care educators. Michael D'Andrea et al., *Evaluating the Impact of Multicultural Counseling Training*, 70 J. COUNSELING & DEV. 143, 145–48 (1991); Glenn Gamst et al., *Cultural Competency Revised: The California Brief Multicultural Competence Scale*, 37 MEASUREMENT & EVALUATION COUNSELING & DEV. 163, 163–66 (2004); Gozu et al., *supra* note 41 *passim* (reviewing numerous health care educator survey instruments); Sunil K. Khanna et al., *Cultural Competency in Health Care: Evaluating the Outcomes of a Cultural Competency Training Among Health Care Professionals*, 101 J. NAT'L MED. ASS'N. 886, 887–89 (2009).

110. Although many legal educators have worked on these issues, we found work done by the following clinical educators particularly informative as we designed the survey: Bliss et al., *supra* note 46; Bryant, *supra* note 31; Miller et al., *supra* note 6; Sedillo López, *supra* note 51; Weng, *supra* note 61.

experts on cross-cultural learning.<sup>111</sup> In designing these outcomes, we used the cultural sensibility model<sup>112</sup> and the knowledge–attitudes–skills framework.<sup>113</sup> We present these learning outcomes cognizant of the issues discussed above and with the understanding that although they might form a core curriculum of basic outcomes to help students understand the effect cultural perspectives have on the lawyering process, they are not an exhaustive or definitive list.<sup>114</sup> Rather, they provide a starting place to envision developing a curriculum that prepares students to practice law in today’s multicultural society. As with all learning outcomes, cultural sensibility learning outcomes will need to be revised and modified in response to student feedback and changing contexts. We have categorized learning outcomes into the knowledge, skills, and attitudes domains. However, as mentioned above, there is often overlap within and between domains, and therefore learning outcomes that we have identified may appropriately fit within more than one domain.<sup>115</sup>

#### A. *Knowledge*

Many legal educators, especially clinical legal educators, recognize that competent lawyers must acknowledge the effect culture has upon the lawyer-client encounter and the ways in which lawyer ignorance of cultural perspectives can adversely impact clients.<sup>116</sup> As discussed in Section I, amongst medical educators who pioneered the concept of developing *culturally competent* practitioners, *competency* originally was defined by knowledge about specific cultures as if there was a homogeneity amongst people who possessed a similar cultural background.<sup>117</sup> Additionally, culture was commonly conflated with race and ethnicity.<sup>118</sup> Such an approach

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111. See generally Raquel Aldana & Leticia Saucedo, *Learning in Mulukukú: A Journey of Transformation*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING 251 (Soc’y of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2011); Gevurtz, *supra* note 36.

112. Karnik & Dogra, *supra* note 37 *passim*.

113. See *supra* text accompanying notes 94–96.

114. For an example of a comprehensive list of cultural sensibility medical school learning outcomes, see ASS’N OF AM. MED. COLLS., TOOL FOR ASSESSING CULTURAL COMPETENCE TRAINING (TACCT), *supra* note 109.

115. See *supra* text accompanying note 96.

116. We do not attempt to provide an exhaustive list of all legal educators who have advocated for the integration of cultural sensibility education into law student clinical training. Rather, we simply note that this issue is one that has long been considered by legal educators, and especially clinicians. See, e.g., Bryant, *supra* note 31, at 35; Sedillo López, *supra* note 51, at 40; Weng, *supra* note 61, at 372–74.

117. Karnik & Dogra, *supra* note 37, at 721.

118. *Id.*

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encourages stereotyping and fails to acknowledge that individuals have multiple cultures and cultural experiences that shape their perceptions and attitudes.<sup>119</sup> This conceptualization of culture can also lead to teaching about culture as if culture belongs to the *Other* rather than encouraging students' understanding that we all have multiple cultural backgrounds that affect how we perceive and interact.<sup>120</sup>

The issues inherent in this narrow approach have led legal educators to reject a knowledge-based approach in which students learn about particular cultures in favor of a more contextual approach in which learning outcomes focus on students' knowledge and understanding of the cultural contexts in which information is presented and received.<sup>121</sup> Additionally, some legal educators suggest that students should understand that cultural perspectives underlie legal decision-making in order to both effectively develop legal strategies under existing laws and to argue for changes to the law.<sup>122</sup> Some argue that law students' knowledge must extend to an understanding of the subconscious cognitive categories, schemas, and the susceptibility of schemas to unconscious biases and stereotyping in order to uncover deeply embedded assumptions and attitudes that affect interactions.<sup>123</sup> Finally, some legal scholars postulate that students must understand the historical role cultural perspectives of the dominant culture

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119. See TERRY CROSS ET AL., TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE: A MONOGRAPH ON EFFECTIVE SERVICES FOR MINORITY CHILDREN WHO ARE SEVERELY EMOTIONALLY DISTURBED 6 (1989); Mary E. Duffy, *A Critique of Cultural Education in Nursing*, 36 J. ADVANCED NURSING 487, 489 (2001); Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 274 (1996).

120. Piomelli, *Cross-Cultural Lawyering by the Book*, *supra* note 33, at 137–42 (critiquing clinical textbook's focus on examining the client's culture while ignoring the student's need to examine his or her own cultural experiences, beliefs and assumptions).

121. See Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1811–17 (1993) (arguing that understanding cultural contexts are critical to teaching lawyering for social change, and suggesting ways to raise personal identification issues in a wide range of classes); Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 664 (2011) (noting the need for community members to help lawyers understand the cultural contexts of clients' statements and actions). Clinical legal educators have adopted this contextualized approach as they teach students to interact with clients. See, e.g., Bryant, *supra* note 3; Sedillo-López, *supra* note 51.

122. See Kahan, *supra* note 67, at 419–21 (arguing that judges view cases through a cultural lens even when consciously trying to be objective); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (finding that judges often have implicit biases that affect their judicial decision-making).

123. See Weng, *supra* note 61, at 373, 391–93; see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1504 (2005); Miller et al., *supra* note 6, at 121–22.

have played and how these perspectives shaped the law in order to understand power differentials<sup>124</sup> and how these perspectives influence relationships between individuals and the development of the law and legal systems.<sup>125</sup>

We relay these last *knowledge* learning objectives with the caveat that, while it may be important to build students' knowledge about historical perspectives, historical contexts vary among different communities and groups.<sup>126</sup> Faculty should carefully consider how much emphasis should be placed upon the role the dominant culture has played in the development of the law and legal systems. If students from the dominant culture feel that the curriculum is saying that their world views are wrong, as opposed to asking them to consider how their world views may color their thinking, the students may be less open to exploring the role culture plays in the lawyering process.<sup>127</sup> A categorical view that certain views are acceptable and others are not may produce a defensive reaction and inhibit students' willingness to engage in self-reflection and challenge their long-held beliefs.<sup>128</sup> Thus, it is generally more effective to talk about unacceptable behaviors rather than unacceptable views.

The following list utilizes the conceptualizations of various aspects of students' cultural sensibility knowledge articulated above to identify some cultural sensibility *knowledge* learning outcomes one might have for a course or even a program of legal education—recognizing that many of these outcomes could also be categorized as *attitude or skill* outcomes.

At the end of the course/law school you should be able to:

- Define, in contemporary terms, race, ethnicity, and culture;

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124. See O'DONNELL & JOHNSTONE, *supra* note 6, at 8; see also Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6 (1995).

125. See O'DONNELL & JOHNSTONE, *supra* note 6, at 8; Roberta Rosenthal Kwall, *The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study*, 34 CARDOZO L. REV. 609, 619 (2012).

126. See, e.g., Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More than Just a Tort*, 96 NW. U. L. REV. 99, 146–47 (2001–2002) (noting that race is a social construct based upon the historical and social context of a given community).

127. See Aldana & Saucedo, *supra* note 111, at 255–56 (discussing the role reflective thinking plays in transformative educational experiences).

128. See Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1563–65 (2010) (discussing psychologists' findings that discussions of white privilege can have deleterious effects and ignite hostility in marginalized whites who may otherwise be allies in attempts to disrupt effect of that privilege).

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- Identify your own cultural experiences and how those experiences may affect your perceptions of the law and legal systems;
- Explain why cultural biases are not unique to one particular race or ethnicity or cultural background;
- In a particular case or factual scenario, identify cultural experiences of the parties and the lawyers that may affect the legal and factual analysis;
- Discuss the ways in which social determinants such as culture, education, income, housing, employment, access to transportation, and socio-economic status may affect access to justice;
- Describe the influence of culture on the historical development of laws and legal systems;
- Describe how stereotyping and biases may affect a lawyer's interpretation of the facts and application of a legal rule to the facts;
- Identify examples of culturally biased assumptions that lawyers and clients may bring into the lawyer-client relationship;
- Explain your own cultural biases and how those may impact legal representation generally as well as in the context of a particular case or factual scenario;
- Explain how subconscious schemas and categories make it difficult to identify when your reactions to other people are based upon culturally biased assumptions or stereotypes;
- Recognize that bias and stereotyping (conscious and unconscious) affect your factual and legal analysis;
- Describe challenges in cross-cultural communications.

B.      *Attitudes*

Because our perspectives influence the decisions we make and how we view interactions,<sup>129</sup> legal educators have discussed the need to develop students' receptiveness to exploring the effect of socio-cultural beliefs and behaviors on the provision of legal services and the lawyer-client relationship.<sup>130</sup> Clients may receive inadequate representation if law students and lawyers are not aware of their own potential bias and how their cultural

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129.      See John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 90–91 (1999).

130.      See generally Bryant, *supra* note 31; Miller et al., *supra* note 6; Sedillo López, *supra* note 51.



backgrounds affect their perceptions. For example, Professor John B. Mitchell relates the story of a clinic case in which a recent émigré from an Asian country was accused of trying to sexually assault a man at a restroom urinal.<sup>131</sup> The client's story was that he thought he knew the alleged victim, and the client was simply trying to shake the man's hand.<sup>132</sup> For many Americans, the story would not be believable because of cultural attitudes about appropriate behavior at urinals.<sup>133</sup> Understanding that in the client's culture there was no self-consciousness about displaying what many Americans consider private body parts helped student lawyers develop the man's defense.<sup>134</sup> Understanding the effect of one's socio-cultural belief systems is not just important in social justice lawyering. It also important to lawyers engaged in representing business clients. For example, in Western cultures, a signed contract represents a final business deal that the parties should honor and follow. In other cultures, the fulfillment of a deal may be based upon trust between the parties rather than what is written in the contract.<sup>135</sup> If lawyers do not understand that their attitudes toward a transaction stem from their own cultural practices and traditions, and that they should not view other cultural practices as *wrong*, the transaction may fail.

A critical component of cultural sensibility education involves helping students understand how their own and others' cultural practices and perceptions affect how they view clients and transactions.<sup>136</sup> Students must understand that there is no single *correct* attitude or viewpoint, and faculty should not attempt to impose specific attitudes or values upon students.<sup>137</sup> Rather, faculty should seek to develop students' curiosity, empathy, respect, and humility with regard to their own and others' cultural beliefs and perspectives.<sup>138</sup> These attitudes are important because they acknowledge that

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131. Mitchell, *supra* note 129, at 104–05.

132. *Id.* at 112.

133. *Id.* at 116–17.

134. *Id.* at 121.

135. Catherine Sun, *Negotiating Business Transactions in China*, in BEST PRACTICES FOR INTERNATIONAL BUSINESS TRANSACTIONS IN CHINA: LEADING LAWYERS ON STRUCTURING AND NEGOTIATING TRADE TRANSACTIONS, UNDERSTANDING THE IMPORTANCE OF DUE DILIGENCE, AND WORKING AS A LEGAL PROFESSIONAL IN THE INTERNATIONAL BUSINESS COMMUNITY 76 (Aspatore, 2009).

136. See Miller et al., *supra* note 6, at 105–06; Sedillo López, *supra* note 51, at 45–49.

137. Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 160 (1995); F. Patrick Hubbard, *Justice, Creativity, and Popular Culture: The "Jurisprudence" of Mary Chapin Carpenter*, 27 PAC. L.J. 1139, 1146–47 (1996).

138. Miller et al., *supra* note 6, at 113; Piomelli, *Cross-Cultural Lawyering by the Book*, *supra* note 33, at 153, 166; see also Weng, *supra* note 61, at 372.

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our world view is not an absolute truth. In cultural sensibility education, perhaps the most important attitudes to cultivate are openness to learning about how culture affects the lawyering process and open-mindedness about the assumptions students have about their own and others' cultures.<sup>139</sup> Students should learn not to make judgments based upon their own cultural background and perceptions and should not assume that others share their perspective.<sup>140</sup> They should also be open to discovering that their initial assumptions about another's legal system or culture may be incorrect.<sup>141</sup> Faculty should also help students develop their self-awareness about their own system and culture, teaching students about how their own cultural backgrounds affect their perceptions and actions.<sup>142</sup> Finally, students should be aware of differences in communication styles and value systems without attributing positive or negative connotations to those differences.<sup>143</sup>

With these principles in mind, the following list identifies some cultural sensibility *attitude* learning outcomes one might have for a course or even a program of legal education (recognizing that many of these outcomes could also be categorized as *knowledge or skill* outcomes).

At the end of the course/law school you should be able to:

- Explain the challenges inherent in exploration of one's own cultural biases and stereotypes;
- Identify impediments that affect your openness to learning about your own cultural biases and stereotypes;
- Explain why lawyers are as likely as clients to see the world through their own cultural lenses;
- Reflect on how different values systems and communications styles may affect lawyers' interpretations of client reactions and behaviors;
- Reflect upon how your own varied cultural experiences affect your perceptions and interactions with clients, colleagues, and staff;
- Evaluate why people are resistant to admitting that they make judgments based upon cultural biases and stereotypes;
- Evaluate the role your own cultural experiences have had in shaping your views about the law and legal systems;

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139. The attitude learning outcomes for a culturally sensible lawyer are built upon the work done by clinical legal educators. For example, over a decade ago, Professor Bryant suggested that open-mindedness was a critical component of building students' abilities to work effectively across cultures. Bryant, *supra* note 31, at 41–42.

140. Weng, *supra* note 61, at 385–86.

141. See Gevurtz, *supra* note 36, at 84–85.

142. Miller et al., *supra* note 6, at 105–06, 114; Silver, *supra* note 67, at 230.

143. See Gevurtz, *supra* note 36, at 83–84.

- Recognize the need to suspend judgment when encountering unfamiliar conduct or views;
- Demonstrate curiosity about the ways in which your cultural beliefs and practices influence your perceptions and interactions;
- Demonstrate curiosity about clients' cultural beliefs and practices.

### C. *Skills*

Legal educators have identified the need for students to account for cultural perspectives, motivations, backgrounds, and understandings of the lawyer and the person with whom he or she interacts, and to apply these same understandings to their legal analysis.<sup>144</sup> Students should be taught to assess whether their own assumptions and biases affect their understandings of information or the overall case,<sup>145</sup> to identify *red flags* that indicate miscommunication may have occurred, and to develop strategies for correcting miscommunications caused by cultural misunderstandings.<sup>146</sup> All of these skills enhance students' abilities to effectively represent clients from a wide range of cultural backgrounds and perspectives. Although some cultural sensibility skills are probably best developed via experiential learning, others can be developed in doctrinal courses through analysis of the cultural perspectives and beliefs underlying legal arguments, legal rules and judicial reasoning.

The list below suggests some cultural sensibility *skills* learning outcomes one might have for a course or program of legal education (recognizing that many of these outcomes could also be categorized as *knowledge or skill* outcomes).

At the end of this course/law school you should be able to:

- Identify the cultural factors that may have affected the judge's or jury's decision-making process in a given case;
- Identify the cultural factors that may have affected how the lawyer presented his or her client's case;
- Identify methods that may be utilized to ensure awareness of your own cultural traditions, perspectives, and beliefs;
- Identify methods that may be utilized to ensure awareness of others' cultural traditions, perspectives, and beliefs and how those may be the same or different than your own;

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144. Bryant, *supra* note 31, at 40–41.

145. *Id.* at 48–50; Sedillo López, *supra* note 51, at 46–48.

146. Bryant, *supra* note 31, at 73, 76.

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- Incorporate cultural considerations into your discussion of a hypothetical legal problem and the appropriate solution;
- Provide examples of how your own cultural assumptions and biases affected your understanding of the factual and legal issues in a given case or transaction;
- Identify situations in which your cultural biases or stereotypes impeded successful legal representation;
- Ask appropriate questions to elicit client information about cultural beliefs or practices that may affect representation;
- Communicate effectively using a wide range of strategies to engage with clients;
- Respond appropriately to client feedback about key cross-cultural issues;
- Demonstrate strategies to assess, manage, and reduce bias in encounters with clients and witnesses;
- Explain techniques and tools that can help identify *red flags* that there has been a cross-cultural miscommunication;
- Use reflective practices when working on legal cases or transactions;
- Use reflective practices when considering cultural contexts and cultural norms and whether particular cultural norms and practices create injustices which should be challenged.

### III. THE CULTURAL SENSIBILITY LEARNING CONTINUUM

Identification of learning outcomes helps clarify what students should learn. However, assessment of learning outcomes has to occur with the recognition that cultural sensibility develops on a continuum and that individual students within a given cohort may be in different places on that continuum. Educators in other disciplines have developed various models to explain the progression students go through as they develop their abilities to work effectively across cultures. One seminal early model was developed by Milton J. Bennett, M.D.<sup>147</sup> Dr. Bennett's model "provides a theory-based explanation for the varying degrees of individual and organizational effectiveness one observes in intercultural endeavours."<sup>148</sup> Bennett's theoretical model describes the progression through various phases of what

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147. Milton J. Bennett, *A Developmental Approach to Training for Intercultural Sensitivity*, 10 INT'L J. INTERCULTURAL REL. 179, 179 (1986).

148. Joe Greenholtz, *Assessing Cross-Cultural Competence in Transnational Education: The Intercultural Development Inventory*, 25 HIGHER EDUC. EUR. 411, 412 (2000); see also Bennett, *supra* note 147, at 180.

he calls *intercultural sensitivity*.<sup>149</sup> He suggests that learners move from being ethnocentric, using their own culture as the yardstick by which other cultures are measured, to becoming ethnorelative, realizing that their own culture is “one of many equally valid worldviews.”<sup>150</sup>

Bennett labels the first level of this development as *Denial of Difference*.<sup>151</sup> In this phase, students do not understand or accept cultural differences. People in this category either do not notice differences or construct broad, undifferentiated categories of cultural difference, such as *Asian*.<sup>152</sup> Students at this stage must learn to recognize the existence of cultural differences.<sup>153</sup> Bennett identifies the second level as *Defense Against Difference*, a stage in which one views differences as a “threat to the centrality of one’s world view.”<sup>154</sup> In this phase, learners recognize cultural differences but negatively evaluate those differences.<sup>155</sup> People at this level tend to either denigrate other cultures, exaggerate the positive characteristics of their own culture, or in some cases see another culture as superior to their own.<sup>156</sup> At this stage, students need to work on developing less polarized views about cultural differences.<sup>157</sup> Bennett describes the third level, *Minimization of Difference*, as a “last-ditch attempt to preserve the centrality of one’s own world view”<sup>158</sup> by trivializing differences.<sup>159</sup> Learners recognize and accept superficial cultural differences but insist that all human beings are essentially the same, with the same basic values.<sup>160</sup> At this stage, students need to work on development of cultural self-awareness, including understanding their own values and beliefs and exploring issues of dominant group privilege.<sup>161</sup> The goal is to help students at this stage develop open-mindedness, the ability to perceive others accurately, and the capacity to maintain a nonjudgmental interaction posture.<sup>162</sup>

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149. Bennett, *supra* note 147, at 180.

150. Greenholtz, *supra* note 148, at 413; *see also* Bennett, *supra* note 147, at 190–91.

151. Bennett, *supra* note 147, at 182.

152. *Id.* at 182–83, 187.

153. *Id.* at 187–88.

154. *Id.* at 183.

155. *Id.* at 183, 188.

156. Bennett, *supra* note 147, at 183, 188.

157. *Id.* at 189.

158. *Id.* at 183.

159. *Id.* at 184.

160. *Id.*

161. *See* Bennett, *supra* note 147, at 190–91.

162. *See id.*; Bryant, *supra* note 31, at 56 (noting that “non-judgmental [thinking] is a core cross-cultural skill and one that is particularly difficult for lawyers”). For an insightful discussion of why it is important to help law students move from an ethnocentric

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At the fourth level, *Acceptance of Difference*, learners recognize and appreciate cultural differences in behavior and values.<sup>163</sup> Learners are able to differentiate and elaborate various cultural categories and develop a meta-level view of cultural difference, including knowledge about the multi-faceted aspects of their own culture.<sup>164</sup> At this stage, educators should work with students to help them refine their analysis of cultural contrasts and deepen cultural self-awareness.<sup>165</sup> Students should begin to learn how to shift their frame of reference to incorporate willingness to learn about other cultures without judgment.<sup>166</sup> Bennett's fifth level, *Adaptation to Difference*, is the stage at which students are aware of the role culture plays in interactions and have developed the communication skills that enable effective intercultural communication.<sup>167</sup> Students at this level consciously understand the need to shift their frame of reference in intercultural situations so that they are not looking at the situation only through their own cultural lens.<sup>168</sup> At this stage, students are working at problem solving and interaction skills from the perspective of one who understands that culture is multi-faceted and relative, and that there is no one good or bad cultural perspective.<sup>169</sup> Bennett's final level, *Integration of Difference*, is when learners have internalized multicultural frames of reference and do not self-identify with any one particular culture, but rather look at themselves as having a multicultural identity and having the ability to unconsciously adjust to a wide range of cultural beliefs and practices.<sup>170</sup> At this stage, educators help students understand their multicultural identity and how that identity is a work-in-progress based upon continuing experiences and interactions.<sup>171</sup>

As learners progress through these stages, they move from a lack of recognition of the role culture plays in their own interactions to fully understanding and integrating cultural sensibility into their lives by accounting for, and adjusting to, differing cultural perspectives. Underlying Bennett's model is the need to help students develop self-awareness in order to progress from ethnocentrism—the first three stages—to ethnorelativism—the latter three stages.<sup>172</sup>

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to an ethnorelative perspective, see Shiv Narayan Persaud, *Is Color Blind Justice Also Culturally Blind*, 14 BERKELEY J. AFR. AM. L. & POL'Y 23, 63–64 (2012).

163. Bennett, *supra* note 147, at 184–85.

164. *Id.*

165. *See id.* at 191–92.

166. *Id.*

167. *Id.* at 185–86.

168. Bennett, *supra* note 147, at 185–86.

169. *Id.* at 192–93.

170. *Id.* at 186.

171. *See id.* at 193–94.

172. Greenholtz, *supra* note 148, at 412–13.

William Howell designed a slightly different model<sup>173</sup> that Professors Bryant and Koh adapted to describe the stages of law student cultural competence. Using Howell's model, they identify the first stage as *unconscious incompetence*, one that involves a total lack of awareness of the role culture plays in the lawyering process.<sup>174</sup> Students at this stage do not recognize cultural differences and are unaware of cross-cultural miscommunications. In Howell's second stage, *conscious incompetence*, students recognize that culture plays a role in how they understand and perceive communications and interactions, but they do not have the skills necessary to engage in effective cross-cultural interactions.<sup>175</sup> In this stage, students recognize cross-cultural miscommunications and misunderstandings, but they do not know how to avoid them or how to build positive and trusting relationships with clients.<sup>176</sup> The third stage is one of *conscious competence*, in which students understand how to effectively communicate across cultures, and are aware of the need to use cross-cultural lawyering skills that they consciously apply to their interactions with clients.<sup>177</sup> Finally, students reach Howell's fourth stage: The level of *unconscious competence*.<sup>178</sup> At this stage, the understanding of the role culture plays in the lawyering process, and the skills necessary to deal effectively across cultures, has become so ingrained that students unconsciously incorporate cross-cultural skills and perspectives into their interactions with others.<sup>179</sup>

For cultural sensibility, the learning continuum is slightly different than the continua described above in that the best practice or highest level in cultural sensibility education is achieved when the individual incorporates the principles regarding culture and diversity as an integral part of their daily practice.<sup>180</sup> That is, practitioners reflect on their communications and interpretations as they are happening—reflection in action—and modify them as they receive cues that clients are disengaging or that client and practitioner perspectives are too far apart.<sup>181</sup> In recognizing potential differences at an individual level, practitioners avoid falling into the trap of using stereotypes.<sup>182</sup> Practitioners are also skilled at making subtle changes

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173. See WILLIAM S. HOWELL, THE EMPATHIC COMMUNICATOR 29–33 (1982).

174. Bryant, *supra* note 31, at 62–63 (describing how Howell's work applies to law students).

175. *Id.* at 62.

176. *Id.*

177. *Id.* at 62–63.

178. *Id.* at 63.

179. Bryant, *supra* note 31, at 63.

180. See Karnik & Dogra, *supra* note 37, at 724–25.

181. See *id.* at 725.

182. Sternlight & Robbenolt, *supra* note 80, at 511–12.

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to accommodate different perspectives and bring them closer together if needed to avoid miscommunication.<sup>183</sup> The cultural sensibility model also recognizes that students may need to be aware of the fact that our emotional contexts can influence how comfortably we are able to challenge our perspectives and understandings. For example, when we are anxious or afraid, we are less likely to feel comfortable challenging our perspective or even questioning our perspectives.<sup>184</sup>

However, it is important not to view stages along learning continuums as linear and unidirectional. Individuals will move between stages at different times and in different contexts. The stages in these theoretical models are fluid and should not be viewed in absolute terms. Also, as with all theoretical models, they do not operate as neatly in practice as they do on paper. Nonetheless, the models are useful because they may help faculty set realistic cultural sensibility learning outcome goals.<sup>185</sup> Although it may not be realistic to hope law graduates all attain the highest level of cultural sensibility, a reasonable goal might be that all law graduates reach recognize and appreciate that everyone approaches issues through their own cultural lens, which varies based upon each person's cultural experiences—Bennett level 4/Howell level 2.<sup>186</sup> It may be that the goal is simply to get students to the point where they accept the roles of cultural beliefs, values, and behaviors in the lawyering process, understand that all behavior, including their own, exists in a cultural context<sup>187</sup> and understand that *good* and *bad* ways of being in the world exist in cultural context.<sup>188</sup> This does not mean students should be taught to blindly accept the status quo. For example, attitudes towards sexual orientation, gender, and race have changed significantly over the last century. These changes would not

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183. See Karnik & Dogra, *supra* note 37, at 728 tbl.1.

184. “Research indicates that we are more likely to fall prey to stereotype when we are feeling stress and unable to monitor ourselves for bias.” Bryant, *supra* note 31, at 78. “Stress inhibits students from receiving and processing information when anxiety distracts them from the learning task.” Nancy L. Schultz, *Lessons from Positive Psychology for Developing Advocacy Skills*, 6 JOHN MARSHALL L.J. 103, 134 (2012). See also Jacobs, *supra* note 39, at 400–01 (noting that learning more about clients’ cultural backgrounds will help reduce student anxiety when working with clients and enable the students to recognize that a client may have a perspective which differs from the student’s).

185. See, e.g., Sonia J. Crandall et al., *Applying Theory to the Design of Cultural Competency Training for Medical Students: A Case Study*, 78 ACAD. MED. 588, 588–89 (2003) (using the theoretical models described above to shape course and curricular learning outcomes).

186. See *supra* text accompanying notes 163–66, 175–76.

187. See *supra* text accompanying notes 163–66, 175–76.

188. John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT’L L.J. 177, 225 (2010) (discussing cultural relativism).



have happened if accepted norms had not been challenged.<sup>189</sup> Thus, when developing learning outcomes for cultural sensibility, educators should consider including, as an outcome, preparing students to become reflective practitioners willing to examine, and potentially challenge, social norms. They should also consider where on the cultural sensibility continuum they hope their students will be at the completion of a given course or curriculum.

#### IV. DEVELOPING A BASELINE MEASURE OF STUDENTS' CULTURAL SENSIBILITY

In light of the move to incorporate learning outcomes into legal education and mindful of the theoretical underpinnings of cultural sensibility education, we developed a measure to assess some aspects of law students' cultural sensibility knowledge, attitudes, and skills. The initial development work has been detailed elsewhere.<sup>190</sup> As described below, the initial instrument has since been revised.

The revised instrument described herein is a starting point in measuring some law student cultural sensibility learning outcomes and we share it with many caveats in the hope that it can continue to be further refined and improved. First, we note that cultural sensibility cannot be measured by a single instrument. We also acknowledge that despite the efforts described below to develop a valid and reliable instrument, some may disagree with the questions we asked or the language we used. Our goal with this work is not to develop the definitive cultural sensibility learning outcome instrument. Rather, it is to present a tool legal educators can use to: Assess the need for cultural sensibility education, develop cultural sensibility learning outcomes, design courses and curriculum that meet students' educational needs, and track changes in students' cultural sensibility knowledge, attitudes, and skills.<sup>191</sup> The completion of the tool can also serve as an educational intervention in itself because it enables students to consider their responses and prompts them to think about the role culture plays in the lawyering process. Finally, we hope the instrument will be further tested as a tool for measuring student learning outcomes.

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189. For examples of these changes and other efforts to challenge accepted norms, see Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 330–40 (2006) (discussing legal scholars' challenges to race and class based legal norms).

190. Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, *passim*.

191. These goals are similar to those identified by pharmacy school educators who performed a factor analysis on a pharmacy education cultural competence tool. See Margarita Echeverri et al., *Nine Constructs of Cultural Competence for Curriculum Development*, AM. J. PHARMACEUTICAL EDUC. Dec. 15, 2010, at 1, 1.

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A.      *Initial Survey Design and Development*

Health care educators,<sup>192</sup> as well as educators in other disciplines,<sup>193</sup> have developed numerous instruments to measure what they identify as students' *cultural competence* learning outcomes. We used those survey instruments<sup>194</sup> and the scholarship of clinical legal educators who have incorporated cultural sensibility into their teaching,<sup>195</sup> to develop an initial twenty-nine-question, anonymous electronic survey using a five-point semantic differential response scale—one equals strongly disagree and five equals strongly agree—that sought information about students' knowledge of how culture affects the lawyering process, their attitudes toward cultural diversity education, and their awareness of how their cultural background affects the ways in which they, and others, communicate and interact. The survey also asked demographic questions and contained a series of open-ended questions seeking information about the survey design as well as students' thoughts about the role culture plays in their world-view and interactions. After obtaining Institutional Review Board ("IRB") approval, we conducted an initial study. The survey was distributed to incoming law students during their orientation week at a second-tier, southern, urban state law school that has both a full and part-time program. The survey was also distributed to a small number of upper level students enrolled in one of the school's clinics. A total of 138 students participated in the initial study. The initial study provided valuable insights into students' knowledge and attitudes.

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192.      See, e.g., Gozu et al., *supra* note 41, at 182–83 (reviewing forty-five instruments used to measure nurses, physicians, and other health care professionals' cultural competence).

193.      Alvino E. Fantini, *Assessing Intercultural Competence: Issues and Tools*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE 456, 466–75 (Darla K. Deardorff ed., 2009) (listing various assessment tools used in a wide range of disciplines to measure ability to communicate effectively across cultures).

194.      Instruments that helped us develop this survey include those set out in the following articles: Jesse C. Crosson et al., *Evaluating the Effect of Cultural Competency Training on Medical Student Attitudes*, 36 FAM. MED. 199, 201 (2004) (medical students); D'Andrea et al., *supra* note 109, at 145 (counselors); Nisha Dogra & David Stretch, *Developing a Questionnaire to Assess Student Awareness of the Need to be Culturally Aware in Clinical Practice*, 23 MED. TCHR. 59, 60 (2001) (medical students); Gamst et al., *supra* note 109, at 164–65 (counselors); Gozu et al., *supra* note 41, at 181–82 (assorted health care professions); Khanna et al., *supra* note 109, at 887–89 (assorted health care professionals); Stephanie Myers Schim et al., *Development of a Cultural Competence Assessment Instrument*, 11 J. NURSING MEASUREMENT 29, 34–35 (2003) (nurses).

195.      See Bliss et al., *supra* note 46, at 126–27; Bryant, *supra* note 31, at 38–48; Helen Y. Kim, Note, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 ELDER L.J. 265, 286–88 (2007); Sedillo López, *supra* note 51, at 42–45.

Although the survey instrument used in the initial study reached an acceptable level of statistical reliability ( $\alpha = 0.713$ ) and provided useful information,<sup>196</sup> we decided to further refine the instrument. To do this, we used the data collected from the open-ended questions in the initial study. We also asked two faculty members of divergent political and cultural perspectives, to review the survey. Finally, after obtaining IRB approval to do so, we conducted three student focus groups. Based upon information gathered in these processes, we made some significant changes to the original instrument. We included a definition of culture<sup>197</sup> and drafted survey questions that encompassed a wider range of cultural factors. These changes were made to both ensure students approached the questions with the same understanding of the term *culture* and to educate them that culture is multi-faceted. We also added an initial set of questions that alerted students to the fact that because not all individuals in a given cultural group hold the same views or have the same experiences,<sup>198</sup> it is our cultural experiences, rather than our culture, that impacts our perspective. In addition to these structural changes, we re-worded questions that students found confusing and re-worded or eliminated questions students and expert reviewers identified as seeming to call for a *correct* answer. We also added the Marlowe-Crowne social desirability scale<sup>199</sup> to determine whether the survey answers were tainted by the desire to answer in a socially desirable manner. Finally, we expanded the response scale to a 6-point semantic differential scale. This change controlled for a *perceived* neutral point.

Our goal was to produce an instrument that could be used to provide law faculty with information about their students' views and where their students were on the cultural sensibility education continuum to help faculty develop tailored learning outcomes. We also hoped to develop an instrument that ultimately could be used to measure whether some cultural sensibility learning outcomes were achieved. In the survey design, we focused on

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196. For a discussion of our initial findings, see Curcio et al., *Using Existing Frameworks to Develop Ways to Teach and Measure Law Students' Cultural Competence*, *supra* note 9, at 25–27.

197. The survey began with the following statements:

There are many different definitions of culture, race, and ethnicity and these terms are sometimes used interchangeably. In this questionnaire by the term *culture* we mean: Culture is a historically transmitted pattern of shared meaning by which people communicate, perpetuate, and develop their knowledge and attitudes about life. An individual's cultural identity may be affected by such factors as race, ethnicity, age, language, country of origin, acculturation, sexual orientation, gender, socioeconomic status, religious/spiritual beliefs, physical abilities, occupation, among others.

198. Bergey & Kaplan, *supra* note 32, at 1; Steven A Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & LAW 33, 51–52 (2001).

199. See *infra* text accompanying notes 200–08.

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broad-based learning outcomes built upon a structural framework that provides a starting point from which to develop and evaluate courses. Using this framework, the final version of the re-designed survey consisted of twenty-four questions relating to cultural sensibility. The first six questions asked students to identify which of their cultural experiences has influenced their views of the U.S. legal system using a scale of 1 to 6—no influence at all to very strong influence—(Appendix A). The remaining eighteen questions sought students’ views on a variety of questions related to the role culture plays in the lawyering process. Students were asked to respond on a scale of 1 to 6—strongly disagree to strongly agree—(Appendix A). The reliability alpha for the new survey instrument was .842, indicating a high degree of internal consistency in the instrument.

B.      *Survey Methodology*

One issue with any self-assessment instrument is whether respondents are answering in a *socially desirable* manner—i.e., choosing answers that they believe “conform to socially acceptable values, avoid criticism, or gain social approval.”<sup>200</sup> We took the opportunity to measure whether social desirability would be an issue since such bias is “most likely to occur in response[] to socially sensitive questions.”<sup>201</sup> Although there is no absolute way to determine if the answers are based upon a desire to answer correctly, social scientists often use the *social desirability* scale developed by Marlowe and Crowne.<sup>202</sup> This scale serves as a test for whether surveyors are getting accurate or tainted responses.<sup>203</sup> We used the thirteen-question Marlowe-Crowne short form<sup>204</sup> with the 191 incoming student cohort at the Southern Urban School. Although there is some debate about whether the Marlowe-Crowne test is a valid measure of social desirability bias,<sup>205</sup> it continues to be the instrument most frequently used to assess whether respondents were answering in what they believe was the

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200.      Thea F van de Mortel, *Faking It: Social Desirability Response Bias in Self-Report Research*, AUSTRALIAN J. ADVANCED NURSING, June–Aug. 2008, at 40, 41.

201.      *Id.*

202.      *Id.*; see Douglas P. Crowne & David Marlowe, *A New Scale of Social Desirability Independent of Psychopathology*, 24 J. CONSULTING PSYCHOL. 349, 351 (1960).

203.      Van de Mortel, *supra* note 200, at 40.

204.      See William M. Reynolds, *Development of Reliable and Valid Short Forms of the Marlowe-Crowne Social Desirability Scale*, 38 J. CLINICAL PSYCHOL. 119, 124 (1982).

205.      See Steven D. Barger, *The Marlowe-Crowne Affair: Short Forms, Psychometric Structure, and Social Desirability*, 79 J. PERSONALITY ASSESSMENT 286, 289 (2002) (critiquing the use of the Marlowe-Crowne instrument to determine social desirability responses).

correct socially desirable manner.<sup>206</sup> An analysis of the social desirability scale compared favorably with the literature standards.<sup>207</sup> Results indicated that 17% of our respondents were low scorers (e.g., answering in a socially undesirable direction), 60.2% were average scorers (showing an average degree of concern for social desirability), and 22.5% scored high (indicating a high degree of concern for social approval).<sup>208</sup> These percentages suggest that general survey responses were not due to a social desirability bias. Having checked the instrument for social desirability responses, we then eliminated the Marlowe-Crowne questions from the remaining survey administrations to shorten the instrument.

After receiving IRB approval, the revised survey was initially administered to incoming students at a second-tier, southern, urban state law school. Time was set aside during orientation week for completion of the revised survey; thus, the response rate was very high (n = 191, 94% response rate). The revised survey also was administered to incoming law students at a top-tier, northern, metropolitan state law school that purposefully seeks to promote diversity in viewpoint, experience, and background among its faculty and students. At that school, during orientation week, students were asked to complete the survey via an email solicitation. A total of 118 incoming students (response rate of 58%) chose to complete the survey.

In the spring semester, upper level students at both the Southern Urban and the Northern School were asked, via email, to complete the revised survey. The response rate for upper level students at the Northern School was 32% (n = 127). At the Southern Urban School, 27% (n = 155) of the upper level students completed the survey. The total response rate for upper level students was 30% (n = 282). The combined total response rate for the survey was 591 with an average response rate of 43%. The overwhelming majority of respondents self-identified as white, while gender distribution was virtually equal (see Table 1).

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206. See Van de Mortel, *supra* note 200, at 42–45 tbl.1 (listing thirty-one studies in 2004–2005 that used Marlowe-Crowne instrument to check for social desirability response); Shana L. Lassiter, Cultural Competency Training in Dental Education and Implications for the Elimination of Oral Health Disparities: Results from a Quantitative and Qualitative Investigation (May 16, 2009) (unpublished E.d. dissertation, Columbia University) (microformed on UMI 3368358); see also Maria Antonia Marzan, Incoming Medical Students' Perceptions of Knowledge, Attitudes and Skills Regarding Cross-Cultural Medical Education (May 16, 2008) (unpublished E.d. D. dissertation, Columbia University) (microformed on UMI 3327063).

207. The scoring key is available at *Self-Assessment: Dare You Say What You Think? The Social-Desirability Scale*, CENGAGE LEARNING, [http://www.cengage.com/resource\\_uploads/downloads/0495092746\\_63626.pdf](http://www.cengage.com/resource_uploads/downloads/0495092746_63626.pdf) (last visited Feb. 16, 2014).

208. These results are based upon the scoring key, see *id.*

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Table 1: Respondent Demographics.

		N	%
Gender	Female	287	48.6
	Male	291	49.2
Ethnicity/Race	Asian	46	8.1
	Black	37	6.5
	Hispanic/Latino(a)	17	3.0
	White	435	76.7
	Two or More	32	5.6
Age	20–25 years	323	55.9
	26–30 years	181	31.3
	31–35 years	43	7.4
	36–40 years	11	1.9
	41–45 years	15	2.6
	46–50 years	3	.5
	Over 50 years	2	.3
Student Type	Entering Law Students	309	52.3
	2L or 3L	282	47.7
School Type	Northern	273	46.2
	Southern Urban	318	53.8

An exploratory factor analysis (“EFA”) was performed on the data to identify, through statistical exploration, inter-relationships between items that are part of a unified concept or underlying structure.<sup>209</sup> Social scientists use exploratory factor analysis to reduce a number of interrelated items (e.g., items on a survey) into factors that can be conceptually grouped together.<sup>210</sup>

The Kaiser-Meyer Olkin Measure of Sampling Adequacy was .843 (excellent) and the Bartlett’s Test of Sphericity was  $p < .000$  (the strength of the relationship among the survey items is strong), indicating that a factor analysis was appropriate. Using Principal Component Analysis (“PCA”) as

209. See DENISE F. POLIT & CHERYL TATANO BECK, RESOURCE MANUAL FOR NURSING RESEARCH: GENERATING AND ASSESSING EVIDENCE FOR NURSING PRACTICE 255 (9th ed. 2012).

210. DENNIS CHILD, THE ESSENTIALS OF FACTOR ANALYSIS 1–2 (3d ed. 2006); see Anna B. Costello & Jason W. Osborne, *Best Practices in Exploratory Factor Analysis: Four Recommendations for Getting the Most from Your Analysis*, PRAC. ASSESSMENT RES. & EVALUATION, July 2005 at 1, 8.

our extraction method and Varimax with Kaiser Normalization as our rotation method, we retained five factors (Table 2).

Table 2: Factor Descriptives.

	No. of Items	Mean (SD)	Alpha
Factor 1	9	4.25 (0.81)	.827
Factor 2	6	3.17 (1.16)	.827
Factor 3	3	4.57 (1.08)	.778
Factor 4	3	4.88 (0.79)	.588
Factor 5	2	4.40 (0.87)	.726

The five identified factors group the survey findings into conceptual constructs that correspond to various aspects of cultural sensibility learning. The first factor examines students' understanding of how culture influences lawyers, judges, and clients in the context of legal decision-making and representation. The second factor assesses students' self-awareness about the role their cultural experiences play in their own perceptions of the legal system. The third factor looks at students' desires to learn how culture affects the lawyering process. The fourth factor examines students' understanding of client behaviors that may be based upon cultural practices different from their own. The fifth factor looks at how students self-assess their ability to identify their own unconscious biases and stereotypes. These factors help educators assess students' openness to learning about the role culture plays in the lawyering process, students' understanding of how culture may influence others, and their understanding of how their own cultural experiences affect their perceptions and actions. This information can be useful in designing courses, curricula, and teaching methods that are best suited to a given group of students' educational needs. It also can be useful to those who want to assess—in a big picture way—the effectiveness of education geared toward developing certain aspects of cultural sensibility, such as developing students' awareness that cultural experiences affect everyone, not just clients or those belonging to specific racial or ethnic groups. Below, we set forth each factor and the survey questions that grouped with that factor.

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Table 3: Cultural Sensibility Survey Structure.

Factor	Survey Item
Factor 1 <i>Cultural Influences</i>	<p>2.16. White lawyers bring culturally biased assumptions into the lawyer/client relationship.</p> <p>2.2. Lawyers look at legal problems through their own cultural lens.</p> <p>2.6. A lawyer's socioeconomic background influences how the lawyer perceives a client's behavior.</p> <p>2.11. How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.</p> <p>2.9. Judges do not look at legal problems through their own cultural lenses.</p> <p>2.14. Lawyers belonging to racial and ethnic minorities bring culturally biased assumptions into the lawyer/client relationship.</p> <p>2.4. I do not view the legal system through a culturally biased lens.</p> <p>2.1. Clients look at legal problems through their own cultural lenses.</p> <p>2.3. How a client communicates with his or her lawyer is not influenced by the client's cultural background.</p>
Factor 2 <i>Self-Awareness</i>	<p>(Influences views about the U.S. legal system)</p> <p>1.1. Experiences arising from your racial identity.</p> <p>1.2. Experiences arising from your ethnic identity.</p> <p>1.4. Experiences arising from your socioeconomic background.</p> <p>1.3. Experiences arising from your religious identity.</p> <p>1.5. Experiences arising from your gender.</p> <p>1.6. Experiences arising from your sexual identity.</p>
Factor 3 <i>Desire to Learn</i>	<p>2.17. Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.</p> <p>2.18. A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.</p> <p>2.7. Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds than my own.</p>



Factor 4 <i>Client Behaviors</i>	2.8. A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed. 2.12. When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful. 2.15. When a client shakes hands with a male attorney, but refuses to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney.
Factor 5 <i>Self-assessment</i>	2.13. In general, I can accurately identify my culturally biased assumptions about others who are from cultures different from my own. 2.10. In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.
Excluded Item	2.5. If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case.

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### C. *Survey Results*

Below we explain the factors in greater detail and identify key findings from the data. Throughout our descriptions, we note when there are significant differences between incoming and upper level students, between students at the two schools, and differences in survey responses, by gender and race or ethnicity. It should be noted that for analytical purposes we collapsed all Asians, Blacks, Latinos, and Two or More races into one group to ameliorate the differences in numbers between those groups and Whites. We are, however, mindful that collapsing these groups is a study limitation.

#### **Factor 1: Understanding How Culture Influences Lawyers, Judges, and Clients in Context of the Legal Decision-Making and Legal Representation.**

The first factor includes nine items that can be grouped under the construct of understanding how culture influences lawyers, judges, and clients in the context of legal decision-making and legal representation (Table 3). This factor relates to students' understanding that lawyers, judges, and clients look at legal problems through their own cultural lenses and that lawyer-client communications are influenced by both the lawyer's and the

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client's cultural backgrounds.<sup>211</sup> Factor 1 also looks at students' understanding that all lawyers, regardless of racial or ethnic background, bring culturally biased assumptions into the lawyer-client relationship<sup>212</sup> and their self-assessment about whether, as future lawyers, they bring culturally biased assumptions into the lawyering process (Table 3).<sup>213</sup> The items in this factor all deal with students' perceptions of the role culture plays in others' perceptions of legal problems and interactions, with the exception of item 2.4—*I do not view the legal system through a culturally biased lens*. That item was grouped with this factor because it sought information about how, as future lawyers, students believed their cultural biases would affect their assessment of legal problems.

Findings showed that there was a statistically significant difference ( $p < .000$ ) in the mean scores for this factor between incoming and upper level students, with upper level students more likely to recognize that cultural experiences and perspectives affect lawyer-client communications and the lawyering process (Table 4). Women were significantly more likely than men to recognize the affect culture has on various aspects of the lawyering process (Table 4). There was also a statistically significant difference between students at the two schools, with the Northern School's students more likely to recognize that lawyers', clients', and judges' cultural backgrounds and experiences influence legal decision-making and representation (Table 4).

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211. Miller et al., *supra* note 6, at 104–07.

212. *See id.* at 104–05.

213. For a discussion of the implications of students' awareness of their culturally biased assumptions and the impact of those assumptions on the lawyering process, see *infra* text accompanying notes 252–256.

Table 4: Comparisons for Factor 1 (Understanding how culture influences lawyers, judges, and clients).

Comparison Variables	N	M(SD)	Sig.
Incoming Law Students	309	4.04 (0.78)	p<.000
Upper Level Law Students	282	4.48 (0.80)	
Female	287	4.39 (0.82)	p<.000
Male	291	4.11 (0.79)	
Asian	46	4.29 (0.81)	
Black	37	4.37 (0.97)	
Latino/a	17	4.31 (0.76)	
White	435	4.22 (0.81)	
Two or More	32	4.29 (0.81)	
Southern Urban School	318	4.05 (0.79)	p<.000
Northern School	273	4.49 (0.78)	

Note. Mean range = 1–6 with the higher mean score representing higher level of cultural sensibility.

### **Factor 2: Self-Awareness About the Role Culture Plays in Students' Own Perceptions of the Legal System**

The second factor groups six items that ask students to self-assess whether experiences arising from their own cultural backgrounds have influenced how they view the U.S. legal system.<sup>214</sup> Students of color were more likely than white students to identify experiences arising from their racial identity, ethnic identity, and gender, as influencing their view about the U.S. legal system (Table 5). Women were also more likely than men to indicate that their cultural experiences influenced how they view the legal system (Table 5).

214. Scholars have discussed how individuals' culturally based experiences affect their views and understandings of the legal system. See Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 7–8 (2008) (discussing how cultural experiences permeate one's understanding of contracts and contract law); Carolyn Smiley-Marquez, *Bias in the Legal System*, COLO. LAW., Mar. 1996, at 19, 19 (noting that various state task forces on gender and racial bias in the justice system found women's and minorities' experiences led them to view the justice system from a different perspective than their white male counterparts).

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Table 5: Comparison for Factor 2 (Self-awareness about the role culture plays in students' own perceptions of the legal system).

Comparison Variables	N	M(SD)	Sig.
Incoming Law Students	309	3.14 (1.13)	
Upper Level Law Students	282	3.21 (1.19)	
Female	287	3.52 (1.05)	p<.000
Male	291	2.83 (1.15)	
Asian	46	3.52 (1.09)	
Black	37	3.95 (1.07)	
Latino/a	17	3.44 (1.05)	
White	435	3.03 (1.11)	p<.000*
Two or More	32	3.50 (1.33)	
Southern Urban School	318	3.10 (1.15)	
Northern School	273	3.25 (1.16)	

*Note.* Mean range = 1–6 with higher mean score representing higher level of cultural sensibility.

\*Significance test performed on categories White and Non-White (Asian, Black, Latino/a, Two or More).

### **Factor 3: Openness to Learning About the Role Culture Plays in the Lawyering Process**

Factor 3 contains three items related to the importance of learning about how culture affects legal rule-making and the provision of legal services. Overall, students expressed a high degree of interest in learning about the role culture plays in the lawyering process. There was a statistically significant difference in responses between women and men and between white and non-white students' responses to the questions in this factor (Table 6). Women and non-white students expressed a greater openness to learning how culture affects legal rule-making and lawyer-client interactions (Table 6). There also was a difference in attitudes between upper level and incoming students, with incoming students being more receptive to this kind of education (Table 6).

Table 6: Comparison for Factor 3 (Openness to learning about the role culture plays in the lawyering process).

Comparison Variables	N	M(SD)	Sig.
Incoming Law Students	309	4.66 (0.96)	p<.05
Upper Level Law Students	281	4.46 (1.19)	
Female	287	4.83 (0.95)	p<.000
Male	290	4.34 (1.12)	
Asian	46	4.76 (0.81)	
Black	37	5.03 (1.16)	
Latino/a	17	4.92 (0.98)	
White	434	4.50 (1.05)	p<.000*
Two or More	32	4.91 (0.89)	
Southern Urban School	317	4.53 (1.04)	
Northern School	273	4.61 (1.13)	

*Note.* Mean range = 1–6 with higher mean score representing higher level of cultural sensibility.

\*Significance test performed on categories White and Non-White (Asian, Black, Latino/a, Two or More).

#### **Factor 4: Understanding Differing Cultural Backgrounds and Lawyers' Perceptions About Client Behaviors**

This factor groups three items that deal with students' awareness of the assumptions that lawyers may make if they do not understand that some behaviors may be based upon clients' cultural beliefs and practices.<sup>215</sup> The behaviors chosen were just a small sampling of conduct that may vary between cultures. This factor measures students' understanding that lawyers should examine their own cultural assumptions when assessing client behaviors so as not to misinterpret particular behaviors. Students at the Northern School had a greater level of awareness of the need to assess underlying cultural assumptions in context of lawyer-client relationships (Table 7).

215. The behaviors chosen included: Lack of eye contact, displays of emotion, and refusal to shake hands with a woman. Each of these behaviors may be affected by cultural factors. See Jacobs, *supra* note 39, at app., tbl.1, at 414 (shaking hands with member of opposite sex); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 23–25 (2000) (displays of emotion); Tremblay, *supra* note 51, at 393–94 (eye contact).

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Table 7: Comparison for Factor 4 (Understanding differing cultural backgrounds and lawyers' perceptions about client behaviors).

Comparison Variables	N	M(SD)	Sig.
Incoming Law Students	309	4.89 (0.77)	
Upper Level Law Students	281	4.88 (0.83)	
Female	287	4.89 (0.82)	
Male	290	4.87 (0.77)	
Asian	46	4.87 (0.79)	
Black	37	4.86 (0.96)	
Latino/a	17	4.73 (0.66)	
White	434	4.87 (0.78)	
Two or More	32	4.98 (0.82)	
Southern Urban School	317	4.79 (0.83)	p<.01
Northern School	273	5.00 (0.74)	

*Note.* Mean range = 1–6 with higher mean score representing higher level of cultural sensibility.

\*Significance test performed on categories White and Non-White (Asian, Black, Latino/a, Two or More).

### **Factor 5: Identifying Own Unconscious Biases and Stereotypes**

Factor 5 has two items that assess students' openness and willingness to admit the difficulty of accurately identifying when reactions are based upon stereotypes and cultural biases.<sup>216</sup> While factors are generally composed of three or more items, we felt that the loading and Eigenvalues,<sup>217</sup> as well as the construct itself, warranted including these two survey items as a factor. Students rated themselves moderately high in terms of their ability to identify both their culturally biased assumptions and when they were reacting based upon stereotypical beliefs (Table 8).<sup>218</sup> For this factor,

216. For a discussion of the implicit bias literature and the potential relationship between the social cognition implicit bias theories and self-perceptions as they relate to students' survey responses, see Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, at 114–19.

217. In factor analysis, an Eigenvalue represents how much variance is accounted for in a correlation matrix. See BARBARA G. TABACHNICK & LINDA S. FIDELL, *CAL. STATE UNIV., USING MULTIVARIATE STATISTICS* 398 (5th ed. 2007). It is one of several methods used to determine the number of factors or constructs that can be selected from the data. See RICHARD L. GORSUCH, *FACTOR ANALYSIS* 97 (2d ed. 1983); TABACHNICK & FIDELL, *supra* note 217, at 398.

218. This result parallels findings from the pilot study. See Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, at 112.

southern students were statistically more likely to think that they could identify their own unconscious biases and stereotypes (Table 8).

Table 8: Comparison for Factor 5 (Identifying Own Unconscious Biases and Stereotypes).

Comparison Variables	N	M(SD)	Sig.
Incoming Law Students	309	4.47 (0.84)	
Upper Level Law Students	280	4.33 (0.89)	
Female	287	4.46 (0.87)	
Male	290	4.36 (0.87)	
Asian	46	4.43 (0.85)	
Black	37	4.69 (0.95)	
Latino/a	17	4.50 (1.10)	
White	434	4.37 (0.83)	
Two or More	32	4.48 (1.10)	
Southern Urban School	316	4.46 (0.87)	p<.01
Northern School	273	4.34 (0.88)	

*Note.* Mean range = 1-6 with higher mean score representing higher level of cultural sensibility.

\*Significance test performed on categories White and Non-White (Asian, Black, Latino/a, Two or More).

### **Discarded Item**

A factor analysis groups different items that form patterns. There was one item that was not associated with any other group of items that made up the factors. That item asked students to agree or disagree with the following statement: "If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case." This item was designed to inferentially test whether students believe that a lawyer should impose his or her cultural beliefs upon a client. In retrospect, the question does not lead to a clear answer because it is so context-based. Thus, it is not surprising that it did not load with any factor. We discarded this item in the factor analysis discussion and the question should be eliminated from future surveys.

## V. USING THE SURVEY TO INFORM TEACHING AND DEVELOP LEARNING OUTCOMES

The survey provides information about students' openness to learning about the role culture plays in the lawyering process, awareness of

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how culture affects others, and awareness of how culture affects them. The survey provides useful information to legal educators considering developing course and institutional learning outcomes.<sup>219</sup> It is also helpful as educators try to get a sense of where their students are on the cultural sensibility continuum.<sup>220</sup> This tool can be used as students enter and leave law school to assess students' progress towards cultural sensibility over the course of their legal education. It can also potentially be used as a pre- and post-course assessment to inform educators about the effect of their teaching on students' cultural sensibility development. Thus, the survey may help educators refine teaching methodologies and materials in light of students' learning.

In context of the learning outcome domains, the survey instrument encompasses students' self-assessments of their knowledge about how culture affects lawyers', judges', and clients' perceptions and reactions, as well as students' understandings of how different value systems and communications styles may affect lawyers' interpretation of clients' reactions and behaviors (knowledge domain).<sup>221</sup> The survey looks at students' awareness of the affect that their own cultural beliefs, experiences, biases, and prejudices have upon their perceptions, and their openness to learning about the role culture plays in the lawyering process (attitudes domain).<sup>222</sup> Finally, this survey assesses students' abilities to apply their understandings of how culture affects the lawyering process to situations in which lawyers' perspectives may be affected by cultural misunderstandings (skills domain).<sup>223</sup> Because learning outcome domains overlap,<sup>224</sup> some factors apply to more than one learning outcome domain.

A.      *Students Want to Learn About the Role of Culture in the Lawyering Process*

Factor 3 relates to students' attitudes about the inclusion of cultural sensibility teaching into the law school curriculum. Our findings indicate that law students are generally receptive to learning about the role culture plays in the lawyering process (Table 6) although somewhat more ambivalent about being assessed on the issues (Appendix B). Openness to learning about how one's own and others' socio-cultural beliefs and behaviors affect the lawyering process is one of the key attitude learning

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219.      *See supra* text accompanying notes 97–98.

220.      *See supra* Part III.

221.      *See supra* Part II.A.

222.      *See supra* Part II.B.

223.      *See supra* Part II.C.

224.      *See supra* text accompanying note 96.



outcomes.<sup>225</sup> The data indicates that in this survey cohort, women were statistically significantly more open to learning about how culture affects the lawyering process than men, and those self-identifying as non-white were more receptive to cultural diversity education than those self-identifying as white (Table 6). We do not know why the differences exist, although we suspect that the real world may present more everyday challenges for females and non-white students both within and outside the law school classroom<sup>226</sup> so that the teaching may be less threatening to them, or they have greater interest in raising others' awareness about these issues.<sup>227</sup> White male students may feel more defensive about learning about the role culture plays in the lawyering process as there can be an actual or perceived tendency for cultural and diversity education to dismiss and denigrate their perspective.<sup>228</sup> In discussing culture and diversity, white males may feel that they have the most to lose and may feel uncomfortable, especially if the blame for historical wrongs is laid at their door.<sup>229</sup>

Interestingly, incoming students expressed a greater interest than upper level students in learning about how culture affects the lawyering process (Table 6). It is unclear why this difference exists. Some upper level students may have experienced cultural diversity education in some law school classes that they found alienating. Or, incoming students may be eager to learn about everything while upper level students are more jaded. Or, some other reason altogether could explain this difference. Again, this

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225. Bryant, *supra* note 31, at 50–51.

226. See Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1251 (2005) (discussing women's experiences in law school classrooms); Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, RUTGERS RACE & L. REV., 2012, at 75S, 124S (reporting results of large national survey of law students in which Black students reported experiencing discrimination at much higher rates than their white counterparts).

227. These results are consistent with findings in a study of medical students. See Carol L. Elam et al., *Diversity in Medical School: Perceptions of First-Year Students at Four Southeastern U.S. Medical Schools*, 76 ACAD. MED. 60, 64–65 (2001) (finding that students with the most diverse first year class placed the greatest value on the contributions of diversity to the learning environment. Female students placed more value on the inclusion of diversity issues in the curriculum than did male students and also placed greater value on understanding diversity issues in their future medical practices. In this survey, African-American students were the least likely to think that the curriculum contained adequate information about diversity).

228. David Barnhizer, *A Chilling of Discourse*, 50 ST. LOUIS U. L.J. 361, 378–79 n.40 (2006) (recounting an anecdotal story of the denigration of a white male for expressing opposition to homosexuality).

229. Sharon E. Rush, *Emotional Segregation: Huckleberry Finn in the Modern Classroom*, 36 U. MICH. J.L. REFORM 305, 358 (2003) (noting that white students often are uncomfortable talking about race and often feel defensive about being white).

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question merits further study. Future survey administrations should provide room for student comments that might provide insights into the reasons for these differences.

The survey data provides useful information both in terms of students' general receptivity and desire to learn about the role culture plays in the lawyering process and in terms of potential approaches to teaching. For example, the data indicates varying levels of openness—with women and students of color indicating a higher degree of receptivity to cultural sensibility education.<sup>230</sup> These survey results suggest that educators need to be careful not to alienate students by presenting cultural sensibility education as *political correctness*<sup>231</sup> or give some groups more validity than others. Varying levels of openness to such education also means that educators need to carefully think of how to engage male and white students. When developing teaching modules and methods, educators should focus on how cultural sensibility relates to becoming an effective lawyer.<sup>232</sup> Any teaching needs to engage students and while effective teaching may be—and probably should be—challenging, educators must be wary of presenting the material in a way that creates a defensiveness in students rather than fostering curiosity.<sup>233</sup> Educators must be cautious not to focus on teaching culture as belonging to the *Other*.<sup>234</sup> Rather, educators should help students recognize that everyone comes to the table with multiple cultural experiences that affect perceptions, legal analysis, and interactions.<sup>235</sup>

The survey instrument itself may also serve as a teaching tool. In the open-ended question section of the initial survey, many incoming students noted that simply taking the survey prompted them to begin thinking about how culture may affect the lawyering process.<sup>236</sup> Administering the survey to incoming students sets the stage for discussions during orientation and first year courses about cultural perspectives that influence legal decision-making and individuals' perceptions and actions. Thus, the instrument can be a valuable educational tool, as well as a tool that provides faculty with

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230. See *supra* Table 6; *infra* Appendices D, E.

231. See Sedillo López, *supra* note 51, at 43.

232. Miller et al., *supra* note 6, at 105–08.

233. Sara Gronningstarter, *A Patient's Right to Choose is Not Always Black and White: Long Term Care Facility Discrimination and the Color of Care*, 26 J. CIV. RTS. & ECON. DEV. 329, 353–54 (2012) (noting “Cultural competency teachings are not meant to make care providers feel as if they are incompetent or racist, they are meant to enhance professional development and facilitate the education of care providers on the latest science in communications and communicating effectively across cultures”).

234. Kumas-Tan et al., *supra* note 42, at 551–52; see also Weng, *supra* note 61, at 373.

235. See *supra* text accompanying notes 27–33.

236. Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, at 113.

information. Administering the survey may also communicate to students that the law school considers cultural sensibility an important lawyering skill.

B. *Understanding How Culture Influences Lawyers, Judges, and Clients*

Factors 1 and 4 relate to students' understanding of how culture may influence lawyers', clients', and judges' perceptions and behaviors. On a scale of 1 to 6, a mean of 4.04 for incoming students and 4.48 for upper level students for Factor 1 suggests that, although incoming students may have a basic understanding that culture plays a role in how lawyers, clients, and judges understand, react to, and communicate about legal problems, students may not fully recognize the extent to which people's cultural experiences affect their perceptions and behaviors.

The difference between upper level and incoming students indicates that upper level students have a greater awareness of the role culture plays in how judges, lawyers, and clients view legal problems and communicate about legal issues. It may be that exposure to the law and legal processes raised students' awareness of how cultural experiences influence legal decision-making and interactions. However, we cannot say for certain that legal education made a difference in students' perceptions because the survey did not track a group of students from law school orientation through their upper level legal education. However, the results do suggest that something may happen to students during law school to increase their awareness of the role culture plays in the lawyering process. Increased awareness may be attributed to exposure to probing questions in doctrinal courses, experiences in clinics or externships, or simply a maturation process. Or, the survey results could be a variation caused by self-selection on the part of upper level students where the response rate was much smaller than for incoming students.<sup>237</sup> Whatever the reason, we found it interesting that at both schools there was a statistically significant difference between incoming and upper level students with regard to this factor. The results also suggest that this instrument is a viable tool for those schools that want to track changes in students' cultural sensibility attitudes from when students enter school to when they graduate.

The responses to individual items provide some insights to educators wishing to use the survey responses to develop cultural sensibility learning outcomes. Students believed white lawyers were more likely than lawyers of color to bring culturally biased assumptions into the lawyer-client relationship (Appendices B–E). This suggests the need to educate students

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237. See *supra* Part IV.B.

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that everyone has cultural biases and brings those biases and perspectives to the table.<sup>238</sup> Students also thought that clients were much more likely than lawyers to be influenced by their cultural backgrounds (Appendices B–E). Students may believe that, as professionals, lawyers are more able to be objective and to put aside their cultural biases and perspectives. These findings suggest that one learning outcome should be to build students’ understanding that cultural experiences affect *all* people and that a particular racial background or profession does not make one more or less likely to be influenced by his or her cultural experiences.

The survey also identified whether students recognized that some behaviors might be based upon cultural practices. In the consent forms and introduction of the survey, students understood they were being asked about the role culture plays in the lawyering process. In this context, there was generally a high level of awareness that some client behaviors may be based upon cultural practices and that lawyers should not make assumptions about those behaviors.<sup>239</sup> Whether that awareness carries over to actual lawyer-client situations was not measured. Also, although students seemed able to easily identify some commonly understood culturally based behaviors, such as refusal to look a lawyer in the eye or lack of visible emotion (Appendices B–E),<sup>240</sup> they were less aware that other behaviors, such as refusal to shake hands with a woman, might also be a cultural practice (Appendices B–E).<sup>241</sup> The inability to recognize potentially lesser-known cultural practices suggests the need for learning outcomes that focus on developing students’ abilities to identify situations in which differing cultural perspectives and practices may arise and may influence their perceptions about a client’s behavior.<sup>242</sup> We do not suggest that the survey results indicate a need to teach more about a litany of cultural practices. Rather, the survey results suggest a need to develop students’ curiosity about client behaviors that may be different than their own and indicate a need to work with students to help them suspend judgment. Students should develop a level of comfort that

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238. See Miller et al., *supra* note 6, at 105–08; Silver, *supra* note 67, at 238–39; Weng, *supra* note 61, at 369, 372–73.

239. See *supra* Table 7. The students’ responses to individual questions aimed at assessing their awareness of the need to avoid assumptions about clients’ behaviors can be found in, *infra* Appendices B–E.

240. See sources cited *supra* note 215.

241. Sayedeh Kasmai-Nazeran, *Between Gender Equality and Religious Freedom*, ISLAMIC INSIGHTS (Nov. 23, 2008), <http://www.islamicinsights.com/news/community-affairs/between-gender-equality-and-religious-freedom.html> (noting that some Muslims’ and Orthodox Jews’ religious beliefs prohibit them from shaking hands with someone of the opposite sex).

242. For examples of a wide array of conduct that may be based upon cultural practices, see Jacobs, *supra* note 39, app. at 413–14 tbl.1.

allows them to ask questions and explore potential cultural practices that might be unfamiliar.<sup>243</sup>

C. *Understanding How Cultural Experiences Affect Perceptions and Actions*

A culturally sensible lawyer understands culture is multi-faceted, and that everyone's worldviews, conduct, perceptions, and actions are based upon a complex compilation of numerous cultural factors and experiences.<sup>244</sup> A culturally sensible lawyer is aware of the need to be self-reflective about the role culture plays in our interactions.<sup>245</sup> Being self-aware and reflective about our own socio-cultural beliefs, and how those beliefs affect our perceptions and actions, is a critical *attitude* learning outcome. Factors 2 and 5 address these concepts.

Factor 2 assesses students' self-awareness about the role culture plays in students' perceptions about the legal system.<sup>246</sup> The mean scores for this factor were 3.14 for incoming students and 3.21 for upper level students (Table 5). These scores suggest that many students do not believe their views about the U.S. legal system are influenced by experiences arising from various cultural factors such as their race, ethnicity, religious identity, socio-economic background, gender, or sexual orientation.<sup>247</sup> The responses to individual items in this factor suggest that although students generally understood that their view of the U.S. legal system was probably influenced by their socio-economic experiences, they were much less likely to recognize that their views about the legal system were affected by their racial identity

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243. This skill was originally identified by Professors Bryant and Koh as a critical one for clinical students to develop. Bryant, *supra* note 31, at 64–78.

244. See Karnik & Dogra, *supra* note 37, at 724, 726–28 tbl.1.

245. *Id.* at 724, 728 tbl.1.

246. See *supra* text accompanying note 214.

247. One way to begin educating students about how experiences based upon race, ethnicity and gender affect people's perceptions of the legal system would be to expose them to the various state and federal court studies on race and gender within the courts. Throughout those studies, women and people of color discuss how their experiences affected their views of the legal system. See generally REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL AND ETHNIC FAIRNESS IN THE COURTS (1997), *reprinted in* 1997 ANN. SURV. AM. L. 117 (1997); THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (July 1993), *reprinted in* 67 S. CAL. L. REV. 745 (1994). For an excellent discussion of a survey that looked at how racial experiences affect individuals' perceptions of the justice system, see MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 28–67 (2010). For a discussion of how religious identity affects one's view of the law and legal systems, see Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 TEMP. POL. & CIV. RTS. L. REV. 143, 155–61 (2004).

or sexual orientation (Appendices B–E). Perhaps, not surprisingly, non-white students were more likely to believe that experiences arising from their racial identity influenced their views of the U.S. legal system<sup>248</sup> (mean score for non-white students: 4.11; mean score for white students: 2.83) (Appendix D). Students were least likely to believe that experiences arising from their sexual orientation influenced their views (mean score for entering students: 2.31; mean score for upper level students: 2.60) (Appendix B).<sup>249</sup> The responses to this question suggest a need to identify *attitude* learning outcomes that seek to develop students' abilities to identify and be more reflective about their own varied cultural experiences, and how those experiences affect their perceptions and interactions.<sup>250</sup> They also suggest that many students may be in the ethnocentric stages of Bennett's intercultural competence continuum in that they are not aware of how their own values and beliefs have shaped their perceptions.<sup>251</sup>

Factor 5 also relates to students' awareness of the role that their own cultural experiences, biases, and stereotypes play in their perceptions and interactions.<sup>252</sup> A mean of 4.40 (Table 2) suggests that many students felt they were able to identify their culturally biased assumptions and were able to identify when they were reacting based upon stereotypical beliefs. This finding is consistent with the findings in our initial study.<sup>253</sup> This self-assessment could mean that students already understand when and how their unconscious biases and stereotypes affect their perceptions and actions. However, this result may indicate that students do not fully grasp how subconscious cognitive categories and schemas are susceptible to unconscious biases and stereotyping.<sup>254</sup> These results may demonstrate that students do not understand how difficult it is to recognize our embedded

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248. Whites tend not to think about themselves or experiences in terms of race. "Whites' *consciousness* of whiteness is predominantly *unconsciousness* of whiteness." Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

249. Some courts have formed task forces on how sexual orientation affects fairness within the judicial system document how sexual orientation plays a role in how straight and LGBT people experience the justice system. For a discussion of the findings of some court task forces, see Pamela D. Bridgewater & Brenda V. Smith, *Introduction to Symposium: Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1, 3–8 (2002–2003).

250. See *supra* Part II.B.

251. See *supra* text accompanying notes 147–62.

252. See *supra* text accompanying notes 216–18.

253. Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, at app. B at 127–28.

254. See Kang, *supra* note 123, at 1508; Weng, *supra* note 61, at 394.

assumptions and how those attitudes and assumptions affect our perceptions and interactions.<sup>255</sup>

In self-assessments, people tend to overestimate their abilities.<sup>256</sup> Factor 5 suggests the need for *knowledge* learning outcomes that build students' understandings of subconscious and implicit biases and stereotypes. This data suggests that useful *attitude* learning outcomes might focus on helping students accept that both conscious and unconscious bias and stereotyping affect our perceptions and behaviors. Learning outcomes should emphasize understanding the insidious nature of subconscious and implicit bias, acknowledging the challenges inherent in recognition of subconscious and implicit biases, and realizing the power of subconscious and implicit biases to affect our conduct, communications, and reactions, even if we wish it were otherwise. The associated *skill* learning outcome could be recognition of the drivers and biases behind our own behaviors. Students need to understand that we all have cultural biases. Rather than denying biases, we need to acknowledge they exist and become aware of how they affect our interactions and decision-making processes.<sup>257</sup> If students will not acknowledge they have biases, they cannot develop methods to help avoid being adversely influenced by them in their dealing with others.<sup>258</sup>

The survey results suggest that an important aspect of cultural sensibility teaching is developing students' understanding that we all bring our cultural biases into the legal profession.<sup>259</sup> Without this understanding, students may be unable to move toward an ethnorelative view of the world,

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255. Kang, *supra* note 123, at 1528–29. Recognition of the role played by unconscious biases is critical both in terms of lawyer-client relationships and in terms of adequately representing clients. Professor Justin Levinson conducted two studies demonstrating the impact of biases on jurors' decision making. *See generally* Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345 (2007) (discussing the role of implicit bias on jurors' memories of facts presented); Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010) (discussing the role implicit bias plays in jurors' interpretation of ambiguous evidence).

256. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955 (2006) (discussing how people are generally unaware of their biases and over-estimate their abilities to identify their biases); Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1121 (1999) (discussing how self-assessments are often inaccurate with those least skilled most likely to over-estimate their abilities).

257. Weng, *supra* note 61, at 396–97; *see also* Silver, *supra* note 67, at 237–39.

258. Kang, *supra* note 123, at 1528–29.

259. *See* Miller et al., *supra* note 6, at 105–07.

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in which they understand that everyone has a multi-faceted cultural perspective and that there is no single good or bad cultural perspective.<sup>260</sup> However, cultural sensibility is not a model that accepts that *anything goes*. While students need to understand that there is no single good or bad cultural perspective, they also need to develop the skills to challenge perceived unjust *cultural norms*, but should do so sensitively and after exploring all perspectives.

D.      *Study Limitations*

This study has several limitations, some of which we discussed above. Additional limitations are discussed below.

First, we acknowledge that there are a wide range of cultural sensibility learning outcomes that are not assessed by this instrument and may not lend themselves to a quantitative self-assessment instrument.<sup>261</sup> This instrument does not address, and is not meant to address, the full range of cultural sensibility learning outcomes necessary to assess whether students are able to effectively work across cultures.

Second, despite efforts to assess the role of social desirability response bias in the data,<sup>262</sup> all self-assessments, including this one, remain vulnerable to self-evaluations based upon students' perceptions of the *correct* response rather than students' actual beliefs and perceptions.

Third, in Factor 4, which assesses students' understanding of the need to be curious about what may be culturally based behaviors, there were likely an insufficient number of examples of various types of behaviors that may be based upon cultural practices.<sup>263</sup> Also, it is difficult to write statements that describe what may be culturally based behaviors outside of any particular context. This factor may thus be inadequately explored via this instrument. This limitation was based upon the necessity of limiting the survey length in order to increase response rate.

Fourth, students' self-assessment of their ability to identify their culturally biased assumptions and when they are acting based upon

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260.      *See supra* Part III (discussing Bennett's stages of intercultural competence).

261.      Others have attempted to measure additional learning outcomes via various self-assessment instruments. *See* sources cited *supra* note 194. However, self-assessment instruments are not, and should not be, the only way students' cultural sensibility learning is assessed. For example, in doctrinal courses, students could be assessed via essay or short answer questions asking them to incorporate cultural perspectives into their analysis. In experiential learning classes students could be assessed via journal entries, simulation exercises and actual interactions with clients and court personnel.

262.      *See supra* text accompanying notes 201–07.

263.      *See supra* Table 3.



stereotypes (Factor 5) presents a difficult dilemma. The data indicates that students, on average, rate themselves moderately highly when it comes to the ability to self-identify when they are acting based upon stereotypes or biases. However, the literature suggests most people underestimate the effect of biases on their behaviors, often because they are unaware of the impact of implicit biases on decision making.<sup>264</sup> Thus, we cannot make the assumption that those who scored highly on this factor are able to accurately self-assess when they are acting based upon stereotypes and biases.

Finally, as stated earlier, there may be a possible effect of nonresponse bias with the Northern School data and upper level student response data in general.<sup>265</sup> It may be that non-responders were not as interested in participating in a survey on the role culture plays in the lawyering process, or conversely, those responding were more interested in the topic.

## VI. CONCLUSION

Whatever the individual views of legal educators might be, learning outcomes will soon become part of the legal education accreditation process.<sup>266</sup> The decision about whether the outcomes include teaching our students to work effectively across cultures will be left to law schools.<sup>267</sup> We believe that in today's multicultural world, students must develop into culturally sensible lawyers who understand how their own cultural experiences affect their legal analysis, behaviors, and perceptions; who do not make assumptions about other cultures or legal systems; and who avoid behaviors based upon cultural domination or superiority of their own perspectives.

The cultural sensibility framework helps legal educators begin to conceptualize learning outcomes related to students' abilities to work effectively across cultures. It also serves as the basis for a statistically reliable survey instrument we developed to help law faculties better

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264. For a summary of various studies demonstrating the impact of implicit bias on the behavior of various actors within the legal system, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). For a review of the literature on implicit bias and how it potentially relates to the survey results, see Curcio et al., *Educating Culturally Sensible Lawyers*, *supra* note 9, at 117–19.

265. See *supra* Part IV.B. Incoming students at the Southern Urban School took the survey as part of the scheduled orientation process. The other survey cohorts were asked, via email, to complete the survey.

266. See *supra* notes 4, 19–20.

267. See Proposed Standards for Approval of Law Schools, Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, on Chapter 3: Program of Legal Education (Mar. 2014), *supra* note 4.

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understand some aspects of their students' cultural sensibility knowledge, attitudes, and skills. The survey described herein can help faculties gauge their students' receptivity to learning about the role culture plays in the lawyering process and assist educators in identifying where to devote educational time and effort. Additionally, the survey can help faculties identify potential learning outcomes and track students' cultural sensibility development over the course of their legal education. Specifically the instrument can help assess: 1) students' understanding of how culture influences judges, lawyers and clients; 2) students' self-awareness of the influence their cultural experiences have on how they view the legal system; 3) students' desire to learn about the role culture plays in the lawyering process; 4) students' awareness of the need to evaluate whether unfamiliar behaviors may be based upon cultural beliefs and practices; and 5) students' understanding of the difficulty inherent in identifying when we are acting based upon our biases and stereotypes.

Although we do not suggest that the survey instrument discussed herein can, or should, be the sole measure of student cultural sensibility learning outcomes, its statistical reliability and validity and its demonstrated ability to identify differences amongst incoming and upper level students indicates that it may be a useful learning outcome measurement tool for some aspects of cultural sensibility learning.<sup>268</sup> While more work needs to be done to develop a wide range of cultural sensibility learning outcome assessments, the research provided in this paper provides legal educators a starting point as they begin to consider the need for cultural sensibility education, what that education should entail, and whether that education is effective.

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268. This survey may be useful as a pre- and post-course survey. However, faculty must be cognizant of the fact that cultural sensibility learning may not *click* immediately after a course has been completed. Thus, immediate post-course survey results may not indicate the full extent of student learning. Additionally, faculty members must be cautious in how they present the survey to avoid students trying to answer in a way that pleases the faculty member rather than truly reflects the students' own views.

APPENDIX A

*Survey Instrument*

1. Please indicate the degree to which the following influences your views about the U.S. legal system.

Scale: 1=No influence at all to 6=Very strong influence

- 1.1 Experiences arising from your racial identity
- 1.2 Experiences arising from your ethnic identity
- 1.3 Experiences arising from your religious identity
- 1.4 Experiences arising from your socio-economic background
- 1.5 Experiences arising from your gender
- 1.6 Experiences arising from your sexual orientation

2. Please indicate the extent to which you agree with the following statements:

Scale: 1=Strongly disagree to 6=Strongly agree

- 2.1 Clients look at legal problems through their own cultural lens.
- 2.2 Lawyers look at legal problems through their own cultural lens.
- 2.3 How a client communicates with his or her lawyer is not influenced by the client's cultural background.
- 2.4 I do not view the legal system through a culturally-biased lens.
- 2.5 If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case.
- 2.6 A lawyer's socioeconomic background influences how the lawyer perceives a client's behavior.
- 2.7 Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds.
- 2.8 A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed.
- 2.9 Judges do not look at legal problems through their own cultural lens.
- 2.10 In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.
- 2.11 How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.

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- 2.12 When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful.
- 2.13 In general, I can accurately identify my culturally-biased assumptions about others who are from cultures different from my own.
- 2.14 Lawyers belonging to racial and ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.
- 2.15 When a client shakes hands with a male attorney but refused to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney.
- 2.16 White lawyers bring culturally-biased assumptions into the lawyer/client relationship.
- 2.17 Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.
- 2.18 A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.

3. Law School Classes

- 3.1 Have you taken any clinics in law school?
- 3.2 Please tell us which clinic(s) you have taken.
- 3.3 Have you taken any law school classes in which the role of culture in the lawyering process was discussed?
- 3.4 Please tell us which course(s) or professor(s).
- 3.5 What have you encountered in your classes that has helped to foster, or to inhibit, discussion of the role of culture in the lawyering process?

4. Demographics

- 4.1 Please indicate your current year in law school. [I am a 2L (have completed 29 to 57 law school credit hours)]  
[I am a 3L (have completed in excess of 57 law school credit hours)]

Gender [Female] [Male] [Transgender]

Ethnicity/Race (Choose all that apply.) [American Indian or Alaska Native]  
[Asian] [Black] [Hispanic/Latino(a)] [Hawaiian or Pacific Islander] [White]

Age [20-25] [26-30] [31-35] [36-40] [41-45] [46-50] [over 50]

We would appreciate any comments or suggestions you may have regarding the questionnaire or the topic.

## APPENDIX B: SURVEY ITEM MEANS BY STUDENT LEVEL

Survey Items		N	Mean	SD	Sig.
Experiences arising from your racial identity	Entering law students	309	3.14	1.55	
	2L or 3L	282	3.10	1.66	
	Total	591	3.12	1.60	
Experiences arising from your ethnic identity	Entering law students	309	2.85	1.60	
	2L or 3L	282	2.70	1.62	
	Total	591	2.78	1.61	
Experiences arising from your religious identity	Entering law students	309	3.20	1.59	
	2L or 3L	280	2.95	1.60	
	Total	589	3.08	1.59	
Experiences arising from your socio-economic background	Entering law students	309	3.92	1.43	
	2L or 3L	281	4.10	1.47	
	Total	590	4.01	1.45	
Experiences arising from your gender	Entering law students	309	3.41	1.59	
	2L or 3L	282	3.80	1.61	p<.01
	Total	591	3.60	1.61	
Experiences arising from your sexual orientation	Entering law students	309	2.31	1.54	
	2L or 3L	280	2.60	1.69	p<.05
	Total	589	2.45	1.62	
Clients look at legal problems through their own cultural lens.	Entering law students	309	5.04	0.97	
	2L or 3L	281	5.16	0.95	
	Total	590	5.09	0.97	
Lawyers look at legal problems through their own cultural lens.	Entering law students	307	3.72	1.31	
	2L or 3L	281	4.33	1.18	p<.000
	Total	588	4.01	1.28	
How a client communicates with his or her lawyer is not influenced by the client's cultural background. †	Entering law students	309	5.09	1.06	
	2L or 3L	281	5.30	1.00	p<.05
	Total	590	5.19	1.04	
I do not view the legal system through a culturally-biased lens. †	Entering law students	309	3.66	1.38	
	2L or 3L	280	4.09	1.34	p<.000
	Total	589	3.86	1.37	
If a client's cultural practice is to defer	Entering law students	306	2.82	1.23	
	2L or 3L	278	2.54	1.20	

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Survey Items		N	Mean	SD	Sig.
decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case.†	Total	584	2.68	1.22	p<.05
A lawyer's socioeconomic background influences how the lawyer perceives a client's behavior.	Entering law students	307	4.03	1.22	p<.000
	2L or 3L	279	4.58	1.12	
	Total	586	4.29	1.20	
Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds than my own.†	Entering law students	308	5.08	1.13	
	2L or 3L	280	5.04	1.31	
	Total	588	5.06	1.22	
A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed.†	Entering law students	305	5.36	0.87	
	2L or 3L	281	5.39	0.99	
	Total	586	5.37	0.93	
Judges do not look at legal problems through their own cultural lens.†	Entering law students	309	4.42	1.24	p<.000
	2L or 3L	279	4.91	1.18	
	Total	588	4.65	1.23	
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.	Entering law students	307	4.68	0.89	p<.05
	2L or 3L	280	4.52	0.92	
	Total	587	4.61	0.91	
How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.†	Entering law students	309	4.50	0.96	p<.000
	2L or 3L	280	4.86	0.99	
	Total	589	4.67	0.99	
When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful.†	Entering law students	307	5.16	0.93	
	2L or 3L	279	5.21	0.91	
	Total	586	5.19	0.92	

Survey Items		N	Mean	SD	Sig.
In general, I can accurately identify my culturally-biased assumptions about others who are from cultures different from my own.	Entering law students	308	4.26	1.01	
	2L or 3L	279	4.14	1.06	
	Total	587	4.20	1.04	
Lawyers belonging to racial and ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.	Entering law students	309	3.22	1.32	p<.000
	2L or 3L	281	3.65	1.33	
	Total	590	3.42	1.34	
When a client shakes hands with a male attorney but refuses to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney. †	Entering law students	308	4.15	1.28	
	2L or 3L	281	4.04	1.35	
	Total	589	4.10	1.31	
White lawyers bring culturally-biased assumptions into the lawyer/client relationship.	Entering law students	309	3.26	1.36	p<.000
	2L or 3L	280	3.93	1.37	
	Total	589	3.58	1.40	
Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.	Entering law students	308	4.67	1.08	p<.05
	2L or 3L	279	4.44	1.39	
	Total	587	4.56	1.24	
A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.	Entering law students	309	4.23	1.31	p<.05
	2L or 3L	281	3.93	1.54	
	Total	590	4.09	1.43	

† Item was reverse coded

Note. Mean range = 1-6 with higher mean score representing higher level of cultural sensibility.

\*\*Survey Item Means by Student Level (cont.)

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APPENDIX C: SURVEY ITEM MEANS BY UNIVERSITY

Survey Items		N	Mean	SD	Sig.
Experiences arising from your racial identity	Southern Urban	318	3.06	1.61	
	Northern	273	3.19	1.60	
	Total	591	3.12	1.60	
Experiences arising from your ethnic identity	Southern Urban	318	2.85	1.63	
	Northern	273	2.69	1.58	
	Total	591	2.78	1.61	
Experiences arising from your religious identity	Southern Urban	317	3.14	1.57	
	Northern	272	3.00	1.62	
	Total	589	3.08	1.59	
Experiences arising from your socio-economic background	Southern Urban	317	3.86	1.42	
	Northern	273	4.18	1.46	p<.05
	Total	590	4.01	1.45	
Experiences arising from your gender	Southern Urban	318	3.45	1.57	
	Northern	273	3.77	1.65	
	Total	591	3.60	1.61	
Experiences arising from your sexual orientation	Southern Urban	317	2.27	1.51	
	Northern	272	2.66	1.71	
	Total	589	2.45	1.62	
Clients look at legal problems through their own cultural lens.	Southern Urban	317	5.04	0.97	
	Northern	273	5.15	0.96	
	Total	590	5.09	0.97	
Lawyers look at legal problems through their own cultural lens.	Southern Urban	317	3.79	1.28	
	Northern	271	4.27	1.24	p<.000
	Total	588	4.01	1.28	
How a client communicates with his or her lawyer is not influenced by the client's cultural background. †	Southern Urban	317	5.10	1.07	
	Northern	273	5.30	0.99	p<.05
	Total	590	5.19	1.04	
I do not view the legal system through a culturally-biased lens. †	Southern Urban	316	3.61	1.37	
	Northern	273	4.16	1.32	p<.000
	Total	589	3.86	1.37	
If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case. †	Southern Urban	311	2.71	1.25	
	Northern	273	2.65	1.19	
	Total	584	2.68	1.22	
A lawyer's socioeconomic background influences how the	Southern Urban	315	4.03	1.18	
	Northern	271	4.60	1.16	p<.000



Survey Items		N	Mean	SD	Sig.
lawyer perceives a client's behavior.	Total	586	4.29	1.20	
Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds than my own.†	Southern Urban	316	4.99	1.23	
	Northern	272	5.14	1.20	
	Total	588	5.06	1.22	
A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed.†	Southern Urban	314	5.30	0.94	
	Northern	272	5.46	0.90	
	Total	586	5.37	0.93	
Judges do not look at legal problems through their own cultural lens.†	Southern Urban	316	4.50	1.28	p<.01
	Northern	272	4.83	1.16	
	Total	588	4.65	1.23	
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.	Southern Urban	315	4.66	0.90	
	Northern	272	4.55	0.92	
	Total	587	4.61	0.91	
How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.†	Southern Urban	316	4.47	1.01	p<.000
	Northern	273	4.90	0.91	
	Total	589	4.67	0.99	
When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful.†	Southern Urban	314	5.08	0.99	p<.01
	Northern	272	5.31	0.82	
	Total	586	5.19	0.92	
In general, I can accurately identify my culturally-biased assumptions about others who are from cultures different from my own.	Southern Urban	315	4.26	1.05	
	Northern	272	4.13	1.03	
	Total	587	4.20	1.04	
Lawyers belonging to racial and ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.	Southern Urban	317	3.27	1.26	p<.01
	Northern	273	3.60	1.41	
	Total	590	3.42	1.34	
When a client shakes hands with a male attorney but refuses to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney.†	Southern Urban	316	3.97	1.35	p<.05
	Northern	273	4.24	1.26	
	Total	589	4.10	1.31	

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Survey Items		N	Mean	SD	Sig.
White lawyers bring culturally-biased assumptions into the lawyer/client relationship.	Southern Urban	317	3.25	1.35	p<.000
	Northern	272	3.96	1.37	
	Total	589	3.58	1.40	
Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.	Southern Urban	315	4.51	1.18	
	Northern	272	4.61	1.31	
	Total	587	4.56	1.24	
A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.	Southern Urban	317	4.08	1.41	
	Northern	273	4.10	1.45	
	Total	590	4.09	1.43	

† Item was reverse coded

*Note.* Mean range = 1-6 with higher mean score representing higher level of cultural sensibility.

## APPENDIX D\*\*: SURVEY ITEM MEANS BY RACE/ETHNICITY

Survey Items		N	Mean	SD	Sig.
Experiences arising from your racial identity	Non White	132	4.11	1.56	p<.000
	White	435	2.83	1.49	
	Total	567	3.13	1.60	
Experiences arising from your ethnic identity	Non White	132	3.91	1.70	p<.000
	White	435	2.43	1.41	
	Total	567	2.78	1.60	
Experiences arising from your religious identity	Non White	132	3.27	1.73	
	White	433	3.00	1.54	
	Total	565	3.06	1.59	
Experiences arising from your socio-economic background	Non White	131	4.18	1.38	
	White	435	3.95	1.44	
	Total	566	4.00	1.43	
Experiences arising from your gender	Non White	132	3.91	1.72	p<.05
	White	435	3.53	1.56	
	Total	567	3.62	1.61	
Experiences arising from your sexual orientation	Non White	132	2.36	1.74	
	White	434	2.47	1.56	
	Total	566	2.44	1.60	
Clients look at legal problems through their own cultural lens.	Non White	132	5.14	1.05	
	White	435	5.08	0.94	
	Total	567	5.09	0.97	
Lawyers look at legal problems through their own cultural lens.	Non White	132	4.07	1.47	
	White	433	3.97	1.23	
	Total	565	4.00	1.29	
How a client communicates with his or her lawyer is not influenced by the client's cultural background.†	Non White	132	5.13	1.20	
	White	435	5.21	0.99	
	Total	567	5.19	1.05	
I do not view the legal system through a culturally-biased lens.†	Non White	132	3.91	1.37	
	White	434	3.85	1.36	
	Total	566	3.86	1.36	
If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case.†	Non White	131	2.64	1.29	
	White	430	2.69	1.19	
	Total	561	2.68	1.21	
A lawyer's socioeconomic background influences how the	Non White	132	4.33	1.35	
	White	431	4.27	1.15	

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Survey Items		N	Mean	SD	Sig.
lawyer perceives a client's behavior.	Total	563	4.28	1.20	
Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds than my own.†	Non White	131	5.25	1.14	
	White	433	5.03	1.20	
	Total	564	5.09	1.19	
A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed.†	Non White	129	5.40	0.98	
	White	433	5.36	0.91	
	Total	562	5.37	0.92	
Judges do not look at legal problems through their own cultural lens.†	Non White	131	4.81	1.20	
	White	434	4.60	1.24	
	Total	565	4.65	1.23	
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.	Non White	132	4.70	0.99	
	White	432	4.58	0.89	
	Total	564	4.61	0.91	
How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.†	Non White	132	4.89	1.00	p<.05
	White	433	4.61	0.98	
	Total	565	4.67	0.99	
When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful.†	Non White	131	5.23	0.96	
	White	432	5.17	0.90	
	Total	563	5.18	0.92	
In general, I can accurately identify my culturally-biased assumptions about others who are from cultures different from my own.	Non White	132	4.35	1.13	
	White	432	4.15	1.01	
	Total	564	4.20	1.04	
Lawyers belonging to racial and ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.	Non White	132	3.14	1.40	p<.05
	White	434	3.49	1.31	
	Total	566	3.41	1.34	
When a client shakes hands with a male attorney but refuses to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney.†	Non White	132	4.02	1.33	
	White	433	4.09	1.31	
	Total	565	4.07	1.31	
White lawyers bring culturally-biased assumptions into the lawyer/client relationship.	Non White	132	3.69	1.38	
	White	433	3.53	1.40	
	Total	565	3.57	1.40	

Survey Items		N	Mean	SD	Sig.
Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.	Non White	131	4.89	1.06	p<.01
	White	432	4.49	1.23	
	Total	563	4.58	1.20	
A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.	Non White	132	4.55	1.29	p<.000
	White	434	3.97	1.40	
	Total	566	4.11	1.39	

† Item was reverse coded

Note. Mean range = 1-6 with higher mean score representing higher level of cultural sensibility.

## APPENDIX E\*\*: SURVEY ITEM MEANS BY GENDER

Survey Items		N	Mean	SD	Sig.
Experiences arising from your racial identity	Female	287	3.55	1.61	p<.000
	Male	291	2.71	1.49	
	Total	578	3.13	1.61	
Experiences arising from your ethnic identity	Female	287	3.13	1.65	p<.000
	Male	291	2.43	1.50	
	Total	578	2.78	1.61	
Experiences arising from your religious identity	Female	286	3.21	1.54	p<.05
	Male	290	2.93	1.62	
	Total	576	3.07	1.59	
Experiences arising from your socio-economic background	Female	286	4.21	1.35	p<.01
	Male	291	3.79	1.51	
	Total	577	4.00	1.45	
Experiences arising from your gender	Female	287	4.39	1.35	p<.000
	Male	291	2.83	1.45	
	Total	578	3.61	1.60	
Experiences arising from your sexual orientation	Female	286	2.65	1.67	p<.01
	Male	291	2.25	1.53	
	Total	577	2.45	1.62	
Clients look at legal problems through their own cultural lens.	Female	287	5.26	0.92	p<.000
	Male	291	4.93	0.99	
	Total	578	5.10	0.97	
Lawyers look at legal problems through their own cultural lens.	Female	286	4.23	1.29	p<.000
	Male	290	3.77	1.25	
	Total	576	4.00	1.29	
How a client communicates with his or her lawyer is not influenced by the client's cultural background.†	Female	287	5.34	0.96	p<.000
	Male	291	5.038	1.10	
	Total	578	5.19	1.04	
I do not view the legal system through a culturally-biased lens.†	Female	287	4.04	1.34	p<.01
	Male	290	3.67	1.39	
	Total	577	3.85	1.38	
If a client's cultural practice is to defer decision making to others in the client's family, a lawyer should help the client understand why he or she should make his or her own decisions about the case.†	Female	285	2.66	1.18	
	Male	287	2.67	1.25	
	Total	572	2.66	1.21	
A lawyer's socioeconomic background influences how the lawyer perceives a client's behavior.	Female	285	4.40	1.17	p<.05
	Male	289	4.19	1.23	
	Total	574	4.29	1.21	

Survey Items		N	Mean	SD	Sig.
Legal education should not include education about cultural issues that may arise when providing legal services to people from different cultural backgrounds than my own.†	Female	285	5.3439	1.11	p<.000
	Male	290	4.8069	1.25	
	Total	575	5.0730	1.21	
A lawyer should assume that a client's visible lack of emotion means that the client does not feel strongly about what is being discussed.†	Female	285	5.43	.95	
	Male	288	5.32	.91	
	Total	573	5.37	.93	
Judges do not look at legal problems through their own cultural lens.†	Female	286	4.77	1.20	p<.05
	Male	290	4.52	1.26	
	Total	576	4.64	1.24	
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.	Female	287	4.65	.88	
	Male	288	4.57	.93	
	Total	575	4.61	.91	
How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background.†	Female	286	4.83	1.00	p<.000
	Male	290	4.52	.96	
	Total	576	4.67	.99	
When a client refuses to look his or her lawyer in the eyes, the lawyer should assume the client is not being truthful.†	Female	287	5.24	.90	
	Male	287	5.12	.94	
	Total	574	5.18	.92	
In general, I can accurately identify my culturally-biased assumptions about others who are from cultures different from my own.	Female	286	4.26	1.06	
	Male	289	4.15	1.02	
	Total	575	4.21	1.04	
Lawyers belonging to racial and ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.	Female	287	3.38	1.41	p<.05
	Male	290	3.46	1.27	
	Total	577	3.42	1.34	
When a client shakes hands with a male attorney but refuses to shake hands with a female attorney, the lawyers should assume the client will not respect advice given by the female attorney.†	Female	287	4.02	1.34	
	Male	289	4.15	1.28	
	Total	576	4.09	1.31	
White lawyers bring culturally-biased assumptions into the lawyer/client relationship.	Female	287	3.74	1.39	p<.05
	Male	289	3.44	1.41	
	Total	576	3.59	1.40	
Law professors should discuss with their students the cultural assumptions embedded in appellate legal opinions.	Female	286	4.79	1.10	p<.000
	Male	288	4.38	1.29	
	Total	574	4.59	1.22	

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*CULTURAL DIVERSITY EDUCATION LEARNING OUTCOMES*

Survey Items		N	Mean	SD	Sig.
A law student's ability to recognize cultural diversity issues as they relate to the lawyering process should be assessed during law school.	Female	287	4.38	1.35	p<.000
	Male	290	3.85	1.43	
	Total	577	4.11	1.42	

† Item was reverse coded

*Note.* Mean range = 1-6 with higher mean score representing higher level of cultural sensibility.



## EXPERIENTIAL EDUCATION AS CRITICAL PEDAGOGY: ENHANCING THE LAW SCHOOL EXPERIENCE

SPEARIT\* AND STEPHANIE SMITH LEDESMA\*\*

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### PROLOGUE

The sting of recession that grips the American economy is even more dramatic in the realm of legal education.<sup>1</sup> Law schools, in addition to producing too many graduates for an already too full legal economy, also face a barrage of bad press,<sup>2</sup> dwindling LSAT takers,<sup>3</sup> and sharp declines in student applications,<sup>4</sup> not to mention sharp criticism about high costs of tuition and spiraling student debt.<sup>5</sup> Due to this *perfect storm* of troubles, law schools are now being forced to plan more strategically than in decades of

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\* Associate Professor, Thurgood Marshall School of Law, Texas Southern University. Special thanks to Professor Olympia Duhart, Dr. Docia Rudley, and Dean Danyne R. Holley for their insights and intellectual support.

\*\* Assistant Professor and Director of Experiential Learning Programs, Thurgood Marshall School of Law, Texas Southern University.

1. Stanley Fish, *The Bad News Law Schools*, N.Y. TIMES (Feb. 20, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/02/20/the-bad-news-law-schools/>.

2. See, e.g., *id.* (summarizing much of the negative press).

3. See, e.g., John Schwartz, *Drop in LSAT Takers Shows Legal Field's Slump*, N.Y. TIMES, Nov. 1, 2013, at A.20.

4. *Three-Year ABA Volume Comparison*, LSAC, <http://www.lsac.org/lisacresources/data/three-year-volume> (last updated March 7, 2014).

5. See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* ix (John M. Conley & Lynn Mather eds., 2012).

prosperity.<sup>6</sup> Among the implicit critiques of legal education are the more direct critiques coming from the corporate world.<sup>7</sup> In particular, large law firms are demanding in growing unison that J.D. graduates be more *practice ready* for the rigors of corporate practice.<sup>8</sup> Although big firms employ only a small percentage of all J.D. graduates, they are influencing the discussion with support from members of the academy, bench, and bar, all of whom support increasing practical skills training, albeit under different rationales.<sup>9</sup>

This article examines this transformation in legal education through the lens of critical pedagogy. At its base, critical pedagogy is about “devis[ing] more equitable methods of teaching, help[ing] students develop consciousness of freedom, and [helping them] connect knowledge to power.”<sup>10</sup> The insights of critical pedagogy are valuable for a fuller understanding of experiential education and its potential to affect students in profound ways, particularly as a means of empowerment.<sup>11</sup> Although this is an understudied area of pedagogical scholarship, as one scholar notes,

[p]ower relations pervade the regime of practices that constitute legal education, operating in subtle but nevertheless concrete ways to shape the actions of students, teachers, professionals, and administrators. Yet, despite their pervasiveness, legal education scholarship does not effectively grasp or explore power relations—they do not feature as objects of research in an explicit manner, and when they are considered, they are understood in problematic ways.<sup>12</sup>

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6. THE N.Y.C. BAR ASS’N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, N.Y.C. BAR, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY 45–47 (2013), available at <http://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf>.

7. See *id.* at 23.

8. See *id.* at 22–23.

9. See *id.* at 26–27 (citing that firms of 501 or more employees employed “nearly [twenty percent] of 2010 graduates from law schools in New York State”); Press Release, N.Y.C. Bar Ass’n, New York City Bar Association Task Force Calls for Changes in Education and Career Focus for New Lawyers—Report Announces Pilot Programs and Urges Focus on Unmet Middle Class Legal Needs (Nov. 14, 2013), <http://www.nycbar.org/media-aamp-publications/press-releases/press-archives-2013/1885-new-york-city-bar-association-task-force-calls-for-changes-in-education-and-career-focus-for-new-lawYERS-report-announces-pilot-programs-and-urges-focus-on-unmet-middle-class-legal-needs/>.

10. SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 469 (2012) [hereinafter SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*].

11. See *id.* at 472.

12. Matthew Ball, *Power in Legal Education: A (New) Critical and Analytical Approach*, 12 QUEENSL. U. TECH. L. & JUST., Apr. 12, 2012, at 157, 157.

Critical pedagogy is a frame for considering how experiential education empowers students and leads to other positive outcomes.<sup>13</sup> Although advocates of experiential education typically emphasize the needs of the profession and student marketability, critical pedagogy reveals more at stake for students—including experiencing greater agency, autonomy, and hopefully, greater justice.<sup>14</sup>

The article outlines a student-centered set of rationales for adopting experiential principles. As such it seeks to engage law professors of all persuasions to consider what experiential education means for students personally. More pointedly, this article attempts to break down some of the great divide between teaching doctrine and experiential education.<sup>15</sup> Infusing doctrinal courses with opportunities for experiential learning will be imperative for law schools; and so it will be imperative to engage doctrinal faculty.<sup>16</sup> The pages that follow are an attempt.

Among the most compelling rationales for enhancing experiential education is its potential to engage students in justice directly, and not simply as a lesson from a book.<sup>17</sup> For example, students who experience the law through direct interaction with indigent clients learn valuable lessons in justice and the unmet legal needs that affect the most vulnerable and marginalized segments of society.<sup>18</sup> Students learn through their experience that *justice* is complex and multilayered, and indeed unstable. Yet, by assisting such clients, students experience the law as stewards of justice, rather than floundering law students. Students get the opportunity to learn justice inside and outside of the classroom setting, and are assessed in abilities other than typical law school test-taking.<sup>19</sup> A more variegated approach to assessments promises more student evaluation of the skills and values that lawyers need for successful and meaningful practice.<sup>20</sup>

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13. SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, *supra* note 10, at 469.

14. *See id.* at 469–70, 479.

15. Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 N.E. U. L.J. 87, 87 (2013) (describing doctrine faculty and skills faculty as “composed of two separate worlds”).

16. *Id.* at 87–88.

17. SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, *supra* note 10, at 470.

18. *See, e.g.*, VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 62–63, 399 (Soc’y of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2011).

19. Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 527, 530–32 (2011–2012).

20. *See id.* at 531–32.

The potential benefit of experiential education hardly means there is not a potential for pitfalls in implementing and maintaining experiential curricula.<sup>21</sup> For example, as one commentator notes:

[D]eveloping a conceptual framework for articulating options may provoke controversy because of its potential to be misunderstood as suggesting that all experiences have equal value. Such an interpretation would permit law schools to ignore the consequences of the choices that they explicitly and implicitly make, as long as they provide *some* kind of experiential opportunity.<sup>22</sup>

Accordingly, one might easily imagine courses consisting of little more than a mundane, semester-long task, or students unable to match their practical interests with the available curriculum.<sup>23</sup> Educators must avoid these pitfalls through praxis in pedagogy, and further develop ways to exploit experiential education as a means to enhance the *law school experience*.<sup>24</sup>

#### I. REFORMING LAW SCHOOL CURRICULA: MORE EXPERIENTIAL EDUCATION

With the employment market for attorneys currently in a subpar state,<sup>25</sup> legal employers have the attention of both the American Bar Association (“ABA”) and law schools, and these employers are demanding practice-ready graduates.<sup>26</sup> Historically, the legal academy has been generally content with a model of education that focuses on legal theory and case law doctrine, with schools typically leaving most of the practical

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21. *E.g.*, Martin J. Katz, *Facilitating Better Law Teaching—Now*, 62 EMORY L.J. 823, 833 (2013) (describing the pitfalls of simulation training and the “vast difference between good simulations and bad ones”).

22. Maranville et al., *supra* note 19, at 519–20.

23. *See* David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3, 5 (2009) (describing apprentice-lawyers who spent hours “photocopying or delivering documents for their host law practices”); Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 LEGAL COMM. & RHETORIC: JALWD 191, 194 (2011) (advocating “the public-interest-partnership . . . as an approach that best integrates the experiential learning of simulated and live client interactions, while lessening the impact of the negative aspects of both traditional approaches”).

24. Ruan, *supra* note 23, at 191–93.

25. *See, e.g.*, William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: Federal Loans Inflate College Budgets, but How Long Will that Last if Law Grads Can’t Pay their Bills?*, A.B.A. J., Jan. 2012, at 30, 32.

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

training of new attorneys to the auspices of employers.<sup>27</sup> However, in the most recent response to the call for more practice-ready graduates, law schools are increasingly turning to experiential models of various types.<sup>28</sup> Notwithstanding the push towards more experiential education, there is great uncertainty as to how to implement experiential curricula within law school, where not even field trips are a regular feature of the law school syllabus.<sup>29</sup>

Experiential education offers a very different model, one that concentrates on teaching through real-life work experience.<sup>30</sup> Broadly speaking, experiential education may be viewed as a form of active learning that has conceptual overlap with European models of *work-based* learning, which attempt to formalize the workplace as an authentic learning environment.<sup>31</sup> It is broad in scope and “incorporates a continuum of learning opportunities.”<sup>32</sup>

The animating theory of experiential education draws on a distinguished history and lineage, including the works of John Dewey, David Kolb, and Paulo Freire, among others.<sup>33</sup> It involves “[l]earning from an

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27. *Id.* But see David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815, 815–16, 818 (2009) (noting that despite criticism of theory-driven rather than practice-driven education, American law schools expressly draw on experiential learning through the use of legal clinics and by bringing in adjunct instructors who are engaged in full time practice).

28. See Ed Finkel, *Schools Respond to Shifts in Legal Landscape*, STUDENT LAW., Jan. 2012, at 20, 21–22 (examining various programs developed in law schools to make students more ready for practice); Robert A. Parker & Sue Schechter, *The Ugly Duckling Comes of Age: The Promise of Full-Time Field Placements 2* (Soc. Sci. Research Network, Working Paper No. I20, K19, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1886509](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886509).

29. Noelle Higgins et al., *Field Trips as Teaching Tools in the Law Curriculum*, 88 RES. EDUCATION 102, 105 (2012) (stating that even when field trips are undertaken in the law school setting, “they are generally included in an *ad hoc* manner, often with no real context and/or without learning outcomes attached, or no post-trip analysis undertaken.”).

30. See Katz, *supra* note 21, at 830.

31. See C.U. Chisholm et al., *The Characterisation of Work-Based Learning by Consideration of the Theories of Experiential Learning*, 44 EUR. J. EDUCATION 319, 319 (2009) (discussing “how experiential learning theories can contribute to the development of a common theoretical framework which draws together lifelong learning practice to support the conceptualization of work-based learning”).

32. Chavkin, *supra* note 23, at 11.

33. Robert Dinerstein, *Experiential Legal Education: New Wine and New Bottles*, SYLLABUS, Winter 2012-2013, at 2, 2; see generally JOHN DEWEY, *HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS* (1933); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 30th Anniversary ed. 2005); DAVID A. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* (1984).

individual's own experiences"<sup>34</sup> or a type "of learning undertaken by students who are given a chance to acquire and apply knowledge, skills, and feelings in an immediate and relevant setting."<sup>35</sup> This definition is partially based on the model developed by David Kolb and Roger Fry, which outlines four primary elements: 1) concrete experience, 2) observation and reflection, 3) formation of abstract concepts, and 4) testing the abstract concepts in new situations.<sup>36</sup> Conceptually, these elements overlap with Patrick Brayer's definition of social practice theory of learning as one that emphasizes the importance of the social content of learning; "the student learns laterally through collaborat[ion] . . . with an . . . array of workers and peers and vertically through the central, fluid dyad involving the supervisor/expert and the student/novice."<sup>37</sup> In all regards, then, experiential learning is a "pedagogy of systemic interaction."<sup>38</sup>

In legal education, there is no unanimous theory on the content of experiential education, but there has been headway.<sup>39</sup> For example, the Clinical Legal Education Association's ("CLEA") Best Practices for Legal Education report has reiterated how *experiential learning* is distinct from *experiential education*.<sup>40</sup> According to this report, "[e]xperiential education integrates theory and practice by combining academic inquiry with actual experience"; it is focused on academic inquiry and in the way teachers design and structure the student's experience.<sup>41</sup> Whereas experiential education focuses on the intentional design to teach by experience, *experiential learning* corresponds to student learning, and thus can occur in informal settings—even though the learning is not experiential by design.<sup>42</sup>

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34. Patrick C. Brayer, *A Law Clinic Systems Theory and the Pedagogy of Interaction: Creating a Legal Learning System*, 12 CONN. PUB. INT. L. J. 49, 49 (2012).

35. Mark K. Smith, *David A. Kolb on Experiential Learning*, INFED (2010), <http://infed.org/mobi/david-a-kolb-on-experiential-learning/>.

36. *Id.*; see also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 122 (1st ed. 2007).

37. Brook K. Baker, *Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-Op"tation*, 56 N.Y.L. SCH. L. REV. 619, 624 (2011–2012); see also Brayer, *supra* note 34, at 50.

38. Brayer, *supra* note 34, at 50.

39. See STUCKEY ET AL., *supra* note 36, at 121–22.

40. *Id.* at 121; see also Lewis Jackson & Doug MacIsaac, *Introduction to a New Approach to Experiential Learning*, 62 N. DIRECTIONS FOR ADULT & CONTINUING EDUC. 17, 22 (1994); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 78 (1996) (emphasizing that "[l]earning is not education, and experiential learning differs from experiential education. Learning happens with or without teachers and institutions").

41. STUCKEY ET AL., *supra* note 36, at 121, 123.

42. *Id.* at 121.

Under these terms, what law schools are attempting to attain is experiential education that leads to experiential learning.<sup>43</sup>

Historically, law schools have been teaching by experience through clinics, externships, or course simulations, although only a minority of law students are typically afforded the chance to do clinical work.<sup>44</sup> At present, the ABA does not mandate any specific experiential education or experiential learning opportunity for member schools. The winds of change have been blowing, however.<sup>45</sup> For example, at its 2011 Annual Meeting, the ABA House of Delegates adopted a resolution “urg[ing] legal education providers to implement curricular programs intended to develop practice-ready lawyers.”<sup>46</sup> More concretely, the ABA Standards Review Committee recently voted to put forth a proposal for a mandatory six-unit practical skills requirement for all graduates of accredited law schools.<sup>47</sup> If implemented, this would be a mandatory requirement, whereas now the standards say that law schools must provide “substantial opportunities for live-client or other real-life practice experiences,”<sup>48</sup> and that students should receive “substantial instruction in . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”<sup>49</sup>

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43. *See id.* at 122. Although some law school professors would limit experiential education to real-life experiences, Best Practices include simulation courses, as well as in-house clinics and externships. *Id.* Recently, Susan Brooks has included simulation-based courses in her definition of experiential education. Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 403 (2012).

44. *See* Katz, *supra* note 21, at 829.

45. *See* AM. BAR ASS’N, RESOLUTION 10B 1 (Aug. 8–9, 2011).

46. *Id.*

47. Memorandum from Solomon Oliver, Jr., Council Chairperson, Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, & Barry A. Currier, Managing Dir. of Accreditation & Legal Educ., Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar to Interested Persons & Entities (Dec. 13, 2013), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201312\\_notice\\_comment\\_stds\\_205\\_207\\_303a3\\_603a\\_c.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201312_notice_comment_stds_205_207_303a3_603a_c.authcheckdam.pdf); Karen Sloan, *ABA Reconsiders Practical Skills Mandate for Law Schools*, NAT’L L.J., (Dec. 09, 2013, 3:49 PM) <http://www.ctlawtribune.com/id=1202631585383/ABA-Reconsiders-Practical-Skills-Mandate-for-Law-Schools>.

48. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 22 (2013) [hereinafter ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf) (noting in interpretation 302-5 that these can be *clinics* or *field placements*).

49. *Id.* at 21.

The ABA does not define *experiential*, but states:

To qualify as experiential, a course must be primarily experiential in nature and:

- (a) integrate doctrine, theory, skills and legal ethics, and engage students in performance of one or more professional skills identified in Standard 302;
- (b) develop the concepts underlying the professional skills being taught;
- (c) provide multiple opportunities for performance; and
- (d) provide opportunities for self-evaluation.<sup>50</sup>

Although the ABA's attempt to require more experiential learning for law students is a step in the right direction, the California State Bar Task Force has adopted a model that would require "all new Bar admittees [to] demonstrate . . . at least [fifteen hours] of practice based, experiential coursework."<sup>51</sup> This figure is also the minimum recommendation endorsed by the CLEA.<sup>52</sup> More recently, the ABA has revisited the six unit proposal and has invited comment on whether the ABA should make fifteen hours of experiential learning a requirement for all graduates of accredited law schools.<sup>53</sup> The Society of American Law Teachers has been among the voices in support of the proposal.<sup>54</sup>

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50. Draft for November Meeting, Am. Bar Ass'n, Section of Legal Educ. & Admission to the Bar, Standards Review Comm. (Nov. 16–17, 2012), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/July2012/2012\\_nov\\_src\\_meeting\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/July2012/2012_nov_src_meeting_materials.authcheckdam.pdf).

51. TASK FORCE ON ADMISSIONS REGULATION REFORM, STATE BAR OF CAL., PHASE I FINAL REPORT 10 (2013), *available at* [http://www.calbar.ca.gov/Portals/0/documents/bog/bot\\_ExecDir/STATE\\_BAR\\_TASK\\_FORCE\\_REPORT\\_\(FINAL\\_AS\\_APPROVED\\_6\\_11\\_13\)\\_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf).

52. Michele Pistone, *CLEA Calls on ABA to Require 15 Credits of Experiential Learning*, BEST PRAC. FOR LEGAL EDUC. (July 1, 2013), <http://bestpracticeslegaled.albanylawblogs.org/2013/07/01/clea-calls-on-aba-to-require-15-credits-of-experiential-learning/>.

53. Karen Sloan, *ABA Reconsiders Practical Skills Mandate for Law Schools*, NAT'L L.J. (Dec. 09, 2013, 3:49 PM), <http://www.ctlawtribune.com/id=1202631585383/ABA-Reconsiders-Practical-Skills-Mandate-for-Law-Schools>.

54. Letter from Jackie Gardina, Co-President, Soc'y of Am. Law Teachers & Ngai Pindell, Co-President, Soc'y of Am. Law Teachers, to Dean Jeffrey E. Lewis, Chair, Am. Bar Ass'n Standards Review Comm. (Apr. 13, 2012), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/20120416\\_comment\\_outcome\\_measures\\_salt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20120416_comment_outcome_measures_salt.authcheckdam.pdf).



While the actions of the ABA convey a sense of urgency, the call to make law students more practice ready is not new.<sup>55</sup> Publications like *Best Practices for Legal Education: A Vision and a Roadmap*,<sup>56</sup> *Educating Lawyers: Preparation for the Profession of Law* (“Carnegie Report”) in 2007,<sup>57</sup> and *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* in 1992<sup>58</sup> have inspired subsequent revisions of Curriculum Standards 302 (b)(1) and 305 of the ABA Standards and Rules of Procedure for Approval of Law Schools<sup>59</sup>—all of which stress the importance of applied legal training in the modern law school curriculum.

One of the most prominent voices among these is the Carnegie Report and its advocacy of *apprenticeships* in legal education—particularly, *third apprenticeships*, which allow for “knowledge, skills, and the social-ethical dimensions of lawyering [to] come together [and] help students bridge the gap from law school to practice.”<sup>60</sup> The report’s recommendations have been recently criticized for teaching students “what experts are doing [rather than] what they are thinking as they deal with a lawyering problem.”<sup>61</sup>

Despite such criticism, the report is correct to note that few students are afforded the chance to mimic lawyers by doing *what experts do*, let alone to delve into conceptual competences. Instead, law schools have strongly

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55. See Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT’L L.J. 295, 305–07 (2006).

56. See STUCKEY ET AL., *supra* note 36, at 123.

57. WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 8 (2007), available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

58. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 331 (1992), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_macrate\\_report\).auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macrate_report).auth_checkdam.pdf).

59. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 48, at 21–22 (requiring that approved law schools “offer substantial opportunities for . . . real-life practice experiences, appropriately supervised”).

60. Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. SCH. L. REV. 561, 562 (2011–2012); SULLIVAN ET AL., *supra* note 57, at 8.

61. Stefan H. Krieger & Serge A. Martinez, *Performance Isn’t Everything: The Importance of Conceptual Competence in Outcome Assessment of Experiential Learning*, 19 CLINICAL L. REV. 251, 251, 256 (2012) (admonishing that the ABA or a law school following the lead of the Carnegie Report “will unreflectively define ‘competency of an entry-level practitioner’ primarily in terms of the ability to perform certain lawyering tasks rather than the capacity to reason in practice”).

emphasized legal reasoning, black letter law, and standardized testing, with some schools adhering to mandatory course schedules that leave students little opportunity for the sort of courses that would provide personal interaction with lawyers or other legal professionals.<sup>62</sup>

How a non-client model became the dominant model of legal education is a curious development.<sup>63</sup> One researcher suggests that law schools followed flawed assumptions about learning.<sup>64</sup> For example, one was to understand learning as primarily theoretical rather than contextual, and more precisely, that cognitive attainment was synonymous with the “ability to assimilate abstract knowledge and . . . apply that knowledge.”<sup>65</sup> Research shows, however, that human cognition is situational more than abstract; “[h]umans do not confront a particular place and time, a local field of action, with a predetermined set of responses.”<sup>66</sup> “Instead, the primary resources humans bring to bear are exemplars of past practice—memories of comparable dilemmas . . . [which] are typically derived from practice [and] only secondarily [derived] from classroom investigations . . . .”<sup>67</sup>

Another errant assumption was “that learning should be controlled and relatively selfless or disinterested rather than self-directed, identity-focused, and self-actualizing.”<sup>68</sup> From this perspective, students held little agency and autonomy.<sup>69</sup> Related was the assumption that legal education was primarily a solitary rather than a social endeavor.<sup>70</sup> Under this premise, students were expected to “read, research, and write largely on their own,” producing a solitary model that made the student dependent on what was in one’s own head.<sup>71</sup>

Experiential education represents the antithesis to these misunderstandings about education. The approach provides students the opportunity to practice as they learn, and practice what they learn. The apprenticeship-like experiences of experiential learning have been likened to “a cornerstone for effective learning”<sup>72</sup> that contributes to a process of acculturating students to legal practice by interaction with clients, attorneys, and judges, which provides tools necessary to succeed in the legal

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62. See SULLIVAN ET AL., *supra* note 57, at 5–6.

63. For a historical perspective, see A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH & LEE L. REV. 1949, 1949 (2012).

64. Baker, *supra* note 37, at 621.

65. *Id.* at 621–22.

66. *Id.* at 622.

67. *Id.*

68. *Id.* at 621.

69. See Baker, *supra* note 37, at 621.

70. *Id.*

71. *Id.* at 624.

72. *Id.* at 620.

profession.<sup>73</sup> Learning in practice encourages students to enter a participatory and cognitive apprenticeship with senior practitioners where they can collaborate to resolve authentic dilemmas while conceptualizing the workplace as an organic place of learning.<sup>74</sup>

Experiential education is thus the means to practice-based competence, by which students develop “[r]elational skills, situation skills, [and] gap-closing skills.”<sup>75</sup> The skills are learned best through repeated collaborative experiences—through increasing social practice, or as one commentator put it, “[q]uite simply, if learning is about increased access to performance, then the way to maximize learning is to perform, not to talk about it,” but to do it.<sup>76</sup> “[P]edagogy that empowers . . . students to develop genuine understandings must [thus] be primarily contextual rather than didactic and prescriptive.”<sup>77</sup> “[L]earning in the workplace also permits the development of relational skills and situation assessment skills that thereafter permit the adaptation, transfer, and deployment of performance competencies to new and unfamiliar tasks.”<sup>78</sup> The end result of repeat experience in the field of practice is a full repertoire of collaborative skills that are impossible to achieve in the classroom alone.

From the student’s perspective, perhaps the most significant aspect of experiential learning is the opportunity for reflection. The ability to look to the past as a means of making a better decision in the present is the pathway for students to become self-learners. It is also a chance to reflect on the force of law, as well as one’s duty to the legal profession, and more importantly, to society at large, all of which are detailed in the following section.

## II. UNDERSTANDING THE SHIFT WITHIN A CRITICAL FRAMEWORK

The growing emphasis on practical skills in law schools may be properly understood as a critique of a teaching model that has dominated law schools for the last century.<sup>79</sup> Critical pedagogy is a power-full analytic for

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73. *Id.* at 629 n.27.

74. See John Seely Brown et al., *Situated Cognition and the Culture of Learning*, EDUC. RESEARCHER, Jan.–Feb. 1989, at 32, 37.

75. Baker, *supra* note 37, at 627.

76. William F. Hanks, *Foreword* to JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION 13, 22 (1991).

77. Baker, *supra* note 37, at 628.

78. *Id.* at 626.

79. Erickson, *supra* note 15, at 110 (arguing “that the push for experiential education in law schools is really a push for better teaching”); Moliterno, *supra* note 40, at 94 (describing how the basic model of legal education has not changed since the time of Christopher Columbus Langdell, “except for a modest and separatist move toward the

assessing this revolution in legal education. As an interpretive lens, it reveals experiential education as a boon not for the legal profession alone, but also for the soon-to-be-lawyer; it provides insight to the practical and professional outcomes associated with experience-based learning, including those that bear directly on students. The reformation thus represents not only more opportunity for students to gain *hands on* or *on the job* experience, but an opportunity for teachers to create a more meaningful experience for students.

#### A. *Theoretical Overview*

A central tenet of the critical theory of legal education has been to focus on power relations within law schools. The dominant theme of theorists, however, has been largely evaluative, as one scholar notes:

[T]he exercise of power was a bad thing. It was understood as a possession that was held by some—primarily the legal profession—and exercised *over* others—namely law students—in order to achieve the ends of those wielding it. The exercise of power was positioned as negative and repressive, as stifling or denying the *real* interests of law students and leading to ideological indoctrination. It was implied that good could only come from . . . total removal of power relations. . . . [P]ower was assumed to operate upon an inert and passive material, with ideologies being *deposited* into the empty receptacle that is the student, and teaching and assessment practices working to *determine* the shape of the legal graduate.<sup>80</sup>

Of course removing all power relations from education rings impossible, so rather than try to eliminate power, the idea has been to try to recalibrate the balance of power.<sup>81</sup> Critical pedagogy provides a theoretical basis for achieving a better balance by its commitment to a dialectical understanding of the student and teacher relationship.<sup>82</sup> Conceptually, this understanding renders the identity of each party dependent upon the existence of the other; that is, the teacher cannot exist without the student, and vice-versa.<sup>83</sup> This

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experiential model resulting from the clinical education movement. All of the changes in legal education, aside from the clinical education movement, have been about what is taught, not how it is taught. The mainstream of legal education remains almost as alien from the apprentice system as at the time of Langdell's revolution . . .").

80. Ball, *supra* note 12, at 159–60 (emphasis in original).

81. *See id.* at 161–62, 166.

82. *See id.* at 161.

83. *See id.*

base proposition situates the student and teacher on equal conceptual terrain and proclaims their interdependence.<sup>84</sup>

Experiential education may be properly viewed as a species of critical pedagogy, particularly in its advocacy of the apprenticeship model—the “apprenticeship of identity and purpose”<sup>85</sup>—which “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.”<sup>86</sup>

As such, experiential education in law school provides students unique opportunities to immerse themselves within the trenches of the profession, alongside other professionals, thereby encouraging students to form professional relationships. “In forming professional relationships, the student is provided with multiple experiences from the other members of the [legal] system . . . .”<sup>87</sup> Students who participate in experiential education programming enter a learning system that has a multitude of subsystem relationships: student-attorney, student-support staff, student-investigator, student-student, student-court clerk, student-judge and student-client.<sup>88</sup> The student is then empowered through “learning [that] occurs when the student utilizes interpersonal skills to achieve a desired outcome, while [developing and] maintaining a differentiated professional identity.”<sup>89</sup> The learning continues on several different levels, horizontally and vertically. “[F]or instance, [externships] provide students with the opportunity to develop relationships with judges, clerks, opposing counsel, support staff, investigators, social workers, supervising attorneys, fellow students and most importantly, clients and their support systems.”<sup>90</sup> If the learning system environment is properly designed with sufficient interaction, this cycle of student learning will continue to advance the student toward higher levels of individual complexity.<sup>91</sup>

“Students learn how to develop and change by interacting with their environment while learning the importance of maintaining a personal style and philosophy that brings value and power to their interactions with

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84. *See id.* at 161–62.

85. SULLIVAN ET AL., *supra* note 57, at 8, 28 (proposing that professional schools must expose students to three *apprenticeships* to prepare them for professional practice: The first apprenticeship (cognitive) focuses on knowledge and ways of thinking; the second apprenticeship is to the shared forms of expert practice through experience; and the third apprenticeship of identity and purpose).

86. *Id.* at 28.

87. Brayer, *supra* note 34, at 55.

88. *Id.*

89. *Id.* at 56.

90. *Id.* at 55.

91. *Id.* at 57.

others.”<sup>92</sup> When students are able to learn from the legal system directly to maximize both institutional and individual practice goals, “they achieve equilibrium with the new social learning system.”<sup>93</sup> When students reach this state, they become “better prepared to learn and grow in future work environments.”<sup>94</sup>

Another critical aspect of experiential education is its emphasis on reflective learning. Reflective learning is founded on the premise that

intelligent individuals continually attempt to restructure their environment to maximize individual purposes and goals [and ultimately,] “the maintenance and enhancement of one’s self.” The individual accomplishes this task by way of experiential experimentation, attempting various courses of action, and adopting the one that proves the most effective. A person’s understanding grows when this form of experimentation is used to learn from experience.<sup>95</sup>

In order to engage law students and provide opportunities for them to become what the market is now demanding—more *practice ready* law school graduates—some schools have chosen to use more formal models such as the service learning model or the systems theory model to implement experiential learning.<sup>96</sup> Externship programs, pro bono programs, and clinical programs are common in law schools, and they correspond with both service-learning and systems theory models of education.

“Service-learning is a [domain] of experiential [education in which] students and faculty collaborate with communities to address problems and issues, simultaneously gaining knowledge and skills and advancing personal development. . . .” [A] critical aspect of the [service-learning] experience, in order to differentiate it from other volunteer activities, is making certain there is a means for critical reflection by students. [It has been stated that] in any discussion of service-learning “it is particularly important to distinguish between two levels of learning . . .—learning to give service and learning how to learn . . . from the giving of service. . . .” [S]ervice-learning is beneficial to students because . . . it

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92. Brayer, *supra* note 34, at 58–59.

93. *Id.* at 55.

94. *Id.*

95. *Id.* at 59.

96. This term *practice ready* was criticized by Dean Gilbert Holmes—during a work in progress session of the Mid-Atlantic People of Color Legal Scholarship—as somewhat impossible to achieve, and that instead, law schools should be teaching students how to become a proficient practitioner. Gilbert Holmes, Dean, Univ. La Verne, Training the Lawyer in the 21st century (Jan. 24, 2013).

“increases [cognitive] retention; . . . increases the relevancy of education to students [by involving them in real world situations]; . . . enhances personalized education for students; teaches positive values, leadership, citizenship and personal responsibility; empowers students as learners, teachers, achievers, and leaders; [and] invites students to become members of their own community; [and] teaches job skills.”<sup>97</sup>

Distinct from service learning, a systems theory model is a clinical

refram[ing] [of] professional experience as an interaction with a professional environment. . . . [The] theory operates on the premise that students should reframe how they look at their [environment] so that the challenges that make up their professional system are not seen as problems but as means to a solution. Reframing by the student is realized in a clinical system as educators maximize professional interactions and teach from emerging interactive patterns.<sup>98</sup>

This reframing necessarily guides students in the “creation of a professional learning environment that enhances the practice of reflective learning, teaching, and thinking.”<sup>99</sup> Under this system, learning “from experience is impossible if numerous, complex, and diverse interactions do not exist.”<sup>100</sup>

#### B. *Critical Shifts at a Historically Black University*

The critical underpinnings of experiential education are easy to outline, but determining how to create such learning environments on the ground is a greater challenge. The experiential learning program at Thurgood Marshall School of Law (“TMSL”) is a model that is striving for a synthesis of these complex and diverse interactions. However, as a historically black university (“HBCU”), the institution faces unique challenges in incorporating its rendition of the Carnegie approach to legal education.

The mission of TMSL is to prepare a diverse group of students for leadership roles in the legal profession, business, and government. In

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97. Katryna Johnson, *Creating Experiential Learning in the Graduate Classroom Through Community Engagement*, 6 AM. J. BUS. EDUC. 149, 149 (2013) (discussing how business school educators can create “[e]xperiential learning opportunities through client-based projects”); Mary Pat Treuthart, *Weaving a Tapestry: Providing Context Through Service-Learning*, 38 GONZ. L. REV. 215, 220–21 (2002) (last alteration in original).

98. Brayer, *supra* note 34, at 50.

99. *Id.* at 59.

100. *Id.* at 52.

keeping with its rich tradition as an HBCU, TMSL is recognized as one of the most diverse Law Schools in the country.<sup>101</sup> Guided by this mission, the experiential learning program's focus is to create a vibrant learning environment grounded in a legal educational program that immerses each student in multi-level learning opportunities. This experiential education is designed by forging stronger connections among the cognitive, practical and professional identity aspects of becoming a lawyer. This model engages legal education from the perspective of the student; and thus, the program is oriented around student-centered teaching and seeks to increase student opportunity to learn-by-doing; learn-by-experiencing; learn-by-observing; learn-by-evaluating, assessing, and incorporating these experiences; learn-by-self transformation; and learn-by-developing a professional identity.

A host of animating questions guide the model of experiential education at TMSL: What do students value in legal education? How best do students believe they should be trained and about what do they feel they should be trained? What do students expect to receive from their legal education? What transformation do law students expect to experience in law school as a direct result of their legal education and how does this transformation translate to being better practitioners? How do students measure the worth and value of their legal education?

These questions are foundational for creating and incorporating the experiential program. The program takes a holistic approach to the process of experiential education, which involves a number of distinct, yet interrelated programs: Lawyer Processing; Appellate Litigation-Bridge to Practice Skills Program; Trial Simulation; Classroom Simulations; Live-client Clinical Programs; Externship Programs; Client Counseling Programs; Mediation Certification Courses; Mock Trial; Moot Court; and a Texas Legislative Internship Program.

Lawyer Processing ("LP") is a two-semester course and is required of all first-year students.<sup>102</sup> LP is the first-year students' foundational clinical course and focuses on practice-oriented legal analysis and writing.<sup>103</sup> LP introduces students to fundamentals of legal reasoning, basic forms of legal writing, including objective memoranda of law, client opinion letters and trial court motion practice briefs, and the basic sources and processes of legal research.<sup>104</sup> These skills are taught using the clinical method, with the client's perspective firmly in mind and with the students learning by acting

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101. *Mission and History*, TEX. S. U., <http://www.tsulaw.edu/history.html> (last visited Aug. 22, 2014).

102. Thurgood Marshall School of Law, American Bar Association Report, *Lawyering Process Program Description and Assessment* (last updated January 2011).

103. *Id.*

104. *Id.*



as lawyers.<sup>105</sup> The LP professors have voluntarily adopted a uniform syllabus with agreed to student learning outcomes that are assessed at the end of each semester.<sup>106</sup>

The Appellate Litigation-Bridge to Practice Program is a one-semester course that is required for all 2L students. The Appellate Litigation professors with the assistance of the Director of Assessments have collectively identified minimum Student Learning Outcomes that all students should achieve while enrolled in Appellate Litigation. Students are required in each section of the class, taught by different professors, to attend a minimum number of live appellate court oral arguments, conduct legal research and write an appellate brief based on an adopted case book or based on an actual case that was pending before an appellate tribunal, and present an oral argument, based on the written brief, before a panel of practicing attorneys or sitting judges. At least one section videotapes the student's oral argument presentations for later individual evaluation and critique. By requiring the students to read like lawyers, research as lawyers, observe practicing attorneys and sitting judges, write as lawyers, present oral arguments as lawyers and accept critique as lawyers receive, the model aims to utilize multi-level learning and equip students with resources needed to develop and refine their professional identities. The model also prepares students to participate in internal and external Moot Court competitions, giving students enhanced opportunities to develop their legal writing and oral advocacy skills.

Trial Simulation at TMSL is a one-semester course that is required of all 3L students. Students are immersed in a courtroom setting as a means of learning strategies for courtroom litigation under the instruction of leading jurists and lawyers. Utilizing a "learn by doing" approach, students in the Trial Simulation program practice direct and cross examinations of witnesses, learn how to make memorable opening statements, craft powerful closing arguments, as well as interview and prepare witnesses. The course concludes with students conducting a full trial before a presiding judicial officer.

Classroom Simulations are another way that students encounter experiential learning at TMSL. Through classroom simulations, professors incorporate opportunities for students to acquire doctrinal knowledge through traditional and non-traditional modalities, alike.<sup>107</sup> For instance, one

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105. *Id.*

106. Interview with Casandra Hill, Director of Lawyer Processing at Thurgood Marshall School of Law.

107. For further ideas on how to incorporate experiential education in doctrinal courses, see Margaret B. Kwoka, *Intersecting Experiential Education and Social Justice*

Evidence course requires students to draft trial pleadings based on fact patterns, statutes, and other materials distributed and studied over the course of the semester.<sup>108</sup> In addition to the drafting of pleadings, students in the course are given the opportunity to observe evidentiary hearings and are given directed, reflective journal writing assignments that examine, analyze, and evaluate the adherence to or the violation of evidentiary practices. In addition, one of the Property courses has adopted a “Bridge to Practice” course book that contains simulations covering varying issues, which allows and encourages students to take on the role of attorney, oral advocate, or legal writer. These simulations encourage students to take information from a case book and a rule book, analyze it, evaluate it, and then apply it to a given context that has meaning in the benefit of a client. In another course, Criminal Procedure, students are similarly required to draft trial pleadings and are given the opportunity to present mock trial arguments in support of the drafted motions to a panel of professors serving as the presiding bench.

For TMSL and other schools committed to serving the community, a learning experience that also offers service to disenfranchised and underserved communities is paramount to the law school’s existence. The school’s live-client clinical program is designed to give students an opportunity to serve the community in the role of attorney, putting into practice what they have learned in their substantial courses, while developing their professional identity. As attorneys, students are supervised by licensed attorneys who direct the individual legal clinics. Students are responsible for every aspect of an attorney-client relationship, including client interviewing, file maintenance, maintaining client confidentiality, trial preparation, and direct client representation. Students have the opportunity to put into practice what they have learned from their doctrinal classes and the opportunity to see how the application of the law affects clients. Students are able to work in several *legal environments* where they learn vertically from their clients, their supervising attorneys, managing attorneys, and judges, and where they learn horizontally from their fellow student attorneys, new associates, paralegal professionals, and other support faculty. In the process of serving clients, students have the opportunity to find and hear their voice as an advocate for others, as well as uphold justice on behalf of their clients. They experience study as a legal professional and develop their professional identity in accepting the call to represent another human being in the pursuit of justice. Live-client clinics give students the opportunity to

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*Teaching*, 6 NORTHEASTERN U. L.J. 111, 115 (2013) (describing ways that doctrinal professors “can incorporate experiential components into the curriculum”).

108. Pedro A. Malavet, *Evidence: Law 6330*, U. FLORIDA (2013), <http://nersp.osg.ufl.edu/~malavet/evidence/evmain.htm>. Some courses, such as Professor Pedro Malavet’s Evidence course, have been incorporating such assignments for years. *See id.*

learn through directed service and gives them the chance to become agents of positive change while directing the transformation that they—as students—expect from their legal education.

The Externship Program is designed to give students an opportunity for immersion into a legal environment outside the law school setting with simultaneous study in the classroom.<sup>109</sup> The program is a bifurcated experience that requires students to participate in the off-campus practicum and in the classroom. The structure of the off-campus practicum is such that the supervising attorney at the placement is the primary contact for the student, similar to that of a new associate answering to a junior or senior partner. Student work schedules are submitted by the student and approved by the supervising attorney. Students engage in basic professional practices and are responsible for documenting their time, calendaring, and for completing their assignments timely. They must also maintain professional decorum in the legal office and in the courtroom, and communicate effectively with their superiors, colleagues, and clients. Students are evaluated by their placement supervisor that holds them accountable for matters involving legal advocacy, professionalism, ethical responsibility, and client and office management. The classroom component of the externship program is designed as a reflective group class, whose goal is two-fold: 1) to meet the identified student learning outcomes and the educational mission of the law school and 2) to develop an environment for reflective personal and professional growth. The classroom component seeks to enhance legal writing skills by requiring reflective journals, as well as improve legal analysis by engaging students in thoughtful and critical guided reflection about live legal scenarios occurring in their placements.

The Client Counseling program is an example of how TMSL has identified a necessary skill set and provided it with a platform to be explored with greater focus and clarity. This program takes the form of a competition team, conceived and developed as a legal teaching technique, intended to promote greater knowledge and interest among law students in the preventive law and counseling functions of practice. It also encourages students to develop interviewing, planning, and analytical skills in the lawyer-client relationship in the law office.

Recognizing that resolution of legal matters is the reason clients seek legal representation, TMSL offers a mediation certificate that allows students

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109. Various outside offices include the offices of District Attorneys, County Attorneys, City Attorneys, the Attorney General, the United States Department of the Treasury, non-profit organizations, such as Legal Aid organizations, immigrant rights organizations, public policy organizations, and legislative organizations, Federal Courts, State Courts, Appellate Courts, the United States Attorney's office, and other governmental, non-profit, and judicial offices.

to serve as bona fide mediators in actual, live legal disputes. As TMSL is committed to providing budding attorneys the skill of resolution, this certification is a requirement for enrollment in the mediation live-client clinic. This mediation training, coupled with the experience that students receive in the live-client mediation clinic, allows them to graduate well-able to enter the legal community credentialed and experienced in the area of legal dispute resolution.

The aim of the TMSL Mock Trial Advocacy Program is to create competent trial lawyers. Student knowledge of substantive law is integrated in an intensive course study of trial skills that prepares students for national competition. The program provides all students an opportunity to experience the vigor of trial preparation in a controlled classroom environment, coupled with the opportunity to compete against top ranked law schools in a state and national arena. The classroom component of the program surpasses the skills taught in Trial Simulation and introduces the students to advanced learning in the art of questioning technique, evidence, jury profiling and selection, theory, and platform skills.

The Moot Court program is designed to be a comprehensive experience, with a goal of giving each participant opportunity to handle an appellate case from beginning to end. Under the guidance of faculty and subject matter experts from the legal community, students are trained for the challenge of competing in intramural, intermural and national moot court competitions while learning legal professionalism. This opportunity to take doctrinal knowledge and use that knowledge in the context of advocating for a client enhances the educational experiences of each student. Through this program, students participate in multi-level learning that encourages them to excel in the art of persuasive oral advocacy while solidifying their legal research and writing skills.

The Texas Legislative Internship Program (“TLIP”) is an educational internship program sponsored by Senator Rodney Ellis and administered by Texas Southern University.<sup>110</sup> TLIP provides opportunities for graduate students to serve as interns in the Texas Legislature, in various state agencies, and in local government.<sup>111</sup> A TLIP internship lasts one academic semester and affords students the experience public service.<sup>112</sup> During legislative sessions, TLIP interns are placed as legislative assistants in the offices of ranking members of the Legislature, including the offices of the Governor, Lieutenant Governor and the Chief Justice of the Supreme

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110. *Texas Legislative Internship Program*, SENATE TEX., <http://www.senate.state.tx.us/75r/senate/members/dist13/tlip/about.htm> (last visited Aug. 24, 2014).

111. *Id.*

112. *Id.*

Court.<sup>113</sup> The experience offered to students often initiates or focuses a career in public service, with several TLIP participants having continued in public service at the federal, state and local levels of government.<sup>114</sup>

Although the vision of experiential education at TMSL is easy to outline, life on the ground is a work-in-progress, and there is still a lot of work ahead. Implementation of experiential learning at TMSL, perhaps like other HBCUs, comes with high trade-off costs. For example, bar passage has been a perpetual nemesis of the school. Yet in the most recent Texas Bar Examination, nearly eighty percent of the school's students passed on the first attempt, which is among the school's highest scores ever.<sup>115</sup> Part of the success in passage may be the product of a concerted effort at creating a curricular regime based on bar subjects, enhancing academic support, and developing assessment tools. The mandatory course regime alone leaves students little say for the first two years in the name of concentrating on bar subjects and bar-style multiple choice and essay questions. Needless to say, greater emphasis on skills training sits in tension with the need to teach students how to pass the bar; time and resources spent on practice training leaves less time for practicing the exam.

The program plans to continue researching and developing ways to maintain its bar passage rate at the same time it graduates law students with skills to compete in the legal market. It will continue exploring ways to incorporate student-centered teaching, with identified student learning outcomes, in all aspects of the law school curriculum, as well as explore how greater cultural competency training can be implemented in professionalism training.<sup>116</sup> One of the tangible goals of the program is to create opportunities for every student to take at least thirty credits of recognized, upper level experiential learning courses that would include non-traditional business association and appellate litigation courses, traditional clinical offerings, trial advocacy and externship courses, and newly designed pro-bono externship opportunities. Additional aspirations include developing affiliations with associations, such as the Alliance for Experiential Learning

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113. *Id.*

114. *Id.*

115. See *TSU's Thurgood Marshall School of Law Improves Performance on Texas Bar Examination*, TSU E-NEWS NOW (Tex. S. Univ.), Nov. 11–17, 2013, at 1, 1–2, [http://www.tsu.edu/About/Administration/University\\_Advancement/Communications/Publications/enews/TSU%20E-News%20NOW%20Nov%2011-17%202013a.pdf](http://www.tsu.edu/About/Administration/University_Advancement/Communications/Publications/enews/TSU%20E-News%20NOW%20Nov%2011-17%202013a.pdf).

116. *E.g.*, Brooks, *supra* note 43, at 408 (“Effective interactions with clients and other individuals encountered in our daily work require attention to four key dimensions to build positive professional relationships: (1) culture, (2) empowerment . . .”).

in the Law,<sup>117</sup> and establishing new affiliations with other experiential alliances such as *Educating Tomorrow's Lawyers*.<sup>118</sup>

### III. UNINTENDED OUTCOMES: STUDENT SATISFACTION

As described above, the call for more experiential education conceives of skills development largely in terms of the benefits to the profession, however there is more to experiential education than the competencies and skills students acquire. Indeed, the shift to a more skills-based approach promises more than simply greater practical and professional development for law students. There are collateral benefits that impact the students personally as well. This section considers how pedagogy can catalyze student transformation and lead to greater personal satisfaction.<sup>119</sup> This account of experiential education sets the stage for this article's finale, which stresses critical pedagogy as essential to the praxis of exploiting experiential education and maximizing the benefits for students.

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117. *Alliance for Experiential Learning in Law*, NORTHEASTERN U. SCH. LAW, <http://www.northeastern.edu/law/experience/leadership/alliance.html> (last visited Mar. 16, 2014).

The Alliance for Experiential Learning in Law was convened by Northeastern University School of Law in 2011 when a small group of legal educators met to discuss how best to improve legal education in response to significant disruptions in the profession and changes in our society. The Alliance has grown to include legal educators and practitioners affiliated with almost [one hundred] law schools and legal service organizations who have joined together to develop a new approach to legal education and promote transformative approaches and programs for curriculum reform. The Alliance's ultimate goal is to ensure that law graduates are ready to practice with a full complement of skills and ethical and social values necessary to serve clients and the public interest, now and in the future.

*Id.*

118. Inst. for the Advancement of the Am. Legal Sys., Univ. of Fla., *About ETL*, EDUCATING TOMORROW'S LAWYERS, <http://educatingtomorrowlawyers.du.edu/about-etl/> (last visited Mar. 16, 2014).

[Educating Tomorrow's Lawyers] is an initiative of IAALS, the Institute for the Advancement of the American Legal System. We work to align legal education with the needs of an evolving profession by facilitating, evaluating, and promoting law teaching methods designed to produce graduates who are employable and practice-ready; able to meet the needs of their employers, their clients, and society; and prepared to lead and respond to changes in the legal profession throughout their careers.

*Id.*

119. *E.g.*, Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 510–11 (2013) (describing reflections made by students in an Estates and Trusts course, including one student who writes, “[c]lient work is rewarding because it matters—helping people who depend on us”).

A. *Greater Autonomy and Agency*

Experiential learning promises greater autonomy and agency for students, both of which are largely suppressed in dominant models of legal education. As used here, autonomy and agency are not synonymous; they indicate different capacities. Whereas autonomy indicates the ability to choose or decide a course of action, agency refers to the ability to act. Experiential education contributes to both.

Students have greater autonomy in multiple ways. Most basically, experiential opportunities in the curriculum allow for more diverse course options for students. The options increase when schools mandate fewer core courses to afford space for mandatory experiential courses. Simultaneously, students have more variety as to how they will be evaluated, which ultimately affects a student's transcript and grade point average. Although the traditional model constricts student learning to perform and be evaluated in a singular analytical dimension, experiential learning opens up a world of assessment focused on various skills, including the competence to produce legal products, interact with clients, or effectively manage a law practice. The ability to choose more experiential programming also enhances autonomy by allowing students to work in clinics and other settings and represent clients. For some, the experience is the pathway to the sort of justice-oriented work that drove some to law school in the first place.<sup>120</sup> As one commentator noted some decades ago, clinical education furthers professional responsibility because students are implicated in *real decision-making*.<sup>121</sup>

Students wield greater agency through enhanced experiential curricula and acquire skills that are not possible through classroom instruction. Although students indeed practice writing briefs, memos, and motions, doing so on behalf of a real-life client takes on a different meaning

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120. See Sarah Valentine, *Leveraging Legal Research, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* 145 (Soc'y of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2011) (describing that despite the observation that many "law students . . . cite working with underserved communities as a goal, less than three percent of . . . graduates [actually] pursue public interest work"); William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 9 (2007); Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Student's Public Interest Aspirations*, CONN. PUB. INT. L.J., Spring 2008, at 95, 95.

121. GARY BELLOW, ON TEACHING THE TEACHERS: SOME PRELIMINARY REFLECTIONS ON CLINICAL EDUCATION AS METHODOLOGY IN CLINICAL EDUCATION FOR THE LAW STUDENT 391 (1973).

for students.<sup>122</sup> It is a shift from focusing on one's grade to focusing on the needs of the client, which has real-life consequences beyond the student. Accordingly as one clinician has noted,

[s]cholars and teachers and our own human instinct tell us that responsibility for another human being, coupled with appropriate supervision and the opportunity for reflection lead to a deeper and richer educational experience. Students make choices more intentionally and thoughtfully because something other than their personal academic success is at stake. They are motivated to learn more thoroughly because whether they get the answer right matters beyond a particular test or grade.

One of the reasons that client-centered clinical representation works is that students are more motivated to learn by being given responsibility over a case, and that this responsibility in turn leads to greater identification with clients and others who are similarly situated.<sup>123</sup>

Under this type of learning model, students get a sense of both their power to influence the world and their ethical responsibilities to the profession. Moreover, students get the chance to cultivate compassion and judgment.

#### B. *Greater Justice*

Time spent in experiential settings provides students opportunity to confront justice issues face-to-face, while enabling students to help others access justice.<sup>124</sup> It provides opportunity for instruction in the "MacCrate Report's . . . core professional value of '[f]airness, [j]ustice, and [m]orality.'"<sup>125</sup> In addition to learning about and helping to fill the justice gap, experiential learning leads to more just academic outcomes for students. Both in terms of teaching and evaluation, enhancement of experiential education helps to level the academic terrain, and give practical and professional competencies a more prominent place in the law school repertoire.

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122. See, e.g., Grose, *supra* note 119, at 510 (noting one clinical student's teaching evaluation: "Real problems [sic] better than hypos; matters to me more to have an answer—more personal, seeing their faces.").

123. *Id.* at 511.

124. See Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1462, 1475–77 (1998) (exploring "the social justice dimensions of clinical design features in the deeply underserved communities").

125. Jane H. Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1, 4 (1997); Dubin, *supra* note 124, at 1478.



## 1. Filling the Justice Gap and Fulfilling Missions

*Justice*, however defined, “is about the exercise of power.”<sup>126</sup> “In order to promote justice, one must be explicit about how power operates, particularly in its subtle and invisible manifestations.”<sup>127</sup> Teaching students about deconstructing power, identifying privilege, and taking “responsibility for the ways in which the law confers dominance,” is a means of using “power and privilege in socially productive ways.”<sup>128</sup>

Experiential education advances justice by supporting discrete types of service learning as a means to apprenticeship.<sup>129</sup> As an approach, service learning integrates hands-on social action, volunteerism, and learning objectives into an apprenticeship model that can be likened to clinical legal education.<sup>130</sup> It affords opportunities for students to serve communities in experiential settings, allows students to fulfill their professional responsibilities,<sup>131</sup> and, for some, their school’s stated mission. As one Associate Dean for Experiential Education has put it, it is not enough to teach students to be *practice ready*; educators must teach students how to be *justice ready*.<sup>132</sup> This is especially so for those students who come to law school as an advocate of justice.<sup>133</sup>

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126. Aiken, *supra* note 125, at 10.

127. *Id.*

128. *Id.* at 11.

129. See Morin & Waysdorf, *supra* note 60, at 568–72.

130. *Id.* at 590.

A set of service-learning principles, first drafted in 1979 by educator Robert Sigmon and generally accepted across the discipline, highlight three fundamental principles that may or may not intersect with principles of clinical legal education. The Sigmon principles are: “1. [t]hose being served control the service(s) provided; 2. [t]hose being served become better able to serve and be served by their own actions; and 3. [t]hose who serve also are learners and have significant control over what is expected to be learned.”

*Id.* at 565 n.16.

131. See Grose, *supra* note 119, at 495 (describing one of the broad goals of traditional clinical pedagogy as “teach[ing], or at least expos[ing] students to, concepts of social justice”).

132. Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J. L. & Soc. JUST. 231, 231 (2012); *Our Faculty: Jane H. Aiken*, GEORGETOWN L., <http://www.law.georgetown.edu/faculty/aiken-jane-h.cfm> (last visited Mar. 16, 2014). But see Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J. L. & Soc. JUST. 331, 331 (2012).

133. See, e.g., Angela P. Harris, *Teaching the Tensions*, 54 ST. LOUIS U. L.J. 739, 743 (2010) (“Justice is the reason why many of my students have come to law school. But justice is not what the law provides.”).

Service learning furthers student development by allowing representation of clients who cannot afford legal representation,<sup>134</sup> which “contribute[s] to the student’s development as a critically thinking, socially responsible practitioner.”<sup>135</sup> Through experience, students grapple with the real world of need, where “less than one in ten of those involved in the justice system have legal representation”<sup>136</sup> and few legal problems of low-income individuals are dealt with by legal professionals.<sup>137</sup>

As a general rule, law professors fail to integrate any sort of access to justice commitment into the curriculum and law schools have ignored their role in helping students appreciate that lawyers have unique social obligations to the public. “The Society of American Law Teachers’ Committee on Access to Justice attributes this failure to law schools and their curricula, . . . assert[ing] that schools fail to cultivate a service mentality among law students, graduating few with any understanding of the crisis.”<sup>138</sup> However, too often the *justice* element of the law is relegated to those few who identify strongly with a public interest track.

Nonetheless, providing service to the community is also a means for students to fulfill one’s professional responsibility. According to ABA Model Rule of Professional Responsibility 6.1, a lawyer has a duty to provide pro bono legal services for others with *limited means*, charities, and the government, among others.<sup>139</sup> Despite this noble aspiration of the bar, Rule 6.1 stands as a minority rule among bar members, as indicated by “the ABA Standing Committee on Pro Bono and Public Service, [which] reported that only one-fourth of all respondents met the minimum

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134. See THE N.Y.C. BAR ASS’N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, *supra* note 6, at 90.

135. Grose, *supra* note 119, at 511; Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 328–30 (2001) (asserting that “[s]erving as an advocate on behalf of a low-income client under good supervision can deepen the student’s understanding and compassion, and cause her to affirm the common humanity she shares with her client and with others in her client’s position”).

136. SpearIt, *Model Rule 6.1: A Lawyer’s Duty to Increase Access to Justice*, A.B.A. (Nov. 2012), [http://www.americanbar.org/publications/young\\_lawyer/2012-13/november\\_2012\\_vol\\_17\\_no\\_2/model\\_rule\\_6\\_1.html](http://www.americanbar.org/publications/young_lawyer/2012-13/november_2012_vol_17_no_2/model_rule_6_1.html) [hereinafter SpearIt, *Model Rule 6.1: A Lawyer’s Duty to Increase Access to Justice*].

137. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 19–20 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

138. SpearIt, *Model Rule 6.1: A Lawyer’s Duty to Increase Access to Justice*, *supra* note 136.

139. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013); see also SpearIt, *Model Rule 6.1: A Lawyer’s Duty to Increase Access to Justice*, *supra* note 136.

recommendation.”<sup>140</sup> Representing needy clients thus advances justice for students and fulfills a lawyer’s ethical responsibility.

Whether experiential learning, when fully embraced, will produce law students who indeed pursue justice and service upon graduation is uncertain. Determining this with precision is constrained by the need to sift such students from those who came into law school determined to advance social justice, from those influenced by a faculty member, from those targeted by a specific strategic planning goal. Despite these uncertainties, experiential education promises a greater commitment to measuring effectiveness in terms of student outcomes over faculty performance, which effectively changes the power dynamic of a law school’s learning culture.

Finally, for other students, helping individuals with their legal problems advances the school’s mission. For many law schools, religious and secular alike, being of service to the community is integral to the school’s identity. Experiential learning is a means to connect students to the community for the benefit of both, which abides by institutional ideals of *service of humanity*<sup>141</sup> and *social justice*,<sup>142</sup> among other humanistic goals.

## 2. More Variety in Learning and Fairness in Grading

Experiential education leads to greater classroom justice by offering more variety in coursework, which concomitantly requires greater variety in the way students are evaluated and graded. Teaching students in practical settings also recalibrates the heavy reliance on casebook study and doctrine. There would be less emphasis on Socratic regimes and the *suffocating environments*<sup>143</sup> they create, and more involvement with actual lawyering practices, including interviewing clients, drafting and filing documents, and meeting work deadlines. The opportunity for more on-the-job learning means more justice for those who learn best by doing.

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140. SpearIt, *Model Rule 6.1: A Lawyer’s Duty to Increase Access to Justice*, *supra* note 136; *see also* ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS vii (2009).

141. *E.g.*, *Mission Statement*, SAINT LOUIS U., <http://www.slu.edu/x5021.xml> (last visited Mar. 16, 2014).

142. *E.g.*, *Mission Statement*, GONZAGA U., <http://issuu.com/gonzaga/docs/mission-statement?mode=embed&layout=http://skin.issuu.com/v/light/layout.xml&showFlipBtn=true&viewMode=presentation> (last visited Mar. 16, 2014).

143. *See* Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts*, L. TCHR., Fall 1996, at 1, 1; Kenneth L. Schneyer, *Bully Pulpit: Effective Teachers Face Their Power over Students Honestly*, L. TCHR., Spring 1996, at 1, 1 (describing the Socratic method as “where systematic humiliation of the student is only a hair’s breadth away from the formal structure and purpose of the pedagogical method”).

More curricula based on experiential learning potentially levels the field in evaluating and grading students as well. With more courses being evaluated by different metrics, experiential learning provides greater opportunity to be graded by options other than the typical multiple-choice exam. More experience-based learning frees students from typical pen-and-paper-type examinations and doles out more grades for specific legal tasks such as writing briefs, arguing cases, or mediating cases, thereby rewarding professional and practical competencies in addition to knowledge of black-letter law.

#### IV. PRAXIS IN LAW TEACHING

The thrust of this article highlights the student benefits of experiential education and the transformative potential for students. Experience-based teaching is more than training students in particular legal competencies but also, a means of empowering students professionally and helping them achieve greater justice. When students provide legal assistance to the community, they not only gain practical experience of the law, but also ensure that law schools do more than just teach about justice—they advance it. Teachers who are cognizant of these effects on students can work to facilitate not only student acquisition of practical skills, but also the acquisition of a more meaningful investment in law school.

Successful implementation of experiential education in law school depends on maximizing positive outcomes and minimizing the negatives. Toward this end, critical pedagogy provides a theoretical frame for exploiting experiential education in order to maximize outcomes for both students and the legal profession. This article offers a candid look at a program that is engaged in the process, including adding more skills training on the syllabus of doctrinal courses. Although such courses have not been the traditional locus of experiential education in law school, there are compelling reasons for rethinking this tradition and reimagining the possibilities.

Ultimately, this work is about experiential education's personal impact on students. As much of the clamor for more practical skills training has been voiced in terms of benefit to the legal profession, there has been little inquiry into what it means for students or the law school experience. This article has attempted to fill in some of the void.

**LRW’S *THE REAL WORLD*: USING REAL CASES TO TEACH PERSUASIVE WRITING**

ELIZABETH A. SHAVER\*

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\* Assistant Professor of Legal Writing, The University of Akron School of Law. My thanks to all who commented on earlier drafts of this article, with particular thanks to Sarah Morath, Richard Strong, Bernadette Bollas-Genetin, Michelle Goldstein-Roman, Mark Herrmann, and Phil Carino for their valuable comments and insight.

## INTRODUCTION

Over the past two decades, reality television programming has fed the American audience's increasing interest in how people behave in *The Real World*.<sup>1</sup> Today's law students approach their legal education with a similar focus. With a drive to acquire skills needed to succeed in the real world of lawyering, students highly value work done by real lawyers<sup>2</sup> on behalf of real clients.<sup>3</sup>

Law professors who teach persuasive writing can leverage this interest in the real world by using materials from real cases to teach important persuasive writing techniques. Happily, using real cases does more than simply pique students' interest in learning. Materials from real cases, when used in an active learning environment,<sup>4</sup> are exemplary tools to teach the most critical components of persuasive writing. Among those critical components are development of a theme, organization of legal arguments, and effective use of case authority.

This article describes a comprehensive case-study exercise that uses practitioners' briefs and judicial opinions to teach these critical components of persuasive writing. This exercise does more than require students to read an excerpt of a brief or judicial opinion that might illustrate a single persuasive writing technique. Rather, students assess the strength of real pieces of advocacy only after they have learned the applicable law. Students then step into the role of the practitioner and construct arguments by applying the law to facts taken from a real case. Students compare the quality of their arguments to the arguments made in a real brief—a poorly written brief—and assess how the brief failed to meet their expectations about how best to persuade. Finally, students read the decision rendered in the real case and analyze whether the quality of persuasive writing affected the outcome of the case.

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1. See *The Real World: New York—Main*, MTV, <http://www.mtv.com/shows/realworld-season1/series.jhtml#moreinfo> (last visited Feb. 16, 2013). MTV's *The Real World: New York* debuted in 1992. *Id.* *The Real World* has been cited as the show that “set the template for contemporary reality TV.” Michael Hirschorn, *The Case for Reality TV*, ATLANTIC (May 1, 2007, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2007/05/the-case-for-reality-tv/305791/>.

2. Law professors apparently are not *real* lawyers. A student once noted on my course evaluation that it was clear that I “used to be a lawyer.”

3. Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 241–432 (2007).

4. Active learning requires students to engage in higher order thinking, forcing them to engage in analysis, synthesis, and evaluation. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 124 (1st ed. 2007).

Section I of this article describes the primary pedagogical goals of the exercise: To focus on the most challenging aspects of persuasive writing, to use an active learning approach, and to add the real world element by using briefs and judicial opinions from real cases. Section I also discusses how this exercise, by requiring students to exercise their own judgment to develop viable arguments, differs from past uses of briefs and judicial opinions to teach persuasive writing.

Section II of the article then describes the specifics of the exercise, including the materials used, the class discussion, and student reactions. Section III discusses the multiple benefits of this exercise. The primary benefit of the exercise is its effectiveness in teaching students the critical components of persuasive writing; namely theme, organization, and use of case authority. The exercise also helps students to develop high standards for the quality of persuasive writing they expect to see as a reader—standards they transfer to their own work when they begin to write. Best of all, students enjoy the exercise. Students appreciate the opportunity to see how advocacy is conducted in the real world and enjoy their active role in the learning process.

The Appendices to this article contain the documents that students use to record their impressions of the documents that they analyze as part of the exercise.

## I. PEDAGOGICAL GOALS

### A. *To Focus on the Challenging Elements of Persuasive Writing*

This exercise is designed to teach students three critical elements of persuasive writing: Development of a theme,<sup>5</sup> organization of legal arguments,<sup>6</sup> and persuasive use of case authority.<sup>7</sup> While there are several

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5. Theme—also known as theory of the case—is a concise statement why the facts and the law together compel the conclusion that the result being advocated is the *just* result in the case. See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 37–38 (2d ed. 2006); MICHAEL R. FONTHAM ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY IN THE TRIAL AND APPELLATE COURTS 8–9 (2d ed. 2007).

6. To create a well-organized argument, the writer must identify all relevant legal arguments, examine the relationship between the various arguments, and create a hierarchy of arguments in order to present each argument with maximum impact. See BEAZLEY, *supra* note 5, at 70–71; FONTHAM ET AL., *supra* note 5, at 10–16. After having identified each argument and the order in which the various arguments will be presented, the writer must carefully outline each particular argument so that the argument is complete. See BEAZLEY, *supra* note 5, at 75–76.

7. To use case authority well, the writer must provide sufficient information so that the reader understands the case's relevance to the issue. See *id.* at 80–81. Poor use of

other important elements of persuasive writing,<sup>8</sup> in my experience students do not struggle equally with all persuasive writing techniques. With relatively little classroom instruction and targeted comments on students' individual work, most students will improve their persuasive writing with regard to the more obvious issues such as proper punctuation or citation form. But most students struggle quite a bit when learning the critical elements of persuasive writing—how to develop a strong theme, organize legal arguments well, and use case authority for maximum impact.<sup>9</sup>

For example, students may construct a theme, but often they confine it to a short paragraph, usually at the beginning of the brief. Students also may use a shrill or *table-thumping*<sup>10</sup> tone when articulating a theme. Students likewise struggle to organize legal arguments properly; often students may present arguments in the wrong order or have distinct arguments *wander* in and out of each other due to a lack of structure.<sup>11</sup> Finally, students often do not use the cases to their best advantage in the brief, relying on excessive quotations or cursory citations rather than fully describing how the authority supports a particular position.<sup>12</sup>

It is easy to understand why these particular elements of persuasive writing are difficult for students to grasp. Unlike a spelling, grammar, or citation error, the elements of theme, organization, and effective use of case authority are more abstract and subtle. And yet every lawyer who has litigated in private practice has seen a brief that, while it may contain no obvious errors, fails to persuade the reader. The lack of persuasion largely is

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case authority—particularly an overreliance on case quotations—creates *unpersuasive arguments*. *Id.* at 89–90.

8. Other important elements of persuasive writing are the writer's tone, good citation form, appropriate grammar, adherence to rules of punctuation, and lack of spelling or typographical errors. *See id.* at 205. While these elements of legal writing are important, issues of legal analysis and organization are critical to good legal writing and should take precedence when a legal writing professor seeks to improve students' work. Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 654–55 (2007) (suggesting that legal writing professors who are commenting on student work first address substantive issues of poor legal analysis or organization before grammar or punctuation issues).

9. Cara Cunningham & Michelle Streicher, *The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 159, 193–94, 205 (2007) (identifying the failure to effectively present a theme and lack of organization of the argument as common persuasive writing problems exhibited by novice writers).

10. Stephen V. Armstrong & Timothy P. Terrell, *The Rhetoric of Persuasive Writing*, 15 PERSP.: TEACHING LEGAL RES. & WRITING 189, 189 (2007) (describing the tone as *table-thumping*).

11. FONTHAM ET AL., *supra* note 5, at 9 (explaining that poor organization can cause a brief to *wander*).

12. BEAZLEY, *supra* note 5, at 102, 115–16.



due to defects in these more subtle elements of persuasive writing—theme, organization, and use of case authority.

Thus, the challenge is to isolate these more essential elements of persuasive writing to help students better understand why these elements are so important.<sup>13</sup> By eliminating the distraction caused by grammar, punctuation, or citation errors, this exercise enables students to understand that a piece of advocacy can be aesthetically acceptable yet fail to persuade. By targeting only the more abstract concepts of theme, organization, and use of authority, the exercise helps students focus on the elements of persuasive writing that most often will make the difference between winning or losing a case.

#### B. *To Use an Active Learning Approach*

Another goal in developing this exercise was to use an active learning approach. The differences between active learning and passive learning primarily have been described in the classroom context.<sup>14</sup> Passive learning refers to class instruction in which there is a one-way transfer of information from the instructor to the students, whose primary job is to listen.<sup>15</sup> Active learning is a method of learning that “requires students to [engage in] higher-order thinking [such as] analysis, synthesis, and evaluation.”<sup>16</sup> Simulation exercises, where students assume the role of the practitioner, are a particularly effective form of active learning.<sup>17</sup>

Reading is part of active learning,<sup>18</sup> and students who read real world examples of advocacy are not entirely engaged in passive learning. However, depending on the manner in which the material is presented, students may not be actively engaged for several reasons.

First, when asked to read a piece of well-written advocacy<sup>19</sup> that addresses an unfamiliar legal issue, students may not be able to critically

13. Barnett, *supra* note 8, at 654–55.

14. Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 552–53 (2004).

15. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 401 (1999) (Students are engaged in passive learning “when their primary role is to listen to an authority who organizes and presents information and concepts. Active learning occurs when students do more than listen.”).

16. Caron & Gely, *supra* note 14, at 552; Hess, *supra* note 15, at 401.

17. See Hess, *supra* note 15, at 410–11.

18. Caron & Gely, *supra* note 14, at 553.

19. Maria Ciampi has compiled a set of well-written briefs and judicial opinions, together with annotations and commentary to highlight particular persuasive writing techniques. MARIA L. CIAMPI & WILLIAM H. MANZ, *THE QUESTION PRESENTED: MODEL APPELLATE BRIEFS* (2000). Other texts compile excerpts of briefs, judicial opinions, and speeches, also with commentary and annotations that highlight good oral or written advocacy

analyze the document simply because they do not understand the law being applied.<sup>20</sup> First-year law students may be particularly ill-equipped to engage in a critical analysis of legal arguments addressing an unfamiliar issue because they have so little knowledge of the law in general. Even upper-level law students may have difficulty evaluating the strength of an argument that addresses a complex legal issue beyond the students' knowledge.<sup>21</sup>

Without any background in the law, students assigned to read a well-written piece of advocacy simply may accept the professor's opinion that a brief is well-written at face-value and copy the document's form or structure for their own work.<sup>22</sup> Students thus will not engage in any critical analysis of how the writer constructed a persuasive argument.<sup>23</sup> If students view the document only as a fill-in-the-blank form to be adapted for their own work, they are not engaged in the type of higher order thinking that is characteristic of active learning.

The tendency to use the document *passively* may be heightened if the real brief addresses the same legal issue as the students' writing assignment, such as an assignment to draft a trial motion or appellate brief. If the document addresses the same legal issue as a writing assignment and also has the professor's *stamp of approval*, anxious students may treat the document as a template to be copied rather than a tool for learning.

One way to avoid having students use a practitioner's brief as a template for their own work is to ask students to read a poorly written brief and analyze why it fails to persuade. Because federal and state judges are increasingly willing to criticize poor writing, it is not difficult to find an

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techniques. ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* (2011); NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS* (2013).

20. Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 *CLINICAL L. REV.* 501, 515 (2006) (students will better examine persuasive writing if they understand the underlying law).

21. See CIAMPI & MANZ, *supra* note 19, at 30, 180, 230 (briefs involve issues such as the constitutionality and application of anti-trafficking provisions of the Federal Archeological Resources Protection Act, criminal violations of Section 10(b) of the Securities Exchange Act, and alleged violations of the City Charter of the City of New York by a former New York City Comptroller with regard to business dealings with a business entity).

22. McArdle, *supra* note 20, at 514.

23. Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 *REGENT U. L. REV.* 83, 98 (2011–2012) (students tend to use examples of memos and briefs as templates or *go-bys*); see also Anna P. Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 *ST. THOMAS L. REV.* 417, 422 (2010) (students should not rely on practitioners' briefs as templates).

example of a poor quality brief.<sup>24</sup> Yet the analysis of a judicially-criticized brief may have limited value to students, primarily due to the nature of the judicial criticism. Judges generally take the time to criticize only the most obvious errors such as “deliberate mischaracterization[s] of precedent,”<sup>25</sup> arguments that are “rambling stream[s] of consciousness,”<sup>26</sup> “inaccurate [or] incomplete case citations,”<sup>27</sup> or “innumerable and blatant typographical and grammatical errors.”<sup>28</sup>

Judicial criticism of poorly written briefs thus clearly delivers a *do not do this* message with regard to these blatant errors. That cautionary message, however, is not much guidance in developing good persuasive writing techniques. Nor does it engage students in active learning. To the contrary, students need not engage in much critical analysis to determine that a document riddled with typographical errors will fail to persuade.

Thus, a primary goal of the exercise is to keep students either from using a well-written brief only as a *do this* template or from dismissing a poorly written brief as a *do not do this* note of caution. To do so, this exercise employs an active learning approach.<sup>29</sup> Rather than having students dutifully follow along while the professor walks them through an example of good persuasive writing, this exercise is student-driven.<sup>30</sup> The students take the lead not only in evaluating the persuasive qualities of several documents, but also in constructing arguments using law with which the students are familiar. The exercise thus requires students to engage in active learning activities such as synthesizing, evaluating, and creating arguments.<sup>31</sup>

Finally, to avoid the situation where students will use the documents as templates or models for their own work, this exercise is not tied to any graded writing assignment. Students are explicitly told their assignment is to

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24. See Hemingway, *supra* note 23, at 421–22 (discussing use of practitioners’ briefs as a “how not to do it” example); see generally JUDITH D. FISCHER, PLEASING THE COURT: WRITING ETHICAL AND EFFECTIVE BRIEFS (2d ed. 2011) (compiling excerpts of judicial opinions that criticize the quality of writing in briefs and other documents).

25. FISCHER, *supra* note 24, at 5.

26. *Id.* at 23.

27. *Id.* at 50.

28. *Id.* at 40.

29. See STUCKEY ET AL., *supra* note 4, at 110, 123–24. Active learning methods seek to replace “passive receipt of information transmitted by an instructor” with other activities, including “talking, writing, reading, reflecting, and evaluating information received.” Caron & Gely, *supra* note 14, at 553.

30. Hemingway, *supra* note 23, at 426–27 (noting that when the professor led the students through examples of strong point headings written in real briefs, the “students dutifully followed along . . . [but] did not seem overly enthused”).

31. Hess, *supra* note 15, at 401 (Students are “more active when they discuss concepts or skills, write about them, and apply them in a simulation or in real life.”).

identify the presence or absence of persuasive writing techniques in the documents; consider whether, why, and how the documents persuade them as readers; and evaluate how persuasive writing—or lack thereof—may have affected the outcome of a real case. Disconnecting the exercise from any graded writing assignment eliminates the worry that students will view the document as a form to be followed rather than a tool for learning.

C. *To Connect with the Real World*

A third goal of this exercise is to have the students understand that good theme, organization, and use of case authority are not academic concepts created by their professor, but are essential tools for the practicing lawyer. The best way to drive this point home is to connect students to the real world of lawyering. Once students see that these persuasive writing techniques can make the difference in the outcome of a real case, they are more eager to master the techniques. Making it real gives the students both focus and incentive to improve their writing.

## II. THE EXERCISE

A. *Format of the Exercise*

This exercise is taught over two sixty-minute class sessions and includes both assigned readings and questionnaires for students to complete. The first step introduces the students to the substantive law around which the exercise revolves. In this exercise, the legal issue is whether a police stop of a vehicle violated the Fourth Amendment's prohibition on unreasonable searches and seizures. This issue is not tied to the students' writing assignment. For this reason, students are able to focus on assessing the persuasive qualities of the documents without trying to replicate the format or style of the documents in their own work.

Before the first class session, students read several Fourth Amendment cases to learn the applicable legal principles. This knowledge of the substantive law vastly increases the students' ability to critically assess whether the briefs and judicial opinions addressing this Fourth Amendment issue either succeed or fail to persuade them as readers.

After completing the background reading, students read and critique two judicial opinions that apply the substantive law. These opinions are majority and dissenting opinions from the same case. Both opinions are very well-written, and they show students how two writers can effectively assert opposing positions when applying the same law to the same facts. To help students focus on the specific elements of theme development, organization

of legal arguments, and use of case authority, they must complete a questionnaire that records their impressions of the persuasive qualities of the two opinions.<sup>32</sup>

Next, we have our first class meeting in which we discuss the substantive legal issue and the students' impressions of the arguments made in the contrasting majority and dissenting opinions. After a thorough discussion on those topics, I give the students the facts of a real case that involves the Fourth Amendment issue. Armed with their background knowledge of the law and two good examples of persuasive writing addressing both sides of the issue, the students together draft the outline of a brief advocating for one party in the case. Students also draft a thematic statement and discuss strategies for using case authority for maximum persuasive impact.

After class, having already developed expectations for persuasive writing techniques that should be present in the brief, students read the real brief that was filed in the actual case. This brief is poorly written. Students compare this brief to the outline we created in class and complete another questionnaire in which they record their impressions of the brief's lack of persuasion. When the class meets again, we discuss the students' reactions to the unpersuasive brief and examine why the brief failed to persuade, focusing on theme, organization, and use of case authority.

To complete the exercise, the students read the decision reached in the actual case in which the poorly written brief was filed. Students examine how the court decided the issue adverse to the party that filed the poorly written brief and consider the extent to which the poor persuasive writing of the brief may have affected the outcome of the case.<sup>33</sup>

#### B. *The Fourth Amendment Issue*

The exercise involves the issue of whether police officers violate the Fourth Amendment's prohibition against unreasonable searches and seizures when they stop a car based only on an anonymous, phoned-in tip that the driver may be intoxicated. The real case around which the exercise revolves is *Harris v. Commonwealth (Harris III)*,<sup>34</sup> a 2008 decision by the Supreme Court of Virginia.

I chose this legal issue and this case for a number of reasons. First, the Fourth Amendment issue is one that first-year law students can understand after reading just a few cases. Second, the background cases are

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32. See *infra* Appendix A.

33. See *infra* Appendix B.

34. 668 S.E.2d 141 (Va. 2008).

fairly short and easy to read. Third, because the courts have not uniformly applied the Fourth Amendment to anonymous phoned-in tips, I can provide the students with several well-written judicial opinions that use good persuasive writing techniques to reach opposite conclusions. Fourth, the fact pattern of the *Harris* case is straightforward.<sup>35</sup> Fifth, a brief filed in the *Harris* case provides numerous examples of poor persuasive writing.<sup>36</sup> Finally, as discussed below, the decision of the Supreme Court of Virginia in *Harris* arguably demonstrates that poor brief writing affected the outcome of the case.<sup>37</sup>

### C. *The Background Reading*

To understand the Fourth Amendment issue, students first read three decisions of the Supreme Court of the United States. The first two cases, *Adams v. Williams*<sup>38</sup> and *Alabama v. White*,<sup>39</sup> applied the Court's 1968 decision in *Terry v. Ohio*<sup>40</sup> and held that the stops made by police using information provided by informants were constitutional.<sup>41</sup> In *Adams*, the police acted on a tip from a known informant that an individual was carrying a firearm.<sup>42</sup> The Court in *Adams* held that the *Terry* stop<sup>43</sup> was constitutional because the "informant was known to [the police] . . . and had provided [reliable] information in the past."<sup>44</sup> In *White*, the police acted on a tip from an anonymous informant who provided specific information about a drug

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35. *Id.* at 144.

36. See Brief for the Commonwealth at 2, *Harris v. Commonwealth*, 668 S.E.2d 141 (Va. 2008) (No. 080437).

37. See, e.g., *Harris III*, 668 S.E.2d at 144–45.

38. 407 U.S. 143 (1972).

39. 496 U.S. 325 (1990).

40. 392 U.S. 1 (1968).

41. *White*, 496 U.S. at 330–31; *Adams*, 407 U.S. at 147–48. In *Terry*, the Supreme Court of the United States first addressed the issue whether a police officer's stop of an individual based only on a suspicion of criminal activity violates the Fourth Amendment's prohibitions against unreasonable searches and seizures. *Terry*, 392 U.S. at 4. The Court held that a police officer, who both personally observes behavior that he or she considers to be potentially criminal activity and reasonably suspects that a firearm may be involved, may conduct a brief search of an individual without violating the Fourth Amendment. *Id.* at 27. The Court's ruling in *Terry* does not directly address the issue of information provided by informants, either anonymously or otherwise, but it is the seminal case on the issue of *stop and frisk*. See 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1, at 352–69 (5th ed. 2012).

42. *Adams*, 407 U.S. at 146–48.

43. A police officer's stop of an individual or car is commonly referred to as a "Terry stop." See, e.g., 4 LAFAYE, *supra* note 41, at § 9.2(d), at 400–01.

44. *Adams*, 407 U.S. at 146.

transaction.<sup>45</sup> The Court held that the anonymous tip was sufficiently reliable both in its factual details and its prediction of the defendant's future criminal behavior to justify the investigatory stop.<sup>46</sup>

In the third case, *Florida v. J.L.*,<sup>47</sup> the Court held that police violated the Fourth Amendment when they stopped and searched an individual based on an anonymous, phoned-in tip that a young man standing at a bus stop wearing a plaid shirt was carrying a gun.<sup>48</sup> The Court held that the tip had not been sufficiently reliable in its prediction of future criminal activity to give police a reasonable, articulable suspicion to make the *Terry* stop.<sup>49</sup> In so holding, the Court characterized the tipster's information as a *bare report* that essentially identified a particular person without any predictive information about the individual's future movements from which the police could determine the reliability of the tipster's information.<sup>50</sup>

After reading these three cases, students should have sufficient background to understand the Fourth Amendment issue. In addition, the *J.L.* decision throws a *monkey wrench* into the application of the Fourth Amendment to *Terry* stops that are based on anonymous tips.<sup>51</sup> A typical anonymous tip about a drunk driver will consist almost entirely of descriptive information (make, model, color of the car, license plate number, description of the individual, route and direction, some past driving infraction)<sup>52</sup> rather than predictive information (e.g., predicting the future manner of driving).<sup>53</sup> While cases decided prior to *J.L.* could rely on the specificity of the tipster's descriptive information to justify the *Terry* stop,<sup>54</sup> any cases decided after *J.L.* would have to address whether the tipster also provided the necessary predictive information.<sup>55</sup> The *J.L.* decision thus is a terrific case to demonstrate one of the key elements of persuasive writing, namely the need to make either a strong analogy when a case favors the writer's position or a compelling distinction when it does not.

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45. *White*, 496 U.S. at 327, 332.

46. *Id.* at 332. The informant in *White* had provided specific information about the suspect, including the suspect's name, address, and apartment number, the day on which the suspect would be possessing drugs, the route she would drive on the day in question, and her destination, among other details. *Id.* at 327.

47. 529 U.S. 266 (2000).

48. *Id.* at 268–69, 274.

49. *See id.* at 271, 274.

50. *Id.*

51. *See id.* at 271, 274.

52. *E.g.*, *State v. Melanson*, 665 A.2d 338, 339 (N.H. 1995).

53. *E.g.*, *State v. Walshire*, 634 N.W.2d 625, 627 (Iowa 2001).

54. *See State v. Tucker*, 878 P.2d 855, 858 (Kan. Ct. App. 1994); *Melanson*, 665 A.2d at 339.

55. *See United States v. Wheat*, 278 F.3d 722, 724, 733 (8th Cir. 2001); *People v. Wells*, 136 P.3d 810, 811, 813 (Cal. 2006); *Walshire*, 634 N.W.2d at 627.

D. *Advocacy that Takes Opposing Positions in the Same Case*

After learning the substantive law, the students assess the persuasive qualities of two contrasting opinions written in a case that involved an anonymous tip of a drunk driver. In *State v. Boyea*,<sup>56</sup> a case decided only nine months after *J.L.*, a narrow majority of the Supreme Court of Vermont upheld the constitutionality of a *Terry* stop of a suspected drunk driver who was brought to the police's attention by an anonymous phoned-in tip.<sup>57</sup> The case contains well-written majority and dissenting opinions, each of which has a well-developed theme, well-organized legal arguments, and effective use of case authority.<sup>58</sup> Because the majority and dissent take opposing positions, students can assess the persuasive writing techniques of two writers who reached opposite conclusions on the same law and facts.

1. Theme: Public Safety v. Individual Privacy

The majority and dissenting opinions provide starkly contrasting themes, and each opinion uses a different technique to integrate the particular theme in the opinion.<sup>59</sup> This difference allows the students to appreciate not just how the writer formulates a theme but also how the theme can be used effectively throughout the document.

The majority opinion, in upholding the constitutionality of the *Terry* stop, strongly asserts a public safety theme.<sup>60</sup> The majority advances this theme by placing the reader in the shoes of a dedicated police officer faced with the following scenario:

Having received a State Police radio dispatch—derived from an unnamed informant—reporting a specifically described vehicle with New York plates traveling in a certain direction on I-89 operating “erratically,” a police officer locates the car, observes it exit the highway, and pulls out in pursuit. The officer catches up with the vehicle within minutes, but then faces a difficult decision. He could, as the officer here, stop the vehicle as soon as possible, thereby revealing a driver with a blood alcohol level nearly three times the legal limit and a prior DUI conviction. Or, in the alternative, he could follow the vehicle for some period of time to corroborate the report of erratic driving. This could lead to one of several endings. The vehicle could continue without incident for

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56. 765 A.2d 862 (Vt. 2000).

57. *Id.* at 862–63, 868.

58. *See id.* at 862–68 (majority opinion), 877–85 (Johnson, J., dissenting).

59. *See id.* at 862–68 (majority opinion), 877–85 (Johnson, J., dissenting).

60. *Id.* at 862–68 (majority opinion).



several miles, leading the officer to abandon the surveillance. The vehicle could drift erratically—though harmlessly—onto the shoulder, providing the corroboration that the officer was seeking for an investigative detention. Or, finally, the vehicle could veer precipitously into oncoming traffic, causing an accident.<sup>61</sup>

This compelling narrative places the reader in the role of protector of public safety, a perspective that will stay with the reader when evaluating the legal arguments that follow.<sup>62</sup>

The majority opinion reiterates and reinforces this theme throughout the opinion, as is critical in good persuasive writing.<sup>63</sup> The opinion provides students with numerous opportunities to note how the writer integrates the public safety theme into the legal arguments to persuade the reader.<sup>64</sup> The majority opinion contains numerous variations of its original public safety theme, including such phrases as: (1) the “imminent risks that a drunk driver poses to himself and the public;”<sup>65</sup> (2) the “potential risk of harm to the defendant and the public;”<sup>66</sup> (3) the “gravity of the risk of harm;”<sup>67</sup> (4) the “public’s interest in safety;”<sup>68</sup> (5) the “danger to the public [that] is clear, urgent, and immediate;”<sup>69</sup> (6) the “dangerous public safety hazard;”<sup>70</sup> and (7) the “threat to the lives or safety of others that is posed by someone who may be driving while intoxicated or impaired,”<sup>71</sup> among many other examples.<sup>72</sup> The theme is articulated both as the rationale for several cases that upheld the constitutionality of a *Terry* stop of a suspected drunk driver and as an independent policy argument in favor of constitutionality.<sup>73</sup> Theme supports precedent and precedent supports theme. Each strengthens the other to create compelling arguments.<sup>74</sup>

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61. *Boyea*, 765 A.2d at 862.

62. *See id.*

63. *See id.* at 862–68.

64. *See id.*

65. *Id.* at 863.

66. *Boyea*, 765 A.2d at 863 (quoting *State v. Lamb*, 720 A.2d 1101, 1104 (Vt. 1998)).

67. *Id.* at 864 (quoting *Lamb*, 720 A.2d at 1105).

68. *Id.* at 865 (citing *State v. Tucker*, 878 P.2d 855, 861 (Kan. Ct. App. 1994)).

69. *Id.* (quoting *Tucker*, 878 P.2d at 861).

70. *Id.* at 864 (quoting *State v. Melanson*, 665 A.2d 338, 340 (N.H. 1995)).

71. *Boyea*, 765 A.2d at 866 (quoting *McChesney v. State*, 988 P.2d 1071, 1081 (Wyo. 1999) (Thomas, J., dissenting)).

72. *See id.* at 862–68.

73. *Id.* at 865 (discussing *Tucker*, 878 P.2d at 862).

74. *See id.* (discussing *Tucker*, 878 P.2d at 862).

The dissenting opinion also has a well-crafted theme that emphasizes the Fourth Amendment's central role as protecting citizens' individual privacy.<sup>75</sup> Like the majority, the dissent places this theme squarely before the reader at the beginning of the opinion:

Constitutional rights are not based on speculations. Whatever frightening scenarios may be imagined by police officers or appellate judges, the Framers of our Constitution struck a balance between individual privacy and the intrusive power of government, a balance that we have a duty to protect. The Fourth Amendment is the source of protection against searches and seizures that are based on unreliable information. When an anonymous tip provides the sole basis for the seizure, the need for reliability is heightened. Today's decision allows the police to dispense with this constitutional requirement and turn over to the public the power to cause the search or seizure of a person driving a car.<sup>76</sup>

After the opening paragraph, the dissenting opinion's use of theme differs from the majority opinion.<sup>77</sup> Unlike the majority opinion, which weaves thematic statements into its discussion of case precedent, the dissenting opinion rather starkly is divided between precedent arguments and policy arguments, the latter argument being a detailed discussion of the original intent of the Fourth Amendment as an essential restraint on government action.<sup>78</sup> The dissent's thematic statements appear largely in this policy discussion.<sup>79</sup> This different use of theme is one technique that the students evaluate as part of the exercise.<sup>80</sup>

## 2. Organization of Precedent Arguments

The majority and dissenting opinions in *Boyea* also show student's stark contrasts in the organization of legal arguments.<sup>81</sup> In *Boyea*, the organizational structure is most evident in the manner in which the majority and dissent present their positive and negative precedent arguments.<sup>82</sup> Although the legal issue involves a federal constitutional issue, the majority

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75. *Id.* at 877–85 (Johnson, J., dissenting).

76. *Boyea*, 765 A.2d at 877.

77. *Id.*

78. *Id.* at 863–67 (majority opinion), 877–85 (Johnson, J., dissenting).

79. *Id.* at 882–85 (Johnson, J., dissenting).

80. *Id.* at 877–85.

81. *See Boyea*, 765 A.2d at 862 (majority opinion), 877 (Johnson, J., dissenting).

82. *Id.* at 863 (majority opinion), 877 (Johnson, J., dissenting).

opinion at first ignores the federal cases, particularly the *J.L.* decision.<sup>83</sup> Rather, the majority opinion discusses several state court cases decided before *J.L.* in which the courts upheld as constitutional *Terry* stops of drunk drivers that were based on anonymous tips.<sup>84</sup> The *Boyea* majority opinion casts these pre-*J.L.* state cases as important precedent, stating when “[c]onfronted with this precise issue, a majority of courts have concluded that failing to stop a vehicle in these circumstances in order to confirm or dispel the officer’s suspicions exposes the public, and the driver, to an unreasonable risk of death or injury.”<sup>85</sup> The majority then describes several of the state court cases in great detail, including both the facts of particular cases and the various courts’ statements about the public safety danger that a drunk driver presents.<sup>86</sup>

By characterizing the state court cases as the majority view and by providing extensive details about the cases, the *Boyea* majority opinion causes the reader to feel the weight of precedent in favor of the constitutionality of the *Terry* stop.<sup>87</sup> This technique first convinces the reader that substantial precedent supports the constitutionality of the stop. In addition, it primes the reader for the majority’s later discussion of the Supreme Court precedent, particularly the Court’s then-recent decision in *J.L.*<sup>88</sup>

The dissenting opinion in *Boyea* organizes its legal arguments in exactly the opposite way.<sup>89</sup> The dissent first notes that the case involves a question of federal constitutional law, emphasizing that the court is “bound by the Supreme Court’s decisions interpreting the Fourth Amendment.”<sup>90</sup> The dissent then discusses the Supreme Court cases, particularly, the decisions in *J.L.* and *White*, at length.<sup>91</sup> This discussion includes very specific information about both the facts and the Court’s rationale in each case, focusing on the Court’s requirement that the tipster’s information be

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83. *Id.* at 866 (majority opinion).

84. *Id.* at 864–66.

85. *Id.* at 863.

86. *Boyea*, 765 A.2d at 863–66. The majority does acknowledge the existence of some state court cases in which courts found *Terry* stops to be unconstitutional. *Id.* at 866–67. This technique accomplishes two goals. *Id.* First, the majority opinion appears more credible because it acknowledges that the case law is not unanimous. *See id.* at 866. Second, the majority distinguishes the facts of those cases in terms of the quality of the tipster’s information to bolster the reliability of the tip in the case before it. *Id.* at 866–67.

87. *Boyea*, 765 A.2d at 863–65.

88. *Id.* at 866–68.

89. *Id.* at 877 (Johnson, J., dissenting).

90. *Id.*

91. *Id.* at 877–81.

both reliable and predictive.<sup>92</sup> The dissent concludes this discussion by asserting that, “[b]ecause the claim here is based solely on the Fourth Amendment, we must ask ourselves how the . . . Supreme Court [of the United States] would be likely to rule about the anonymous tip in this case after *White* and *J.L.*”<sup>93</sup> The structure of the dissenting opinion thus gives the reader the impression that the Supreme Court itself would rule the *Terry* stop to be unconstitutional.<sup>94</sup>

After discussing the federal cases in detail, the dissent discusses the state court cases only briefly.<sup>95</sup> It cites several decisions in which state courts held that anonymous tips to police—reporting a variety of crimes, not just drunk driving—were unconstitutional for a variety of reasons.<sup>96</sup> The dissent thus creates the impression that the prior precedent reaches inconsistent conclusion on the issue of constitutionality and, for this reason, no great weight should be assigned to any of the state court decisions.<sup>97</sup>

By organizing the arguments using federal and state law in exactly opposite ways, the majority and dissenting opinions demonstrate the importance of good organization at the macro level.<sup>98</sup> The majority opinion’s extended discussion of favorable precedent, albeit state court cases addressing a federal constitutional issue, makes a compelling argument in favor of constitutionality.<sup>99</sup> In the dissenting opinion, the prominent and extended discussion of the Supreme Court cases diminishes the persuasive value of the non-binding state court decisions.<sup>100</sup> Students thus see how two writers, reaching different conclusions on the same legal issue, can craft persuasive arguments by altering the order in which precedent-based arguments are presented and in varying the level of detail used to discuss favorable and unfavorable precedent.<sup>101</sup>

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92. *Boyea*, 765 A.2d at 877–79.

93. *Id.* at 880.

94. *See id.* at 877–85.

95. *Id.* at 881–82.

96. *Id.*

97. *Boyea*, 765 A.2d at 881–82.

98. *See id.* at 862 (majority opinion), 877 (Johnson, J., dissenting).

99. *Id.* at 863–66 (majority opinion).

100. *Id.* at 877–79 (Johnson, J., dissenting).

101. *Id.* at 862 (majority opinion), 877 (Johnson, J., dissenting).

### 3. Persuasive Use of Case Authority

The *Boyea* opinions also illustrate effective use of case authority.<sup>102</sup> In each opinion, the discussion of the most favorable cases is very detailed.<sup>103</sup> Both opinions go far beyond a mere fact-to-fact analogy or distinction of the precedent cases; rather the opinions use all of the *pieces and parts* of the cases—facts, rationale and policy arguments—to create a compelling argument for the advocated position.<sup>104</sup> None of the common mistakes of novice legal writers, mainly overreliance on case citations or excessive quotes from the cases, are present.<sup>105</sup>

The best example of how to use case authority for maximum impact is the two opinions' different treatment of the *J.L.* decision.<sup>106</sup> When *Boyea* was decided, the *J.L.* decision was the most recent and relevant precedent on this Fourth Amendment issue.<sup>107</sup> For the majority, *J.L.* was a problematic case that had to be distinguished.<sup>108</sup> The majority effectively does so by employing several different techniques.<sup>109</sup> First, the majority uses words or phrases that characterize the decision as unimportant or narrowly decided.<sup>110</sup> For example, the majority characterizes *J.L.* as a *relatively brief*<sup>111</sup> ruling in which the Supreme Court had been “particularly careful . . . to limit its holding to the facts.”<sup>112</sup> These words and phrases give the reader the impression that the case does not contribute much to the Court's Fourth Amendment jurisprudence.

The majority then engages in robust analogical reasoning.<sup>113</sup> Stating that *J.L.* “provides an illuminating contrast to the case at bar,” the majority provides great detail about the quality of information provided by the tipster:

The informant reported a vehicle operating erratically; provided a description of the make, model, and color of the subject vehicle, as

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102. See *Boyea*, 765 A.2d at 863–66 (majority opinion), 877–80 (Johnson, J., dissenting).

103. *Id.*

104. *Id.*

105. See *id.* The majority opinion in *Boyea* does contain a few block quotations from cases, but the block quotations are used well. See *id.* at 865–66 (majority opinion).

106. *Boyea*, 765 A.2d at 866–68 (majority opinion), 877–81 (Johnson, J., dissenting).

107. *Id.* at 866–67 (majority opinion), 877 (Johnson, J., dissenting).

108. *Id.* at 866–68 (majority opinion).

109. See *id.*

110. *Id.* at 868 n.8.

111. *Boyea*, 765 A.2d at 867.

112. *Id.*

113. See *id.* at 866–68.

well as the additional specific information that it had New York plates; identified the vehicle's current location; and reported the direction in which it was traveling. The officer went to the predicted location and within minutes confirmed the accuracy of the reported location and description, thus supporting the informant's credibility and the reasonable inference that the caller had personally observed the vehicle. The information that the vehicle was acting *erratically* equally supported a reasonable inference that the driver might be intoxicated or otherwise impaired.<sup>114</sup>

The majority distinguishes those facts from the facts of *J.L.*, characterizing the *J.L.* tip as "nothing more than a bare-bones description of an individual standing at a bus stop."<sup>115</sup> Finally, the majority links the facts of the tipster's information to the Court's requirements of reliability and predictability, stating that the information "described with particularity, and accurately predicted, the location of a fast moving vehicle on a freeway."<sup>116</sup>

Yet the majority opinion goes beyond merely comparing and contrasting the facts about the anonymous tips in each case. The majority also uses dicta in *J.L.* to argue that the Fourth Amendment analysis differs because *J.L.* involved the crime of firearms possession, not drunk driving.<sup>117</sup> In *J.L.*, the Court had declined to create a firearms exception that would have created a relaxed requirement of reliability or prediction for anonymous tips about alleged crimes involving firearms.<sup>118</sup> The Court did, however, leave open the possibility that certain anonymous tips, such as "a report of a person carrying a bomb," might present such a danger to public safety to justify a relaxed requirement of reliability.<sup>119</sup>

The majority leverages this piece of the *J.L.* opinion to its advantage. It characterizes *J.L.* as a circumstance involving a "relative *lack* of urgency,"<sup>120</sup> arguing that the police officers in *J.L.* had time to safely observe the individual to determine whether any criminal activity was underway.<sup>121</sup> The majority thus portrays *J.L.* as a more static situation than a situation involving a drunk driver, stating that "[a]n officer in pursuit of a reportedly drunk driver on a freeway does not enjoy [the] luxury" of observing the driver "without running the risk of death or injury with every passing

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114. *Id.* at 868.  
 115. *Id.* at 867.  
 116. *Boyea*, 765 A.2d at 867.  
 117. *Id.*  
 118. *Florida v. J.L.*, 529 U.S. 266, 272–73 (2000).  
 119. *Id.* at 273–74.  
 120. *Boyea*, 765 A.2d at 867.  
 121. *Id.*; *see J.L.*, 529 U.S. at 268–69.

moment.”<sup>122</sup> The majority even characterizes the drunk driver on the road as a *mobile* bomb.<sup>123</sup>

For the students, the majority’s treatment of *J.L.* is an excellent example of how to *wring* everything out of an important case. The majority does not simply engage in the expected argument—making a factual distinction between the quality of the tipster’s information in *J.L.* and the quality of the tipster’s information in *Boyea*. Rather, the majority engages in a multi-pronged attack on the *J.L.* decision, choosing words and phrases that portray the case as not detailed—a *relatively brief* opinion—and extending the Court’s rationale on a *non-decision*—not creating a firearms exception—so as to further distinguish the case.<sup>124</sup> The students clearly see that persuasive arguments about the applicability of case decisions should extend well beyond a fact-to-fact analogy or distinction.

The dissenting opinion takes a similar approach, but with the opposite goal of portraying *J.L.* as controlling on the issue before the court.<sup>125</sup> Like the majority opinion, the dissenting opinion chooses words and phrases to further this goal, characterizing *J.L.* as “recent and relevant precedent from the [Supreme Court of the] United States”<sup>126</sup> and a “recent pronouncement by th[e] Court on the exact issue of anonymous tips . . . closely analogous case.”<sup>127</sup> The dissent then illustrates the close factual analogy between the tip provided in *J.L.* and the tip provided in *Boyea*.<sup>128</sup> The dissent notes that the description of the car, a “blue-purple Jetta with New York license plates,” is factually indistinguishable from the description of the individual in *J.L.*, “a young black ma[n] wearing a plaid shirt.”<sup>129</sup> The location identified in *J.L.*, a “specific bus stop,” likewise is indistinguishable from the *Boyea* tipster’s statement that the car was traveling between two specific exits on the highway.<sup>130</sup> Finishing the close factual analogy, the dissent notes that the allegation of wrongdoing in *J.L.*, that the young man was *carrying a gun*, likewise is closely analogous to the allegation that Ms. *Boyea* was engaged in *erratic driving*.<sup>131</sup>

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122. *Boyea*, 765 A.2d at 867.

123. *Id.*

124. *See id.*

125. *See id.* at 877–82 (Johnson, J., dissenting).

126. *Id.* at 877.

127. *Boyea*, 765 A.2d at 877–78.

128. *See J.L.*, 529 U.S. at 268–69; *Boyea*, 765 A.2d at 877–78.

129. *J.L.*, 529 U.S. at 271; *Boyea*, 765 A.2d at 879.

130. *J.L.*, 529 U.S. at 268; *Boyea*, 765 A.2d at 863 (majority opinion), 879–80 (Johnson, J., dissenting).

131. *Boyea*, 765 A.2d at 879 (Johnson, J., dissenting); *see also J.L.*, 529 U.S. at 268.

The dissent also directly addresses the majority's assertion that the different crimes warrant a different analysis.<sup>132</sup> The dissent notes that the *J.L.* Court's rationale for declining to create a firearms exception was the *slippery slope* danger that the courts would be unable to "securely confine such an exception to allegations involving firearms."<sup>133</sup> The dissent characterizes the majority's ruling as an *automobile exception* that exemplifies the very danger of which the Supreme Court had warned.<sup>134</sup> The dissent concludes by stating that the "*automobile* exception has no basis in Supreme Court precedent."<sup>135</sup>

To help students identify and assess the persuasive qualities of the *Boyea* opinions, I ask them to complete a questionnaire in which they critique the two opinions as to the elements of theme, organization, and use of case authority. In class, we use the students' impressions to lead our discussion of the persuasive writing techniques present in the two *Boyea* opinions; this discussion highlights the different approaches taken in the two opinions and the relative effectiveness of both opinions in making strong arguments on opposing sides of the same issue.

In class, I also show students one small section of the concurring opinion in *Boyea*. I do not ask the students to read the concurring opinion because it is rather lengthy; however, I do point out one section where the concurring opinion provides excellent imagery to support the majority's public safety theme.<sup>136</sup> The concurring opinion characterizes the threat to public safety as one of "a drunk driver maneuvering a thousand pounds of steel, glass, and chrome down a public road."<sup>137</sup> This compelling image is one that the class agrees should be used by anyone writing a brief in support of the constitutionality of a *Terry* stop involving a drunk driver.<sup>138</sup>

#### E. *Assessing the Disappointing Brief*

In the same class meeting, after we have fully dissected the majority and dissenting opinions in *Boyea*, we leave the realm of well-written advocacy and turn to the next step of the exercise. Now we begin to work with the *Harris III* case.<sup>139</sup>

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132. *Boyea*, 765 A.2d at 877.

133. *Id.* at 881 (quoting *J.L.*, 529 U.S. at 272).

134. *Id.* at 877.

135. *Id.* at 880.

136. *Id.* at 875 (Skoglund, J., concurring).

137. *Boyea*, 765 A.2d at 875.

138. *Id.*

139. *Harris v. Commonwealth (Harris III)*, 668 S.E.2d 141, 143 (Va. 2008).



The defendant in the *Harris III* case was arrested in the early morning hours of December 31, 2005.<sup>140</sup> On April 3, 2006, a grand jury for the Circuit Court of the City of Richmond, Virginia indicted Mr. Harris on one count of operating a vehicle while intoxicated, a felony given Mr. Harris's two prior convictions for the same offense.<sup>141</sup> On April 26, 2006, Mr. Harris filed a motion to suppress any evidence stemming from the police officer's stop of his car on the ground that the stop violated the Fourth Amendment.<sup>142</sup> On July 7, 2006, the Circuit Court judge denied the motion to suppress, after which Mr. Harris was immediately found guilty.<sup>143</sup> Mr. Harris then appealed the trial court's denial of his motion to suppress.<sup>144</sup> On February 5, 2008, the Court of Appeals of Virginia affirmed the defendant's conviction, ruling that the *Terry* stop of Mr. Harris's car did not violate the Fourth Amendment.<sup>145</sup>

I give my students a set of facts from the *Harris III* case, as follows: The police received an anonymous tip of suspected drunk driving.<sup>146</sup> The tipster had identified: (1) the street location of the car; (2) the direction the car was driving; (3) the car's make, color, and a partial license plate number; and (4) the driver's name and the type of shirt he was wearing.<sup>147</sup> After locating the car on the street named by the tipster, the police officer had followed the driver for a few blocks before pulling the car over.<sup>148</sup> The driver failed the field sobriety tests and he was charged with operating a vehicle while intoxicated, his third drunk driving offense.<sup>149</sup>

I also note the procedural history of the case and the basis for the appellate court's ruling. It is important for the students to understand that the defendant twice had unsuccessfully challenged the constitutionality of the *Terry* stop.<sup>150</sup> Students also must understand the nature of the appellate

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140. Brief for the Commonwealth, *supra* note 36, at 2.

141. Grand Jury Charges, *Commonwealth v. Harris*, 2006 WL 6436367 (Va. Cir. Ct. Apr. 3, 2006) (No. 06-F-1159 BBC).

142. Motion to Suppress at 6, *Commonwealth v. Harris*, No. 06F1159, 2006 WL 6436367 (Va. Cir. Ct. July 7, 2006).

143. *Commonwealth v. Harris (Harris I)*, No. 06F1159, 2006 WL 6436367, at \*1 (Va. Cir. Ct. July 7, 2006), *rev'd*, 668 S.E.2d 141 (Va. 2008). Westlaw incorrectly identifies the case at the trial court level as *Commonwealth v. Moses*, using the defendant's middle name as his last name. *Id.*

144. *Harris v. Commonwealth (Harris II)*, No. 2320-06-2, 2008 WL 301334, at \*1 (Va. Ct. App. Feb. 5, 2008), *rev'd*, 668 S.E.2d 141 (Va. 2008).

145. *Id.* at \*3, 5–6.

146. Brief for the Commonwealth, *supra* note 36, at 2.

147. *Id.*

148. *Id.* at 3.

149. *Id.* at 1, 4 (noting prior convictions).

150. *Harris II*, 2008 WL 301334, at \*2–3, 6; *Harris I*, No. 06F1159, 2006 WL 6436367, at \*1 (Va. Cir. Ct. July 7, 2006), *rev'd*, 668 S.E.2d 141 (Va. 2008).

court's ruling. In ruling that the *Terry* stop was constitutional, the appellate court had not relied solely on the anonymous tip as justifying the stop, but also had noted the police officer's own observations of the driver during the few minutes before the officer pulled the driver over.<sup>151</sup>

Finally, I tell the students that the case has been appealed to the Supreme Court of Virginia and that we will, as a class, construct an outline of the Commonwealth's brief arguing that the stop was constitutional.<sup>152</sup> I tell the students that all of the cases they have read, including *Boyea*, are relevant authority that may be used in the brief. I also give them an excerpt from *Jackson v. Commonwealth*,<sup>153</sup> a 2004 decision in which the Supreme Court of Virginia had distinguished *Boyea*.<sup>154</sup> The court in *Jackson* had held, on facts very similar to *J.L.*, that a *Terry* stop based on an anonymous tip of firearms possession violated the Fourth Amendment.<sup>155</sup> In its brief arguing that the stop in *Jackson* was constitutional, the Commonwealth had cited *Boyea* and other cases involving anonymous tips about drunk driving.<sup>156</sup> In rejecting that argument, the Supreme Court of Virginia had expressed approval for the holding in *Boyea* as appropriate for a drunk driving offense, stating:

Nor are we persuaded by the cases relied on by the Commonwealth and the Court of Appeals. Those cases are either inapposite or involved tips that contained indicia of reliability not present here. For example, *Wheat*, 278 F.3d 722; *State v. Walshire*, 634 N.W.2d 625 (Iowa 2001); *Rutzinski*, 241 Wis.2d 729, 623 N.W.2d 516; and *State v. Boyea*, 171 Vt. 401, 765 A.2d 862 (2000), all addressed the reliability of anonymous reports of erratic or drunk drivers. That circumstance and the imminent public danger associated with it are not factors in this case. . . . We agree that "[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action." *Id.*<sup>157</sup>

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151. *Harris II*, 2008 WL 301334, at \*5.

152. *Harris III*, 668 S.E.2d 141, 143 (Va. 2008).

153. 594 S.E.2d 595 (Va. 2004).

154. *Id.* at 603.

155. *Florida v. J.L.*, 529 U.S. 266, 268, 273–74 (2000); *Jackson*, 594 S.E.2d at 597, 603.

156. *See State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000); *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004); Brief for the Commonwealth, *supra* note 36, at 13, 16, 19.

157. *Jackson*, 594 S.E.2d at 603 (alteration in original) (quoting *Boyea*, 765 A.2d at 867).

Thus, armed with (1) the facts of the *Harris III* case; (2) the precedent cases, including *J.L.* and *Boyea*; and (3) the Supreme Court of Virginia's statements in *Jackson*, the class begins to construct an outline of the Commonwealth's brief in the *Harris* case. We develop our theme, organize our legal arguments, and discuss how best to use our case authority.

With respect to theme, the students suggest that the brief should adopt the *threat to public safety* theme articulated by the majority in *Boyea*.<sup>158</sup> The students recognize that the theme will be strengthened by the *Boyea* concurring opinion's image of "a thousand pounds of steel, glass, and chrome [being maneuvered] down a public road."<sup>159</sup> Students also propose that the Supreme Court of Virginia's statement in *Jackson* should be featured prominently in the Commonwealth's brief in the *Harris III* case.<sup>160</sup> Several students suggest that the introduction of the brief filed in the *Harris III* case should remind the Supreme Court of Virginia of its statement made in *Jackson* only a few years earlier. In the real brief that the students will later read, the quote from *Jackson* does not appear until page sixteen of a twenty-one page brief.<sup>161</sup>

When the class discusses how to organize legal arguments, we have two choices. The appellate court in *Harris II* had found the stop to be constitutional based not solely on the tipster's information but also on the police officer's observation of *unusual* driving before stopping the car.<sup>162</sup> The Commonwealth thus has two alternative arguments. One argument is that the stop was constitutional based solely on the tipster's information.<sup>163</sup> The other argument is that the tip and the officer's personal observations together gave rise to a reasonable articulable suspicion of drunk driving sufficient to justify the stop.<sup>164</sup>

As we prepare our in-class outline of the *Harris III* brief, we discuss how best to present these two arguments. Because the first argument—that

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158. *Boyea*, 765 A.2d at 862–65, 867.

159. *Id.* at 875 (Skoglund, J., concurring).

160. *Jackson*, 594 S.E.2d at 603.

161. Brief for the Commonwealth, *supra* note 36, at 16 (quoting *Jackson*, 594 S.E.2d at 603). Although this article provides the Westlaw citation to the Commonwealth's brief, I use the PDF form of the document in class so that students can see the appearance of the brief as it was filed with the court.

162. *Harris II*, No. 2320-06-2, 2008 WL 301334, at \*5–6 (Va. Ct. App. Feb. 5, 2008), *rev'd*, 668 S.E.2d 141 (Va. 2008); Brief for the Commonwealth, *supra* note 36, at 9 (describing the driving as *unusual*).

163. Brief for the Commonwealth, *supra* note 36, at 15.

164. *Id.* at 7–8. The Virginia Court of Appeals, in affirming the trial court's denial of Mr. Harris's motion to suppress, specifically distinguished the facts of the case from those present in either *Jackson* or *J.L.* on the grounds that the police officer, by observing Mr. Harris's driving before pulling him over, had "corroborated the criminal component" of the tipster's information. See *Harris II*, 2008 WL 301334, at \*5–6.

the tip alone was sufficient to justify the stop—allows the writer to advance a compelling theme and use highly relevant cases like *Boyea*, it appears to be the leading argument. Some students question whether the brief's first legal argument should be grounds upon which the Commonwealth previously won the case.<sup>165</sup> This is a debatable issue, and we usually have a good discussion about the order of presenting these two arguments.

When we discuss how best to structure the single argument that the tip provided sufficient information to justify the stop, students suggest that the argument begin with a detailed discussion of *Jackson* and its approval of the *Boyea* holding in the drunk driving context.<sup>166</sup> The students also suggest that the argument should discuss in detail any favorable state court cases, particularly *Boyea*. Students also recognize that other favorable cases may have been decided in the years following *Boyea* and suggest that the brief use any positive precedent decided after *Boyea*.

When we discuss how to best use the case authority, the class agrees that the majority opinion in *Boyea* should be highlighted as a closely analogous case. We compare the quality of the information of the tip in the *Boyea* case to the tip provided in *Harris III*, to argue that the tipster in *Harris III* provided even more reliable information than the tipster in *Boyea* (partial license plate, name of the driver, and what the driver was wearing).<sup>167</sup> In addition, we discuss how the majority opinion in *Boyea* provides other means to distinguish the *J.L.* decision based on the public safety theme and the *firearms* exception.<sup>168</sup>

We end our class meeting with a firm—if somewhat basic—outline of the structure of the Commonwealth's brief to be filed before the Supreme Court of Virginia in the *Harris III* case. After class, I provide the students with a copy of our class outline, the actual brief in the *Harris III* case, and a form that asks them to record their impressions of persuasiveness of the brief.

In our second class meeting, we review the students' reaction to the Commonwealth's brief filed in the *Harris III* case. Students highlight several reasons why the brief failed to persuade. They can identify the absence of the key elements of persuasive writing: Theme, organization of legal arguments, and persuasive use of case authority. They understand that the cumulative effect of the brief's defects with regard to these elements makes the document unpersuasive. In addition, the students are disappointed

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165. See Brief for the Commonwealth, *supra* note 36, at 9.

166. See *State v. Boyea*, 765 A.2d 862, 875 (Vt. 2000); *Jackson*, 594 S.E.2d at 603; Brief for the Commonwealth, *supra* note 36, at 9–11, 13.

167. *Boyea*, 765 A.2d at 863 (describing the tipster's information); Brief for the Commonwealth, *supra* note 36, at 7, 9–10.

168. *Florida v. J.L.*, 529 U.S. 266, 274 (2000); *Boyea*, 765 A.2d at 866–67.

that the brief failed to live up to the expectations they had developed when we outlined the brief in our earlier class. Indeed, their disappointment is heightened by the fact that the students had certain expectations about the document before they read it.

The Commonwealth's brief in *Harris III* lacks a theme. The first argument, which asserts that the stop was constitutional based on the tip and the officer's personal observations together, has no theme at all.<sup>169</sup> It also is the longer of the two arguments identified in the brief, taking ten pages of the sixteen pages of the Argument section.<sup>170</sup> The second argument only half-heartedly asserts the obvious public safety theme.<sup>171</sup> The heading for this second argument, "Stop Supported [b]y Danger [f]rom Intoxicated Driver," is an incomplete sentence that is not written persuasively.<sup>172</sup> The phrase "threat to public safety" appears only twice in the brief; it appears once in-text on page fifteen of the twenty-one page brief and once in a parenthetical following a case citation.<sup>173</sup> The quote from the *Jackson* decision regarding the "greater urgency for prompt action" needed when police receive a report of a drunk driver does not appear until page sixteen of the brief.<sup>174</sup> The image set forth in the concurring opinion in *Boyea*—that of the "drunk driver maneuvering a thousand pounds of steel, glass and chrome down a public road"—is not in the brief at all.<sup>175</sup>

The brief also is poorly organized. Again, the two main arguments in support of the constitutionality of the stop are (1) that the tipster's information, standing alone, was sufficiently reliable to justify the stop; or (2) that the police officer personally observed enough suspicious driving to justify the stop.<sup>176</sup> The *Harris III* brief is weak because it begins with the second argument.<sup>177</sup> This argument relies on more generic Fourth Amendment principles to analyze whether a police officer's observations in a variety of circumstances can give rise to a reasonable suspicion of criminal

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169. See Brief for the Commonwealth, *supra* note 36, at 7–14. The lack of a theme is evident even from a brief review of the Table of Contents. *See id.* at i. The relevant point headings in the Argument Section are "The Officer Properly Conducted An Investigatory Stop" and "Sufficient Independent Corroboration." *Id.* Neither heading provides a hint of a theme that might support the constitutionality of the stop. *See id.*

170. *Id.* at 4–14.

171. See Brief for the Commonwealth, *supra* note 36, at 15–21.

172. *See id.* at 15.

173. *Id.* at 15, 16 (quoting *State v. Stolte*, 991 S.W.2d 336, 343 (Tex. Ct. App. 1999)).

174. *Id.* at 16 (quoting *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004)).

175. *State v. Boyea*, 765 A.2d 862, 875 (Vt. 2000); Brief for the Commonwealth, *supra* note 36, at 1–21.

176. Brief for the Commonwealth, *supra* note 36, at 7–21.

177. *See id.* at 5–6.

activity.<sup>178</sup> Because the argument does not feature factually relevant drunk driving cases, the writer cannot either advance a compelling theme using the precedent or make robust analogies to cases involving substantially similar facts.

The brief itself amply demonstrates this weakness. The first paragraph of the argument consists of three sentences; each sentence extensively quotes a different case, and each quotation sets forth only a general principle of Fourth Amendment law.<sup>179</sup> This structure is not persuasive for two reasons. First, the boring recitation of legal principles does not persuade the reader that the position being advanced is the correct result under the law.<sup>180</sup> Second, the absence of a strong discussion of factually relevant cases gives the reader the impression that no such compelling precedent exists.

Moreover, after a few pages, the police officer observation argument begins to morph into an argument that the tipster's information alone was sufficient to justify the stop.<sup>181</sup> At this point, the brief begins to cite some of the relevant case law, particularly the *J.L.* decision, on the issue of the reliability of anonymous tips.<sup>182</sup> However, the brief lacks a cohesive presentation of the cases that addressed anonymous tips about drunk driving.<sup>183</sup> To the contrary, the brief makes only passing references to the relevant cases by name, as if the cases previously had been discussed for the

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178. *See id.* at 5–7.

179. *Id.* at 5–6. The first paragraph of the argument section reads:  
It is elementary that “the fourth amendment does not proscribe all searches and seizures, only those that are ‘unreasonable.’” *Stanley v. Commonwealth*, 16 Va. App. 873, 875, 433 S.E.2d 512, 513 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). “Whether a search is unreasonable is determined by balancing the individual’s right to be free from arbitrary government intrusions against society’s countervailing interest in preventing or detecting crime and in protecting its law enforcement officers.” *Harrell v. Commonwealth*, 30 Va. App. 398, 403, 517 S.E.2d 256, 258 (1999). “In deciding whether to make a stop or effect a pat-down search, an officer is entitled to rely upon the totality of the circumstances—the whole picture.” *Peguese v. Commonwealth*, 19 Va. App. 349, 351, 451 S.E.2d 412, 413 (1994)(en banc).

*Id.*

180. One such example is the legal proposition that “[a] trained law enforcement officer may be able to identify criminal behavior which would appear innocent to an untrained observer.” Brief for the Commonwealth, *supra* note 36, at 6 (quoting *Alston v. Commonwealth*, 581 S.E.2d 245, 251 (Va. Ct. App. 2003)). That legal proposition seems to have no bearing on the case given the Commonwealth’s argument that the defendant’s driving was unusual or erratic. *Id.* at 9.

181. *See id.* at 10.

182. *See id.* at 9–10 (citing *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000)).

183. *See id.* at 11–12.

reader.<sup>184</sup> The brief thus demonstrates how the failure to present arguments in the correct order can lead to a scattershot presentation of the law.

Finally, the brief makes poor use of the case authority. The brief does cite *Boyea* and several decisions of other state courts in which the courts found a *Terry* stop based on the anonymous tip of a drunk driver to be constitutional.<sup>185</sup> However, the brief contains no detailed discussion of any drunk driving case. Thus, the brief makes no argument analogizing the facts of *Harris III* to any prior drunk driving case. *Boyea* and other favorable cases are cited in a long string citation of state court cases or in two separate, page-long block quotations from a single California case, the facts of which are not explained to the reader.<sup>186</sup> In this regard, the brief amply demonstrates how case citations and block quotations do not convince the reader that the precedent is well-reasoned and should be followed.

Not only does the brief omit any robust analogies to favorable cases, the brief also does not distinguish *J.L.* from the facts in the case. The only attempt to distinguish *J.L.* is an extensive block quote from the Court of Appeals decision in *Harris III*.<sup>187</sup> Given that the Supreme Court of Virginia in *Jackson* strictly followed *J.L.* in a case involving a crime of firearms possession, the failure to distinguish *J.L.*, or otherwise argue that drunk driving differs from the crime of firearms possession, cripples the brief's ability to persuade the reader.<sup>188</sup>

#### F. *Assessing the Consequences of Poor Advocacy*

Our second class meeting discusses all of the defects of the *Harris* brief. The students, having acquired competence in recognizing and assessing strong persuasive legal writing, drive this discussion in class. Moreover, they are quite animated in their assessment of the brief and its

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184. Brief for the Commonwealth, *supra* note 36, at 10–11. When the brief first refers to the *J.L.* decision in-text, it does so as if the reader already knows all of the relevant information about the case. *Id.* at 10 (“The open nature of the conduct here, unlike that of possession of a concealed weapon, as in *J.L.*, reduces the concern about the basis for the informant’s knowledge about the activity.”). When the brief first mentions the *Jackson* decision in-text, it does so in a single sentence that divides two lengthy block quotations from the *Harris* Appellate Opinion. *Id.* at 11–12.

185. *See id.* at 13, 16–17.

186. *Id.* at 11 (block quotation of the appellate court’s opinion), 12 (second block quotation of the appellate court’s opinion), 17 (block quotation of *People v. Wells*, 136 P.3d 810, 815–16 (Cal. 2006)), 18 (block quotation of *Wells*, 136 P.3d at 816). Viewing the brief in PDF form best demonstrates why page-long block quotations bore the reader. *See* Brief for the Commonwealth, *supra* note 36, at 11–18.

187. *Id.* at 11–12.

188. *See Jackson v. Commonwealth*, 594 S.E.2d 595, 600–01 (Va. 2004) (citing *Florida v. J.L.*, 529 U.S. 266, 271 (2000)).

disappointing qualities. Because of the work they have done to learn the law and assess the arguments, the students are invested in the quality of the Commonwealth's brief, and they are disappointed that the real product did not live up to their expectations.

We conclude this exercise by briefly reviewing the potential consequences of the brief's lack of persuasion. First, the students read the Supreme Court of Virginia's decision in *Harris III*, in which the court held that the *Terry* stop had violated the Fourth Amendment.<sup>189</sup> We discuss whether poor briefing by the Commonwealth led to an adverse result in the case. Next, the students read an opinion authored by Chief Justice Roberts of the Supreme Court of the United States in which Chief Justice Roberts dissented from the Court's denial of the Commonwealth's petition for a writ of certiorari in the *Harris IV* case.<sup>190</sup> This well-written opinion brings the lesson full circle.

#### 1. The Supreme Court of Virginia's Decision in *Harris IV*

The *Harris IV* case was narrowly decided by a 4-3 majority of the Supreme Court of Virginia.<sup>191</sup> There are a number of indications in the opinion that poor briefing could have played a part in the court's decision. First, in determining that the stop was unconstitutional, the Supreme Court of Virginia reversed the rulings of both of the lower state courts.<sup>192</sup> A criminal defendant who has lost at both the trial and appellate court levels faces a high obstacle to win in the court of last resort.<sup>193</sup> The fact that the Commonwealth lost before the Supreme Court of Virginia after having won twice in the lower courts is itself significant when assessing the strength of the Commonwealth's arguments before the Supreme Court of Virginia.

Second, the majority in *Harris III* barely acknowledges that the case involves drunk driving or the threat to public safety that drunk driving poses.<sup>194</sup> The majority never cites the court's own prior statement in *Jackson* about the "greater urgency for prompt action" that may be required when police receive a tip about a suspected drunk driver.<sup>195</sup> Nor does it mention any of the decisions of other state courts, like *Boyea*, in which *Terry* stops

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189. *Harris III*, 668 S.E.2d 141, 147 (Va. 2008).

190. *Virginia v. Harris (Harris IV)*, 558 U.S. 978, 978–81 (2009) (Roberts, J., dissenting), *denying cert. to* 668 S.E.2d 141 (Va. 2008).

191. *Id.* at 978.

192. *Harris III*, 668 S.E.2d at 147.

193. 6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.7(g), at 616 (5th ed. 2012) (noting obstacles to a defendant's successful appeal of an adverse ruling on a Fourth Amendment issue).

194. *Harris III*, 668 S.E.2d at 150 (Kinser, J., dissenting).

195. *Id.* (quoting *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004)).



based on anonymous tips of drunk driving were found to be constitutional.<sup>196</sup> In fact, the majority in *Harris III* never uses the word *drunk*, a strong indication that the majority did not view the case as one involving the danger to public safety posed by drunk drivers on the road.<sup>197</sup>

Finally, the nature of the court's ruling indicates that poor briefing may have resulted in a poorly-crafted legal rule on this Fourth Amendment issue. Relying heavily on *White, J.L.*, and *Jackson*, the majority held that the anonymous tip did not contain sufficient indicia of reliability to justify the stop.<sup>198</sup> It went far beyond the facts of the particular case, however, to hold that an investigatory stop of a suspected drunk driver is never justified "unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated."<sup>199</sup> The Supreme Court of Virginia thus created a blanket rule that, in all cases involving an anonymous tip of a drunk driver, the person behind the wheel actually must *drive drunk* before police may stop the car.

The three dissenting justices in *Harris III* severely criticized the majority for failing to address the obvious public safety concerns posed by a drunk driver, stating that "the majority fails to understand" the contours of the legal issue before it.<sup>200</sup> The dissent highlights the Supreme Court of Virginia's prior statement in *Jackson*, that a drunk driver presents a public safety danger that requires a "greater urgency for prompt action."<sup>201</sup> The dissent also quotes the majority opinion in *Boyea* characterizing the drunk driver as akin to a *mobile* bomb.<sup>202</sup> Finally, the dissent chides the majority for ignoring substantial precedent like *Boyea*, stating:

On brief, the Commonwealth discusses at length the decisions from other jurisdictions holding that anonymous tips about incidents of drunk driving require less corroboration than tips

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196. Compare *id.*, with *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000).

197. In contrast, the majority opinion in *Boyea* uses the word *drunk* nine times. See *Boyea*, 765 A.2d at 863–67. This repeated use of the word *drunk* bolsters the public safety theme.\* In contrast, the majority in *Harris III* only uses the word *intoxicated*, and mainly uses the word only to describe either information from the tip or the crime with which the defendant was charged. See *Harris III*, 668 S.E.2d at 143–44, 146 (defendant "was charged with feloniously operating a motor vehicle while intoxicated;" officer received a report from dispatch about an *intoxicated* driver; the tip included the information that the driver was intoxicated).

198. *Harris III*, 668 S.E.2d at 145–46 (citing *Florida v. J.L.*, 529 U.S. 266, 270 (2000); *Alabama v. White*, 496 U.S. 325, 328–31 (1990); *Jackson v. Commonwealth*, 594 S.E.2d 595, 599–600 (Va. 2004)).

199. *Harris III*, 668 S.E.2d at 146.

200. *Id.* at 147 (Kinser, J., dissenting).

201. *Id.* at 150 (quoting *Jackson*, 594 S.E.2d at 603).

202. *Id.* (quoting *Jackson*, 594 S.E.2d at 603).

concerning matters presenting less imminent danger to the public, and decisions holding that anonymous tips concerning drunk driving may be sufficiently reliable to justify an investigatory stop without independent corroboration. In light of its decision, the majority, in my view, should address the Commonwealth's argument.<sup>203</sup>

Having read the brief itself, students understand that the dissenting justices are being charitable when they state that the Commonwealth's brief discusses relevant drunk driving cases from other jurisdictions at length. Indeed, it does not appear that the majority in *Harris III* ignored a well-reasoned argument that was made at length in the Commonwealth's brief. Rather, it seems that the majority virtually ignored the argument because the brief did not place the argument squarely before the court, let alone articulate the argument coherently or persuasively.

## 2. Chief Justice Roberts's Dissenting Opinion

In October 2009, the Supreme Court of the United States denied a writ of certiorari that the Commonwealth of Virginia had filed in the *Harris IV* case.<sup>204</sup> Chief Justice Roberts, along with Justice Scalia, dissented.<sup>205</sup> The dissenting opinion is the final reading of the exercise.

The Roberts dissent strongly articulates the public safety theme that was so absent in the Commonwealth's brief. The first sentence of the dissent tells the reader that "[e]very year, close to [thirteen thousand] people die in alcohol-related car crashes—roughly one death every [forty] minutes."<sup>206</sup> The dissent then casts the *Harris III* decision as one that threatens public safety, stating that the Supreme Court of Virginia has created a legal rule that will "undermine . . . efforts to get drunk drivers off the road."<sup>207</sup> The dissent characterizes the legal rule created as one that "commands that police officers following a driver reported to be drunk *do nothing* until they see the driver actually do something unsafe on the road."<sup>208</sup> These strong statements dramatically convey the risk posed by the *Harris III* ruling—that police

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203. *Harris III*, 668 S.E.2d at 150 n.3 (Kinser, J., dissenting) (citations omitted).

204. *Harris IV*, 558 U.S. 978, 978 (2009) (Roberts, J., dissenting), *denying cert. to* 668 S.E.2d 141 (Va. 2008).

205. *Id.* Chief Justice Roberts's dissenting opinion earned him a "Green Bag Award" for exemplary legal writing from the Green Bag Journal. *Exemplary Legal Writing, GREEN BAG ALMANAC & READER*, [http://www.greenbag.org/green\\_bag\\_press/almanacs/almanacs.html](http://www.greenbag.org/green_bag_press/almanacs/almanacs.html) (last visited Feb. 16, 2014).

206. *Harris IV*, 558 U.S. at 978 (Roberts, J., dissenting).

207. *Id.*

208. *Id.*

officers must watch helplessly from the side of the road while drunk drivers careen into oncoming traffic.

The dissent also organizes the discussion of the case law to best effect. While stating that the federal and state courts are *split*<sup>209</sup> on the issue of whether the Fourth Amendment prohibits investigative stops of suspected drunk driving based on anonymous tips, the dissent characterizes the cases finding in favor of constitutionality as the *majority viewpoint*.<sup>210</sup> Cases in which such stops have been held to be unconstitutional, including *Harris III*, are characterized as the *minority viewpoint*.<sup>211</sup> The dissent concludes by arguing that, given the clear conflict and the high stakes in terms of the potentially devastating effects of drunk driving, the Court should have heard the case.<sup>212</sup>

By reading Chief Justice Roberts's dissenting opinion, students complete the exercise with a well-written example of advocacy. In addition, by reading the Supreme Court of Virginia's opinion in *Harris III* together with the Chief Justice Roberts's dissenting opinion, students see the real-world consequences of poor persuasive writing. They experience the frustration expressed by the dissenting justices of the Supreme Court of Virginia in *Harris III*, namely that the majority did not thoughtfully consider relevant persuasive authority on this very important issue of the proper balance between Fourth Amendment protections and the dangers of drunk driving.

### III. BENEFITS OF THE EXERCISE

This exercise, with its focus on essential elements of persuasive writing in the context of real cases, provides several important benefits to students. First, the exercise succeeds in teaching students the most challenging elements of persuasive writing. Second, the exercise teaches students that, as in the documents they have read, they must critically examine their own work for the presence or absence of these persuasive writing techniques. The exercise thus encourages students to take a more robust view of the writing process, particularly the time and attention needed to review and revise their work. Third, the exercise energizes and empowers students by giving them confidence that they can competently assess and improve their own work. Finally, students see that these persuasive writing

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209. A split among lower federal courts and state courts on a constitutional issue is a common reason for the Supreme Court to grant certiorari in a case. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 269 (2000).

210. *Harris IV*, 558 U.S. at 980.

211. *See id.* at 981.

212. *Id.*

techniques are not esoteric or unimportant concepts, but important tools that can affect the development of the law in the real world.

A. *Teaching the Critical Elements of Persuasive Writing*

With its focus on particular elements of theme, organization, and good use of case authority, the exercise is a powerful tool to teach students essential persuasive writing techniques. The exercise accomplishes this goal on several different levels. Students first learn to identify the presence or absence of persuasive writing techniques through critical reading and assessment. Because students know the substantive law, they are better able to identify and analyze the presence or absence of persuasive writing techniques when they read the various documents in which the law is applied.<sup>213</sup> In addition to reading pieces of advocacy, students also step into the writer's role and test their emerging understanding of persuasive writing techniques by applying the law to the facts of the *Harris III* case. Students form judgments about the ordering of precedent or policy arguments and the juxtaposition of positive precedent with negative precedent. They examine how best to use relevant cases to make persuasive analogies or distinctions. This multi-step approach, where students first read arguments and then create their own arguments, deepens the students' understanding of the particular elements of persuasive writing that are the focus of the exercise.

Students' ability to understand the need for these key elements of persuasive writing is enhanced by the fact that several documents assert opposing positions on the same legal issue. In my view, this method is superior to one where students read excerpts of documents addressing a variety of legal issues, each of which might illustrate a particular persuasive writing technique. In this exercise, students are better able to focus on the persuasive writing techniques because the law does not change materially from document to document, only the manner in which the writer uses the law. The ability to see the differences in writing while the law stays the same is a highly effective teaching tool.

Finally, students become more aware of specific elements of persuasive writing because they analyze a document that, as to the critical persuasive writing elements, disappoints them as readers. This example of *deficient* advocacy enables the students to understand what qualities must be

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213. See Judith B. Tracy, "I See and I Remember; I Do and I Understand" *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 *TOURO L. REV.* 297, 316 (2005) (noting that students have a different learning experience when students are familiar with the law contained in the document they read).

present in order for a document to persuade the reader.<sup>214</sup> Indeed, students become quite animated when we critique the *Harris* brief in class. They make specific suggestions about how the brief might be improved. This level of class participation plainly demonstrates that students are actively engaged in assessing the lack of quality of the poorly written brief.<sup>215</sup> The depth of their analysis of the *Harris* brief demonstrates that they have indeed engaged in higher order thinking that is characteristic of active learning.<sup>216</sup>

B. *A Robust View of the Drafting and Revision Processes*

In addition to teaching essential elements of persuasive writing, the exercise teaches students to take a robust view of the writing process. At the initial drafting stage, the structure of the exercise also reduces, if not eliminates, the concern that the students will use the well-written pieces of advocacy as templates or fill-in-the-blank forms. First, because the examples of well-written advocacy are judicial opinions, not briefs, students may be less likely to use the documents as templates. In addition, students may have difficulty selecting just one of the many examples of well-written advocacy to be the template. A third reason may be that the exercise involves a careful examination of a legal issue that does not relate to the students' writing assignment.<sup>217</sup> Students, therefore, are able to focus on assessing the materials without the corresponding desire to replicate portions of the documents in their own writing assignment.

By reducing the tendency to use a document as a template, the exercise also encourages students to take a more robust view of the writing process, particularly the process of revising a working draft. Students often initially view revision or editing as nothing more than a quick, final review of a document to eliminate any spelling or punctuation errors.<sup>218</sup> Because the

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214. See *id.* at 318 (describing the use of *deficient samples* of objective analyses to demonstrate to students why an analysis may not provide complete information to the reader).

215. Hemingway, *supra* note 23, at 426–27 (describing how students *came alive* when analyzing poorly written work of *actual lawyers*).

216. See *id.* at 422–23.

217. Anna Hemingway sets forth several good reasons why students should read practitioners' briefs that involve a legal issue and authorities that students must use in their own writing assignment. *Id.* Those reasons include the students' heightened interest in the material and linking the students' academic assignment to the real world of lawyering. *Id.* I am concerned, however, that overworked and anxious law students will succumb to the tendency to use the documents as templates. I prefer that my students focus solely on a robust assessment of the exercise materials without any eye towards adapting or using those materials as part of their own writing assignment.

218. See Cunningham & Streicher, *supra* note 9, at 196–97 (stating that students tend to edit at the *micro* level only); Patricia Grande Montana, *Better Revision:*

*Harris* brief does not contain distracting grammar or punctuation errors, students' suggestions to improve the brief's persuasive qualities focus exclusively on substantive deficiencies. Students thus learn that they should evaluate their own work using the same measures by which they evaluate the *Harris* brief, which refines their understanding of the revising and editing process. As one student noted: "When reading my own work I sometimes don't fully complete my thoughts or [I] use conclusory statements because I can easily understand the logic and reasoning. However, in reading this poorly-constructed [brief], I couldn't follow all of the logic or arguments created so it 'drove home' some comments I've received from professors on exams and memos."<sup>219</sup>

### C. *Boosting Students' Confidence*

The exercise also has a benefit for students that I did not expect. My students find the exercise to be a confidence boost.<sup>220</sup> One student commented that the exercise allowed him to see how much he has learned, in that he can identify mistakes and poor structure of the brief.<sup>221</sup> Another student stated, "reading the *Harris* brief gave me confidence that I do possess some admirable writing techniques and skills."<sup>222</sup> Overall, students find it refreshing to be exposed to something other than five-star writing, which some see as an unattainable goal.<sup>223</sup>

### D. *A Connection to the Real World*

Finally, because the exercise uses real world materials, students quickly learn that these persuasive writing techniques are essential tools for the practicing lawyer. Indeed, the exercise has a great impact on the students because the materials are from a real case. Students are interested to see how a poor brief can influence the outcome of a case.<sup>224</sup> They invariably ask many questions about the case, including whether the decision in *Harris* was

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*Encouraging Student Writers to See Through the Eyes of the Reader*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 291, 293 (2008) (noting that students often view the editing process as polishing the document to add topic sentences, change words, or fix grammar or citation form).

219. Student comments were submitted in writing and are on file with the author.

220. See *supra* Part II.E-F.

221. See *supra* Part II.E-F.

222. See *supra* Part II.E-F.

223. McArdle, *supra* note 20, at 519 (reading practitioner work of uneven quality can help a discouraged novice writer).

224. See *supra* Part II.E-F.

followed by other state courts, whether Mr. Harris committed another drunk driving offense, and whether the Supreme Court of the United States has taken another similar case or clarified the issue of anonymous tips in cases of suspected drunk driving. Students worry about the dismissal of a case involving a habitual drunk driver. They see the real world implications of the *Harris* decision as potentially affecting the development of the case law on this legal issue.

#### IV. CONCLUSION

This *real world* focus of the exercise demonstrates to students that these persuasive writing techniques are not simply professor-created metrics to assess and grade their work, but important tools both for the practitioner and the development of the law. Once they perceive that the material being taught actually matters in *The Real World*,<sup>225</sup> they are anxious to master the techniques.

I highly recommend this exercise to those legal writing professors looking for a way to highlight the essential yet subtle aspects of persuasive writing for students. The materials effectively teach the material, and students enjoy the process.

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225. See *supra* text accompanying note 1.

APPENDIX A—*STATE V. BOYEA* QUESTIONNAIRE

You have read two opinions that advocate opposing positions even as they apply the same law to the same facts. Use this questionnaire to record your impressions of the quality of the advocacy in each opinion with regard to three critical components of persuasive writing: development of a theme, organization of legal arguments, and use of case authority.

The Majority Opinion

1. Does the majority opinion have an easily identifiable theme? What is it? Where does the majority first assert its theme?
2. Review the majority opinion and identify at least three instances where the majority makes a thematic statement.
3. Are these thematic statements standing alone, or do they appear as part of a discussion of case precedent?
4. Look carefully at the order in which the majority opinion discusses federal and state court cases addressing the constitutionality of *Terry* stops.
  - a. What case does it discuss first? What cases are discussed next?
  - b. Where does the majority discuss the Supreme Court cases?
  - c. Do you find this ordering of the discussion to be persuasive? Why or why not?
5. Consider the manner in which the majority discusses specific cases. For example, what is significant about the majority's discussion of the *McChesney* case in terms of persuasive writing? Does the holding of the case support the majority's opinion in favor of constitutionality? How does the majority use the case?
6. Consider how the majority's use of the *J.L.* decision. How does the majority distinguish *J.L.*? Does it distinguish the case on its facts and, if so, how?



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- a. Other than a fact-to-fact comparison, how does the majority distinguish *J.L.*?
  7. What is the main policy argument made by the majority? Where does it appear in the opinion? Is it segregated to a particular discussion?
  8. If you were writing a brief in support of the constitutionality of a stop of a drunk driver based on an anonymous tip, what 3–5 quotes from the majority opinion in *Boyea* would you use in your brief?

The Dissenting Opinion

1. Does the dissenting opinion have an easily identifiable theme? What is it? When does the theme first appear in the dissenting opinion?
2. Review the dissenting opinion and identify at least three instances where the dissent makes a thematic statement.
3. Look carefully at the order in which the dissenting opinion discusses federal and state court cases. How does this order of presenting the law differ from the majority?
  - a. Do you find this ordering of the discussion to be persuasive? Why is it persuasive?
4. Consider how the dissenting opinion discusses a single case. Specifically, how does the dissenting opinion use *J.L.* to argue that the stop was unconstitutional? Does it distinguish the case on its facts and, if so, how?
  - a. Does it go beyond a fact-to-fact comparison? How so?
5. Consider how the dissenting opinion deals with the state court cases that were discussed in the majority opinion? How would you characterize the dissenting opinion's treatment of those cases?
  - a. Do you find this treatment of the state court cases to be persuasive in terms of advancing the dissenting opinion's argument? Why or why not?
6. If you were writing a brief arguing that the stop of a drunk driver based on an anonymous tip was unconstitutional, what 3–5 quotes from the dissenting opinion in *Boyea* would you use in your brief?

APPENDIX B—BRIEF REVIEW FORM

Overall Appearance	Yes	No
The brief has a neat and professional appearance.		
Comments:		
The Table of Authorities is neat and correctly organized (cases, constitutions, statutes, rules or regulations, secondary sources).		
Comments:		
The Table of Contents contains point headings that use persuasive language to “tell the story” and/or highlight legal positions. Point headings are complete sentences.		
Comments:		
The brief does not contain distracting use of bold face type, underlining or italics. The font and typeface are appropriate.		
Comments:		
The brief contains no spelling or editing errors.		
Comments:		

<b>Introduction</b>	<b>Yes</b>	<b>No</b>
The introduction contains a central theme or message to support the party's position.		
Comments:		
The client is introduced in a sympathetic and/or positive light.		
Comments:		
The opposing party is introduced in a less than flattering light using appropriate language (no personal attacks).		
Comments:		
The introduction previews the legal arguments, but with a focus on asserting theme (that the ruling sought is the just result).		
Comments:		
The introduction clearly states the relief sought.		
Comments:		

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Statement of the Case (Appellate Brief)	Yes	No
Provides a complete procedural history by identifying relevant filings in the lower court with dates provided (showing thoroughness).		
Comments:		
Uses procedural history to best advantage by emphasizing favorable rulings or casting doubt on unfavorable rulings (ex: “although noting X, the lower court nonetheless ruled Y.” Or, “in a well-reasoned opinion, the lower court correctly ruled Y”).		
Comments:		

Statement of Facts	Yes	No
The Statement of Facts begins by introducing the parties and their relationship to one another (relative to the legal dispute). The client is described favorably and opposing party is cast in an unflattering/unfavorable light given the case and its issues (a legally unfavorable light, not a personal attack).		
Comments:		
The Statement of Facts uses good tone, diction, context and juxtaposition to present facts in the light most favorable to the party while still disclosing all relevant facts (gives most airtime to the best facts).		
Comments:		
The Statement of Facts includes emotional facts necessary to bolster the client's position or characterization of the facts.		
Comments:		
The Statement of Facts does not discuss irrelevant facts.		
Comments:		

<b>Statement of Facts (Cont'd)</b>	<b>Yes</b>	<b>No</b>
The Statement of Facts does contain legal arguments or legal conclusions.		
Comments:		
The Statement of Facts is organized either chronologically or topically to present the facts clearly for the reader, choosing the organization structure that best benefits the client.		
Comments:		

<b>Summary of Argument</b>	<b>Yes</b>	<b>No</b>
Uses the theme or central message to introduce the reader to the summary of the legal arguments.		
Comments:		
Provides the correct level of detail (just enough, not too much) on the legal arguments to allow the reader to understand the client's position.		
Comments:		
Uses persuasive writing style at the word and sentence level to portray the client's position as the just result in the case.		
Comments:		
Focuses on positive arguments only. Saves discussion of negative arguments for the Argument section.		
Comments:		



Argument Section	Yes	No
<p>Ordering of Arguments</p> <ul style="list-style-type: none"> <li>• Has a clear structure of arguments that presents the arguments in a logical order and to best effect for the client.</li> <li>• Starts with “positive” arguments.</li> <li>• When making policy arguments, uses precedent to bolster policy arguments; weaves policy points into case discussions.</li> <li>• Transitions well to “negative” arguments.</li> </ul>		
<p>Comments:</p>		
<p>Use of Legal Authority:</p> <ul style="list-style-type: none"> <li>• Uses a synthesized Rule (if appropriate) that is not a collection of general, boring principles of law.</li> <li>• Fully describes favorable precedent without excessive use of case quotations. Case illustrations of favorable precedent give the reader all of the necessary information needed to demonstrate the applicability of the case to the issue and the impact of its ruling on the current case.</li> <li>• Fully distinguishes unfavorable precedent. Gives the reader all of the necessary information about the case to demonstrate why the precedent is distinguishable or otherwise should not be followed in the current case.</li> </ul>		
<p>Comments:</p>		

Argument Section (Cont'd)	Yes	No
<p>Application to Facts:</p> <ul style="list-style-type: none"> <li>• Contains a complete application of the facts to the law by (a) restating the relevant facts; (b) characterizing those facts to show their relevance; and (c) linking the characterized facts to the Rule by using the language of the legal Rule.</li> <li>• Makes complete analogies to favorable precedent that, if appropriate, go beyond a fact-to-fact comparison to include policy arguments from the precedent case.</li> <li>• Makes relevant factual distinctions vis-a-vis unfavorable precedent.</li> <li>• “Ties up” policy positions to the facts and desired ruling.</li> </ul>		
Comments:		
<p>Persuasive Writing Style:</p> <ul style="list-style-type: none"> <li>• Continues to reiterate and reinforce the theme of the brief.</li> <li>• Uses persuasive writing style at the word and sentence level such that the Argument reads as a piece of persuasive writing without being “over the top” in tone.</li> <li>• Is not so dry in tone that it fails to persuade.</li> </ul>		
Comments:		

**MOVING THE FOCUS AWAY FROM THE IQ SCORE  
TOWARDS THE SUBJECTIVE ASSESSMENT OF ADAPTIVE  
FUNCTIONING: THE EFFECT OF THE DSM-5 ON THE POST-  
ATKINS CATEGORICAL EXEMPTION OF OFFENDERS WITH  
INTELLECTUAL DISABILITY FROM THE DEATH PENALTY**

JILL V. FELUREN\*

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\* Jill V. Feluren will receive her J.D. from Nova Southeastern University, Shepard Broad Law Center in May 2015. Jill received a Bachelor of Arts from The George Washington University in 2010, majoring in Psychology and minoring in English. Jill would like to thank the members of *Nova Law Review*—with a special thanks to the green team—for their hard work and dedication in editing this article. Most of all, she would like to thank her family and loved ones, especially Mark, Sue, Matt, Chloe, and Blake, for their love, support, and encouragement during the development of this article, and always.

## I. INTRODUCTION

In 2002, in the landmark case of *Atkins v. Virginia*,<sup>1</sup> the Supreme Court of the United States held, in a 6-3 majority, that the execution of a defendant with mental retardation was considered to be a violation of the Eighth Amendment.<sup>2</sup> The Eighth Amendment prohibits cruel and unusual punishment, which led to the Court's ruling that the execution of a defendant with an intellectual disability was unconstitutional.<sup>3</sup> In order to make this decision, the Court had to determine how to differentiate between a defendant with normal intellectual functioning and one with a significant intellectual disability.<sup>4</sup> The Court utilized a few psychological resources, including the Diagnostic and Statistical Manual of Mental Disorders ("DSM" or "Manual") IV-TR, to determine what criterion was necessary to qualify a person as having mental retardation.<sup>5</sup> By citing the definition of mental retardation from the DSM in their decision, the Court acknowledged that the Manual has an important legal use,<sup>6</sup> this would later influence many states to use it in the creation of their own legislation.<sup>7</sup>

In May of 2013, a fifth edition of the DSM was released.<sup>8</sup> In this new edition, several revisions were made to mental retardation that are different from the information provided in the DSM-IV-TR, which was the current edition during the *Atkins* decision.<sup>9</sup> The changes made include a name change from mental retardation to intellectual disability, as well as a change in the criterion used to make a clinical diagnosis.<sup>10</sup> The diagnostic

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1. 536 U.S. 304 (2002).

2. Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 812 (2007); Joanna Hall, Comment, *Atkins v. Virginia: National Consensus or Six-Person Opinion?*, 12 AM. U. J. GENDER SOC. POL'Y & L. 361, 362 (2004).

3. U.S. CONST. amend. VIII; Hall, *supra* note 2, at 362.

4. *See Atkins*, 536 U.S. at 308-09.

5. *See id.* at 308 n.3; *see also* AM. PSYCHIATRIC ASS'N, DSM-IV-TR: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxix, 41 (4th ed., text rev. 2000) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-IV-TR].

6. *See Atkins*, 536 U.S. at 308 n.3.

7. Benjamin J. Clark, Comment, *America's Evolving Stance on Mental Retardation and the Death Penalty*, 7 DEPAUL J. HEALTH CARE L. 121, 137 (2003).

8. AM. PSYCHIATRIC ASS'N, DSM-5: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-5]; *Timeline*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/about/pages/timeline.aspx> (last visited Feb. 16, 2014).

9. *See Atkins*, 536 U.S. at 308 n.3; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33; *Intellectual Disability*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf> (last visited Feb. 16, 2014).

10. AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33.

criteria in the new edition moves away from the prior focus on the Intelligence Quotient (“IQ”) score—an objective standard—to a concentration on a measure of the person’s adaptive functioning, which is a more subjective measure.<sup>11</sup> These changes, which create a greater overall subjective standard for a diagnosis of intellectual disability, differ from those in place when the *Atkins* decision was made.<sup>12</sup>

With the newly released DSM-5 starting to be used by mental health professionals, the definition in operation for intellectual disability will now be different from that in place when the *Atkins* case was decided;<sup>13</sup> this change will inevitably have an impact in the legal field for criminal cases with defendants that have intellectual disabilities.<sup>14</sup> This article will first discuss the facts of the *Atkins* case, as well as background information about mental retardation and the death penalty, the DSM, and the specific diagnostic standards for mental retardation that were current at the time of the *Atkins* decision.<sup>15</sup> This section will provide the history and details of the *Atkins* case, as well as an explanation of the final holding of the Court.<sup>16</sup> The third section will note the relevant revisions made in the DSM-5 with the shift from mental retardation to intellectual disability.<sup>17</sup> The final section will analyze the differences between the DSM-IV-TR and the DSM-5.<sup>18</sup> This discussion will be an attempt to predict the inevitable impact that the changes in the new edition of DSM will have on the legal system when courts are presented with mentally retarded defendants that face capital punishment; the diagnostic criteria used by professionals to assess the patient and determine a diagnosis will no longer match up with the law in most states.<sup>19</sup> Additionally, the final section will hypothesize solutions to the problems that may be created by the revisions.<sup>20</sup>

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11. *Id.*; *Intellectual Disability*, *supra* note 9.

12. *See Atkins*, 536 U.S. at 308–09; AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part II.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part IV.

20. *See infra* Part IV.A.

## II. MENTAL RETARDATION AND THE DEATH PENALTY

The history of mental retardation and the death penalty is a relatively simple and straightforward one.<sup>21</sup> Evidence of the relationship between the two can be seen dating back as early as the late 1700s when a person that was deemed by the court to be an *idiot* “was not subject to criminal liability.”<sup>22</sup> By today’s standards, an *idiot* would be a person with severe or profound mental retardation.<sup>23</sup> More recently, the Supreme Court of the United States heard the case of *Godfrey v. Georgia*<sup>24</sup> in 1980.<sup>25</sup> In this case, the Court “discussed the necessity of finding that a defendant has [a] higher moral culpability than an average criminal in order for the death penalty to be imposed.”<sup>26</sup> The holding of this case will prove to be particularly important for future defendants with mental impairments when capital punishment is under consideration; their level of culpability is a factor that will be assessed by the courts as a determination of whether this punishment is appropriate.<sup>27</sup>

Nine years later, the Supreme Court of the United States granted certiorari and heard the case of *Penry v. Lynaugh*<sup>28</sup> in 1989; this was the first time the Court would address the issue of execution of a mentally retarded defendant.<sup>29</sup> In this case, Johnny Paul Penry was sentenced to death after he confessed to the rape and murder of Pamela Carpenter.<sup>30</sup> In state court, a clinical psychologist testified that Penry had mild to moderate mental retardation and an IQ score between fifty and sixty-three.<sup>31</sup> Despite this, the jury found Penry competent to stand trial.<sup>32</sup> The result of the trial was that “[t]he jury rejected Penry’s insanity defense and found him guilty of capital murder.”<sup>33</sup>

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21. See James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from Penry to Atkins*, 33 N.M. L. REV. 173, 173 (2003).

22. Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 307 (2002).

23. *Id.* at 308.

24. 446 U.S. 420 (1980).

25. *Id.* at 420.

26. Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 248 (2009).

27. See *Godfrey*, 446 U.S. at 432–33; Hagstrom, *supra* note 26, at 248.

28. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

29. Ellis, *supra* note 21, at 174.

30. *Penry*, 492 U.S. at 307.

31. *Id.* at 307–08.

32. *Id.* at 308.

33. *Id.* at 310.

In granting certiorari, the Supreme Court of the United States specifically addressed the question of whether “it [is] cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person.”<sup>34</sup> The result of this case was that the Court failed to find an Eighth Amendment violation and stated that mental retardation should be viewed only as a mitigating factor when considering sentencing.<sup>35</sup> The Court also stated that “[w]hile a national consensus against [the] execution of the mentally retarded may *someday* emerge . . . there is insufficient evidence of such a consensus today.”<sup>36</sup> Despite the holding, after the *Penry* decision, eighteen states enacted legislation granting categorical exemption to any mentally retarded defendant from the death penalty.<sup>37</sup>

#### A. *A Brief History of the Death Penalty*

Prior to *Penry*, in 1972, the Supreme Court of the United States heard the case of *Furman v. Georgia*<sup>38</sup> and held that in its current use, the death penalty—also referred to as capital punishment—violated the Eighth Amendment.<sup>39</sup> In this case, three black men had each been accused of the rape or murder of a woman and for this, they faced the death penalty.<sup>40</sup> The Eighth Amendment “bans the use of cruel and unusual punishment.”<sup>41</sup> Specifically, the Eighth Amendment reads, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>42</sup> In writing this amendment, the Framers of the Constitution were aiming to prevent methods of punishment that would be equivalent to torture.<sup>43</sup> In their decision, the Supreme Court Justices had different opinions and reasoning behind their choice of whether or not the death penalty was unconstitutional per se, but did agree on the final holding that the death penalty in its current form was cruel and unusual punishment.<sup>44</sup>

However, in 1976, the Supreme Court of the United States heard the case that established the death penalty could be reinstated and was not

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34. *Id.* at 313.

35. U.S. CONST. amend. VIII; *Penry*, 492 U.S. at 340.

36. *Penry*, 492 U.S. at 340 (emphasis added).

37. Bonnie & Gustafson, *supra* note 2, at 812.

38. 408 U.S. 238 (1972) (per curiam).

39. *Id.* at 239–40; Amanda M. Raines, Note, *Prohibiting the Execution of the Mentally Retarded*, 53 CASE W. RES. L. REV. 171, 177–78 (2002).

40. *Furman*, 408 U.S. at 239, 252–53 (Douglas, J., concurring).

41. Raines, *supra* note 39, at 177.

42. U.S. CONST. amend. VIII.

43. Raines, *supra* note 39, at 177.

44. *Furman*, 408 U.S. at 239–40; Raines, *supra* note 39, at 178.

entirely unconstitutional.<sup>45</sup> *Gregg v. Georgia*<sup>46</sup> presented a case in which the defendant committed armed robbery and murder; he sought to challenge the constitutionality of his death sentence.<sup>47</sup> The Court held that, as a penalty for murder, the death penalty does not violate the Eighth Amendment.<sup>48</sup> “[T]he goals of retribution and deterrence of capital crimes may be permissible” as factors to be considered when making the determination of “whether the death penalty should [or should not] be imposed.”<sup>49</sup> Simply put, to satisfy the goal of retribution, the Court must determine if the crime committed is serious enough to deserve the punishment.<sup>50</sup> To make this determination, it is important to note, “the punishment of death is sufficiently related to an individual’s personal culpability.”<sup>51</sup> Essentially, the levels of culpability of the offender and severity of the punishment must match.<sup>52</sup> The theory of deterrence is based upon the idea that punishment would inhibit a criminal from engaging in that particular behavior; capital punishment can only be considered a deterrent if the murder is premeditated and deliberate.<sup>53</sup> The reason behind that is the cause and effect relationship between the crime and the punishment.<sup>54</sup> In making its decision, the Court noted that the punishment of death could not be said to be disproportionate to the crime of murder, in which another life is intentionally taken.<sup>55</sup> Despite this holding, opponents to the death penalty still believe that it should be abolished completely for all offenders.<sup>56</sup>

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45. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); Kelly Christine Elmore, Note, *Atkins v. Virginia: Death Penalty for the Mentally Retarded—Cruel and Unusual—the Crime, Not the Punishment*, 53 DEPAUL L. REV. 1285, 1295 (2004).

46. 428 U.S. 153 (1976).

47. *Id.* at 158, 162.

48. *Id.* at 207; Elmore, *supra* note 45, at 1295.

49. Holly T. Sharp, *Determining Mental Retardation in Capital Defendants: Using a Strict IQ Cut-Off Number Will Allow the Execution of Many That Atkins Intended to Spare*, 12 JONES L. REV. 227, 229–30 (2008); *see also Gregg*, 428 U.S. at 183.

50. J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 970 (2011).

51. Hall, *supra* note 2, at 376.

52. Hagstrom, *supra* note 26, at 247.

53. Hall, *supra* note 2, at 377.

54. Hagstrom, *supra* note 26, at 247.

55. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

56. Sharp, *supra* note 49, at 232.



B. *The Atkins Case*

In 2002, the Supreme Court of the United States granted certiorari in the case of *Atkins v. Virginia*, a criminal case of murder from 1996.<sup>57</sup> In this case, the defendant, Daryl Renard Atkins, was convicted of abducting Eric Nesbitt, robbing him of the money that he had with him, as well as forcing him to make a cash withdrawal from an automated teller machine.<sup>58</sup> That evening, William Jones was also present and participated in the abduction and robbery.<sup>59</sup> Later on, Atkins and Jones, who had both been armed with semiautomatic handguns the entire time, took Nesbitt to a remote location to shoot him eight times, which resulted in his death.<sup>60</sup>

“Initially, both Jones and Atkins were indicted [under a] capital murder” charge for what happened to Nesbitt.<sup>61</sup> However, Jones made a deal to plead guilty to first-degree murder in return for a full testimony against Atkins; this gave him the sentence of life imprisonment and made it no longer possible for him to receive the death penalty.<sup>62</sup> During Atkins’ trial, his and Jones’ stories matched up substantially with the exception as to who actually took the shots resulting in Nesbitt’s death.<sup>63</sup> As Jones did not have any sort of mental deficiency, his testimony was clearer and seemingly more credible to the jury than that of Atkins; Jones’ clear testimony provided the jury with sufficient evidence of Atkins’ guilt.<sup>64</sup>

In the penalty phase of the trial, Dr. Evan Nelson, a forensic psychologist, testified for the defense about his pre-trial evaluation of Atkins.<sup>65</sup> Taking into consideration “interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of [fifty-nine],” Dr. Nelson stated that Atkins was *mildly mentally retarded* and had been consistently throughout his life.<sup>66</sup> Despite this finding provided by Dr. Nelson, the jury sentenced Atkins to death.<sup>67</sup> After a second sentencing hearing due to a misleading verdict form, the jury rendered the same verdict.<sup>68</sup> With influence from the dramatic shift made in state legislation in

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57. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 307 n.1.

62. *Atkins*, 536 U.S. at 307 n.1.

63. *Id.* at 307.

64. *See id.*

65. *Id.* at 308.

66. *Id.* at 308–09.

67. *Atkins*, 536 U.S. at 309.

68. *Id.*

favor of protecting mentally retarded defendants that had occurred since the *Penry* decision, as well as the severe opinion of the dissenters, the Supreme Court of the United States granted certiorari as that *someday* mentioned in the *Penry* decision had finally arrived, and it was time to review the relationship between mentally retarded criminal offenders and the death penalty.<sup>69</sup>

C. *The Diagnostic and Statistical Manual of Mental Disorders*

While reviewing the facts of the case in order to reach a decision, the Court used two similar psychological definitions to clearly understand Dr. Nelson's diagnosis that Atkins was *mildly mentally retarded*.<sup>70</sup> While multiple sources for a definition exist, the Court chose to use the DSM-IV-TR and the similar definition of the American Association of Mental Retardation ("AAMR").<sup>71</sup> These definitions may differ in language, but offer the same conceptual information as to how to reach a diagnosis.<sup>72</sup> Specifically, the DSM is a diagnostic manual created by the American Psychiatric Association that classifies each type of mental disorder and provides diagnostic criteria to be used for a diagnosis.<sup>73</sup> The DSM is particularly important, as it is the manual used by mental health professionals to make a diagnosis for a patient.<sup>74</sup> Psychologists and psychiatrists—and their work—are important in the legal arena, as they serve as expert witnesses in cases where the defendant's mental health is called into question.<sup>75</sup>

In the United States, the DSM is the primary tool used for mental health professionals to make their diagnoses.<sup>76</sup> The DSM uses a multiaxial system, which assesses an individual on five different axes.<sup>77</sup> These axes each refer to a different area of information about that person, which helps the clinician in creating a comprehensive evaluation of the person.<sup>78</sup> This system also contributes to a convenient format that allows the universal

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69. *Id.* at 307; *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

70. *Atkins*, 536 U.S. at 308 & n.3.

71. *Id.* at 308 n.3.

72. Bonnie & Gustafson, *supra* note 2, at 819.

73. John A. Zervopoulos, *The Diagnostic and Statistical Manual of Mental Disorders (DSM): An Overview*, in 2 EXPERT WITNESS MANUAL 1, 3 (1999); AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at xxiii.

74. Zervopoulos, *supra* note 73, at 3.

75. *See id.* at 2.

76. *Id.* at 3.

77. AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at 27.

78. *Id.*

understanding of the diagnosis.<sup>79</sup> In addition to diagnosis, the DSM also serves as a tool to develop treatment plans and anticipate treatment outcomes.<sup>80</sup> DSM is so widely accepted that it is also used by the insurance industry to determine appropriate reimbursements for psychological treatments.<sup>81</sup>

As noted, psychologists and psychiatrists use the DSM in their clinical practices to make diagnoses and can serve as expert witnesses in death penalty cases involving potentially mentally retarded defendants.<sup>82</sup> The expert must assess the defendant as they would if the defendant individually sought their help in a private practice.<sup>83</sup> Diagnosis is particularly important for a mental health professional serving as an expert in a capital case as their diagnosis will be determinative of the defendant's fate; it is a life or death determination.<sup>84</sup> While it may not be a perfect forensic tool and was not specifically designed for legal use,<sup>85</sup> due to its importance and overwhelming use in the mental health field, the Court chose to refer to the DSM for information about the psychiatric diagnosis of mental retardation.<sup>86</sup> It has continued to be heavily relied upon for legal determinations that involve some sort of mental impairment or dysfunction.<sup>87</sup>

DSM-IV-TR, the edition reviewed by the Supreme Court of the United States in *Atkins*, does include a section in the introduction that cautions about forensic usage of the Manual.<sup>88</sup> It states “dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”<sup>89</sup> It could be argued that this warning is suggesting that mental health professionals should limit their conduct to their own field of expertise as the DSM is intended for

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79. *Id.*

80. Zervopoulos, *supra* note 73, at 4.

81. *Id.*

82. John Matthew Fabian et al., *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 403 (2011).

83. *See id.*

84. *Id.*

85. *See Hagstrom, supra* note 26, at 265.

86. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

87. Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 692 (2013).

88. *Atkins*, 536 U.S. at 308 n.3; AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at xxxii–xxxiii.

89. AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at xxxiii.

use of diagnosis in the mental health field and not for legal determinations.<sup>90</sup> The addition of legal information into the DSM would prove to be more problematic than helpful, which is why forensic additions have not been included in new editions of the Manual.<sup>91</sup> However, it is noted in the DSM that with proper awareness of the risks and limitations, the DSM should properly assist legal decision-makers in reaching their final conclusion.<sup>92</sup>

Despite the brief textual warning in the introduction that the DSM should not be used for forensic purposes, as information may be misrepresented, it is frequently used when law and psychology or psychiatry intersect.<sup>93</sup> “Courts, legislators, and government[al] agencies have relied on the DSM[] as a persuasive” tool when making decisions in cases that involve mental illness.<sup>94</sup> For example, some state and federal statutes make use of DSM definitions of mental illness or diagnostic criteria.<sup>95</sup> Some states make specific mention of the DSM while others just use the language found in it.<sup>96</sup> The DSM is cited over 5500 times in court opinions, including other death penalty cases.<sup>97</sup> Courts have also referred to the DSM with the use of highly respectful terms in several decisions.<sup>98</sup> It is clear that the DSM has played an important role in the legal world—through the development of legislation and decisions made in the courtroom—and it will continue to do so.<sup>99</sup>

### 1. Mental Retardation

As stated, the edition of the DSM that was current and in use during *Atkins* was the DSM-IV-TR, which is a textual revision of the fourth edition.<sup>100</sup> According to the DSM-IV-TR, mental retardation “is characterized by significantly subaverage intellectual functioning—an IQ of approximately [seventy] or below—with onset before age [eighteen] years

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90. *Id.*; Daniel W. Shuman, *The Diagnostic and Statistical Manual of Mental Disorders in the Courts*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 25, 26 (1989).

91. *See* Shuman, *supra* note 90, at 26–27; Ralph Slovenko, Editorial, *The DSM in Litigation and Legislation*, 39 J. AM. ACAD. PSYCHIATRY & L. 6, 6 (2011).

92. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at xxxiii.

93. Slovenko, *supra* note 91, at 6.

94. Hass, *supra* note 87, at 692.

95. Cia Bearden, Comment, *The Reality of the DSM in the Legal Arena: A Proposition for Curtailing Undesired Consequences of an Imperfect Tool*, 13 HOUS. J. HEALTH L. & POL’Y 79, 80 (2012).

96. *Id.* at 97–98.

97. Slovenko, *supra* note 91, at 6, 8.

98. Hass, *supra* note 87, at 692.

99. *See* Slovenko, *supra* note 91, at 11.

100. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002); AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at xxix.

and concurrent deficits or impairments in adaptive functioning.”<sup>101</sup> At the time of publication, the prevalence rate of mental retardation was estimated to be one percent of the population.<sup>102</sup> The estimated number of incarcerated offenders is two percent to twenty-five percent.<sup>103</sup> Between four percent and twenty percent of the offenders currently on death row are estimated to be mentally retarded; of the three thousand five hundred, this comes out to about one hundred forty to seven hundred people.<sup>104</sup> This is a significant number of people, which stresses why diagnosis is so important and will impact the implementation of the *Atkins* holding; it could result in pardons from the death penalty.<sup>105</sup>

The DSM-IV-TR defines the diagnostic features of mental retardation as including three necessary criterions.<sup>106</sup>

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: [C]ommunication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age [eighteen] years (Criterion C).<sup>107</sup>

Each of the three diagnostic criterions is equally as important; all are necessary for a person to receive a diagnosis of mental retardation and one cannot be omitted.<sup>108</sup> For example, even if an individual has an IQ score lower than seventy, a diagnosis cannot be made if there is no impairment in adaptive functioning.<sup>109</sup> Per Criterion B, adaptive functioning is defined as “how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.”<sup>110</sup> This serves as a protection to ensure that the person is not just a

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101. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 39.

102. *Id.* at 46.

103. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 86 (2003–2004).

104. *Id.*

105. *Id.* at 85–86.

106. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41.

107. *Id.*

108. *See id.* at 41–42, 47.

109. *Id.* at 42.

110. *Id.*

bad test-taker.<sup>111</sup> Adaptive functioning includes “self-direction, functioning academic skills, work, leisure, health, safety, personal hygiene, self-control, and aspects of unmanageable behavior” which are each taken into account when a determination for adaptive functioning is made.<sup>112</sup> Any third-party contacts need to be carefully and thoroughly questioned about the individual in order for an accurate evaluation of adaptive functioning to be made.<sup>113</sup> Assessments do exist, but this type of determination is not one that is easily assessed by a standardized test.<sup>114</sup>

The third and final prong, that is equally as important for diagnosis, is that mental retardation exists and will present itself in childhood.<sup>115</sup> Criterion C sets the specification that the person must show signs of cognitive impairment before the age of eighteen.<sup>116</sup> What this means is that a person with seemingly normal cognitive function cannot unexpectedly become mentally retarded as an adult.<sup>117</sup> This criterion is also in place to help clinicians with differential diagnosis; this allows them to distinguish between mental retardation and other intellectual deficits that can be acquired later in life due to a dramatic change such as brain trauma or disease.<sup>118</sup> Additionally, while a mentally retarded person can be taught certain skills that can help them function in society in a more normal way, they can never be fully cured with therapy; this is a chronic condition.<sup>119</sup> When Criterion C is evaluated along with the first two criteria, if a diagnosis of mental retardation is made, it can be sure that it is one that would reflect the person as a whole including their psychosocial and cognitive functioning.<sup>120</sup>

A diagnosis of mental retardation is further divided into four varying degrees of severity: Mild, moderate, severe, and profound.<sup>121</sup> The degree of severity that is most questioned in a legal setting, particularly in *Atkins* cases, is the lowest level—mild mental retardation—which is defined as having an

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111. JAMES R. EISENBERG, LAW, PSYCHOLOGY, AND DEATH PENALTY LITIGATION 113 (2004).

112. *Id.* at 113–14.

113. *Id.* at 113.

114. *See id.*; Bonnie & Gustafson, *supra* note 2, at 846–47.

115. Raines, *supra* note 39, at 176.

116. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41.

117. Raines, *supra* note 39, at 176.

118. Bonnie & Gustafson, *supra* note 2, at 854.

119. Raines, *supra* note 39, at 176.

120. EISENBERG, *supra* note 111, at 114; AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41.

121. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 39.

“IQ level [fifty to fifty-five] to approximately [seventy].”<sup>122</sup> Why is that? It is because this group is the closest or borderline to the level of normal cognitive functioning.<sup>123</sup> This group, mild mental retardation, is the largest group consisting of approximately eighty-five percent of those who have mental retardation.<sup>124</sup> They are described as having the “social and vocational skills adequate for minimum self-support.”<sup>125</sup> Those with this low degree of severity should live successfully in a community setting either on their own or under supervision.<sup>126</sup>

## 2. Intelligence Quotient

For Criterion A of a mental retardation diagnosis, general intellectual functioning is measured and classified by an IQ score.<sup>127</sup> In order to assess subaverage intellectual functioning, it is necessary to implement an intelligence test.<sup>128</sup> Several IQ tests exist and are used in psychometric testing, so a single individual may have multiple true IQ scores based upon their performance on each test they have taken.<sup>129</sup> The standard and most frequently used tests are the Wechsler Adult Intelligence Test, 3rd edition (“WAIS-III”) and the Stanford-Binet.<sup>130</sup> These assessments are designed to measure a person’s general intelligence score by assessing a broad range of skills that produce a final numerical score that correlates to his or her level of mental functioning.<sup>131</sup>

This score, as it is assessed through the psychometric measures, is an objective measure of a person’s cognitive performance.<sup>132</sup> The person’s raw

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122. *Id.* at 42; see Bonnie & Gustafson, *supra* note 2, at 825; Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009).

123. See Tobolowsky, *supra* note 103, at 88.

124. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 43.

125. *Id.*

126. *Id.*

127. *Id.* at 41.

128. David L. Rumley, Comment, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY’S L.J. 1299, 1315–17 (1993); Sharp, *supra* note 49, at 231.

129. Gresham, *supra* note 122, at 93.

130. Bonnie & Gustafson, *supra* note 2, at 826; Alexis Krulish Dowling, Comment, *Post-Atkins Problems with Enforcing the Supreme Court’s Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 798 (2003); Penny J. White, Symposium, *Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 TENN. L. REV. 685, 692 (2009).

131. Dowling, *supra* note 130, at 798; see also White, *supra* note 130, at 692–93.

132. See Tobolowsky, *supra* note 103, at 95.

score is compared to a norm that is predetermined to reach his or her result IQ score.<sup>133</sup> It is important for the courts to be vigilant as to which test was administered to the defendant and how that particular test is to be interpreted, as norms for each assessment differ.<sup>134</sup> The result—the IQ score—and the person’s performance on these tests are interpreted to determine if a defendant has a mental deficiency and, if so, what degree of mental retardation.<sup>135</sup> In general, an IQ score of seventy or below must be obtained in order to receive a diagnosis of mental retardation; the score serves as an essential component in the defendant’s diagnosis.<sup>136</sup> This score of seventy is “two standard deviations below the mean” score of one hundred.<sup>137</sup> However, it should be noted that in IQ assessment, “there is a measurement error of approximately [five] points” depending on the testing instrument used; due to this, mental retardation can also be found in individuals with IQ scores from seventy to seventy-five that show the appropriate level of adaptive behavior.<sup>138</sup>

a. *Potential Issues with IQ Scores*

The IQ test, while it appears to be a convenient and relatively simple tool, is deceiving, as it has been found to have flaws.<sup>139</sup> In fact, it is often referred to as an imperfect tool.<sup>140</sup> There can be a discrepancy between what the court believes an intelligence test measures and what it actually does measure; the court and legal professionals are not trained in the comprehension of psychometric measures.<sup>141</sup> While these potential issues are important to consider, reliance on the IQ score remains high, as it remains heavily used and relied upon.<sup>142</sup>

One believed flaw of IQ tests is the Flynn Effect—the general upward trend of IQ scores—which causes a need for the test norms to be updated and recalculated so that the score can continue to provide an accurate reflection of the actual IQ.<sup>143</sup> James Flynn states that the mean IQ

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133. Dowling, *supra* note 130, at 798–99; Fabian et al., *supra* note 82, at 414; *see also* Gresham, *supra* note 122, at 93.

134. Bonnie & Gustafson, *supra* note 2, at 825.

135. *See* Gresham, *supra* note 122, at 92.

136. Clark, *supra* note 7, at 137; Rumley, *supra* note 128, at 1317.

137. Sharp, *supra* note 49 at 231.

138. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41–42.

139. Rumley, *supra* note 128, at 1329.

140. *Id.* at 1333–34.

141. *See* Gresham, *supra* note 122, at 96.

142. Tobolowsky, *supra* note 103, at 95.

143. Gresham, *supra* note 122, at 93.



of Americans increases three points per decade and 0.3 points per year.<sup>144</sup> Flynn also believes that intelligence of a single individual does not change, but the norm changes over time; it could be said that the Flynn Effect has no impact on death penalty cases as it only concerns norms.<sup>145</sup> However, the problem arises when the IQ assessment used produces scores that rely entirely on comparison to the norms for their meaning.<sup>146</sup> It has also been found that individuals may score differently on an intelligence test depending on which point in the norming cycle the person took the assessment.<sup>147</sup> For example, a person's performance may result in a score in the mentally retarded range in the beginning of the cycle of a certain assessment and in a more borderline range at the end of the cycle of that same assessment.<sup>148</sup>

The other important discrepancy with IQ assessment scores is *practice effects*, which is the theory that those with cognitive dysfunction are often administered multiple tests throughout their lifetime and that causes inflated IQ scores.<sup>149</sup> Due to this, it is known that practice effects occur, and scores can increase due to the repeated administration of the measures; a useful rule of thumb is to only use each assessment once a year with an individual to reduce this effect.<sup>150</sup> It is important to note that the smaller the time interval between administrations of the test, the larger the practice effect can be.<sup>151</sup> The specific outcome of practice effects can also vary; factors that can alter the performance include "the person's age, their learning ability and the time interval between testing."<sup>152</sup> This effect becomes problematic when a person shows an overall increase in their IQ score, but continues to display the same deficits in their adaptive functioning.<sup>153</sup>

Additionally, race and socioeconomic background have also been found to alter an individual's IQ score.<sup>154</sup> Another possible influence on IQ score is that a defendant may be able to fake their mental retardation by purposely doing poorly on an IQ test; the faking of a mental illness is known as malingering.<sup>155</sup> However, even if attempted, the faking of a low IQ score is difficult to do, and the IQ score is not the only consideration in a

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144. *Id.*

145. *Id.* at 94.

146. *Id.*

147. EISENBERG, *supra* note 111, at 113.

148. *Id.*

149. Gresham, *supra* note 122, at 94–95.

150. Bonnie & Gustafson, *supra* note 2, at 839; Gresham, *supra* note 122, at

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151. Gresham, *supra* note 122, at 95.

152. Bonnie & Gustafson, *supra* note 2, at 839.

153. *Id.* at 840.

154. Sharp, *supra* note 49, at 243.

155. *Id.* at 245.

diagnosis.<sup>156</sup> Despite the possibility that there may be some flaws in the IQ testing system, the IQ score has remained an important factor in determining the intellectual functioning of a person under the diagnostic criteria DSM-IV as it is a more objective measure used by the mental health professional to assess a person's overall cognitive functioning; it has been continually used in courts as well.<sup>157</sup> Between adaptive functioning and IQ level, the cognitive IQ tends to be the more stable of the two.<sup>158</sup> However, some believe the IQ score should not be the sole measure used to determine mental retardation, and thus may not be suited for a legal use.<sup>159</sup>

### 3. Adaptive Functioning

Criterion B describes a more subjective way of assessing the intellectual functioning of an individual by means of their adaptive functioning.<sup>160</sup> This element, also referred to as adaptive behavior, includes the mental health professional's assessment of how much service or support that a mentally retarded person needs.<sup>161</sup> These limitations would affect the individual's daily life as well as any stressors in his or her daily life or immediate environment.<sup>162</sup> This measure is looking to "assess deficits in the *performance* of adaptive behavioral skills, even more than in the *acquisition* of such skills."<sup>163</sup> The reason that this measure is so subjective is that mental health professionals must rely upon interviews and other information collected from third parties to make their assessment.<sup>164</sup> Other records, such as those from school, medical professionals, employment, etc., are also consulted, but those are also the result of a third party's opinion or interpretation.<sup>165</sup> In addition, over two hundred instruments are available to be used as a standardized assessment of adaptive behavior, but these assessments face the same level of scrutiny as IQ assessments; the large number of available tests shows the level of uncertainty as to what exactly is to be tested to make the determination.<sup>166</sup> Overall, this assessment is

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156. *Id.* at 246–47.

157. *See* Gresham, *supra* note 122, at 93.

158. AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at 42.

159. *See* Rumley, *supra* note 128, at 1333; Sharp, *supra* note 49, at 243.

160. AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at 41–42; *see also* Bonnie & Gustafson, *supra* note 2, at 849; White, *supra* note 130, at 699.

161. White, *supra* note 130, at 699.

162. *Id.* at 700.

163. Tobolowsky, *supra* note 103, at 96–97.

164. White, *supra* note 130, at 700.

165. *Id.*

166. Bonnie & Gustafson, *supra* note 2, at 846; *see* White, *supra* note 130, at 700.

particularly important for individuals with mild mental retardation, as it may be the determining factor in diagnosis when the IQ score is close to borderline range.<sup>167</sup>

#### D. *The Atkins Decision*

The Court, by making use of a clinical definition of mental retardation, “put professional standards of measurement, assessment, and diagnosis in the center of *Atkins* adjudications.”<sup>168</sup> The decision in *Atkins* creates law that is highly dependent on psychological determinations.<sup>169</sup> With the use of the clinical definition of mental retardation and psychometric measure of IQ score, the Court concluded that the death penalty is not an appropriate punishment for a criminal defendant that is mentally retarded.<sup>170</sup> The Court reasoned that the mentally retarded defendant was “categorically less culpable than the average criminal.”<sup>171</sup> The public consensus from the consistency in direction of change shown by the states was also a contributing factor to the decision.<sup>172</sup> The Court noted that it was “not so much the number of these states that is significant, but the consistency of the direction of change.”<sup>173</sup> While looking at this, the Court found that mentally retarded defendants should be punished in some way, but the death sentence is not appropriate due to their lower level of personal culpability.<sup>174</sup>

The Court also held that execution of a mentally retarded person failed to meet either of the two goals of capital punishment, retribution or deterrence.<sup>175</sup> These societal functions that the death penalty is supposed to accomplish are not obtained with mentally retarded defendants.<sup>176</sup> The goal of retribution cannot be met with those that have mental impairments as they are held to have a lower level of culpability.<sup>177</sup> Therefore, in order “to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.”<sup>178</sup> Deterrence is not met either due to

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167. Bonnie & Gustafson, *supra* note 2, at 847.  
 168. *Id.* at 825.  
 169. *Id.* at 813.  
 170. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); Dillard, *supra* note 50, at 980.  
 171. *Atkins*, 536 U.S. at 316; *see Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980).  
 172. *Atkins*, 536 U.S. at 315; Hall, *supra* note 2, at 370.  
 173. *Atkins*, 536 U.S. at 315.  
 174. Hagstrom, *supra* note 26, at 250.  
 175. *Atkins*, 536 U.S. at 319–20; Sharp, *supra* note 49, at 234.  
 176. Clark, *supra* note 7, at 126.  
 177. Hall, *supra* note 2, at 376–77.  
 178. *Atkins*, 536 U.S. at 319.

the fact that the Court has held that a defendant with mental impairment cannot make the appropriate connection between his or her impulsive conduct—i.e. murder of another person—with the future punishment of death due to the imposition of the death penalty.<sup>179</sup> The inability to further these two goals of the death penalty contributed to the Court's decision to provide a categorical exemption.<sup>180</sup>

A final consideration made by the Court was that mentally retarded defendants face a higher possibility of wrongful execution.<sup>181</sup> By nature of their condition, mentally retarded defendants are at a disadvantage when it comes to their defense.<sup>182</sup> Mentally retarded defendants serve as poor witnesses, do not serve as much help to their defense counsel, can get confused easily, can appear to feel no remorse, and suffer other seemingly negative results of their diminished capacity.<sup>183</sup> In addition, mentally retarded defendants have a much larger risk of making a false confession than defendants with standard intellectual functioning.<sup>184</sup> All of these factors were considered and contributed to the Court's decision that mentally retarded defendants should belong to a categorical exemption and should not face the death penalty.<sup>185</sup>

This decision is a unique one, as it expresses a constitutional rule that is entirely dependent on a definition and diagnostic criteria from clinical psychology.<sup>186</sup> In this case, the Court established “a per se rule exempting all persons with mental retardation from the death penalty based on diagnosis alone.”<sup>187</sup> The exemption includes all people with the diagnosis regardless of what level of severity they are found to have.<sup>188</sup> This makes the important question to be answered in these types of cases to be whether or not the defendant is mentally retarded; this is something that the Court disagreed on how to determine and left this decision to the states.<sup>189</sup> The class that will prove to be the most difficult to protect and have the most controversy is the mildly mentally retarded as they come closest to the normal border range.<sup>190</sup>

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179. Dillard, *supra* note 50, at 971.

180. *Atkins*, 536 U.S. at 321; Sharp, *supra* note 49, at 234.

181. *Atkins*, 536 U.S. at 321; Hagstrom, *supra* note 26, at 252.

182. Hagstrom, *supra* note 26, at 252.

183. *Atkins*, 536 U.S. at 320–21; Hagstrom, *supra* note 26, at 252.

184. Hagstrom, *supra* note 26, at 252.

185. *Id.*

186. Bonnie & Gustafson, *supra* note 2, at 813.

187. *Id.* at 814.

188. *Id.* at 823.

189. *Id.* at 815–16; Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 *FORDHAM L. REV.* 465, 479–80 (2007).

190. See Gresham, *supra* note 122, at 92; Tobolowsky, *supra* note 103, at 88.

However, even with this decision, which essentially overrules *Penry*, the death penalty remains an appropriate punishment “for a smaller, more culpable class of defendants.”<sup>191</sup>

Justice Scalia makes an additional point about the purpose of the death penalty in his dissent.<sup>192</sup> An additional purpose of the death penalty is to eliminate dangerous offenders; by doing this, the future crimes that they may commit are effectively prevented.<sup>193</sup> It is quite clear that this goal is reached by the death penalty, as these offenders would no longer commit any crimes.<sup>194</sup> This, however, is a purpose that would be properly served regardless of how high or low the offender’s IQ score is.<sup>195</sup>

### 1. Determinations Left to the States

In making its decision, the Court neglected to implement a procedure or designate a specific definition to be applied to determine if a defendant is mentally retarded.<sup>196</sup> By doing this, the Court left state lawmakers and officials, and in a way, forensic psychologists or psychiatrists, the task of determining how exactly to enact and properly implement their decision.<sup>197</sup> The Court established some guidance by providing two similar definitions in the cases that implement the same three main criteria for a diagnosis.<sup>198</sup> It could also be argued that the Court intended for the states to adopt one, or a hybrid form of the two definitions cited in the decision, due to their similarities.<sup>199</sup> Its main determination was to justify the exemption of mentally retarded defendants from the death penalty; the exact way to enforce the exemption was not determined.<sup>200</sup> Instead, the Court left this task up to the states, as it had done in *Ford v. Wainwright*<sup>201</sup> for the determination of competency, and it became the task of the states to develop the

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191. White, *supra* note 130, at 687; *see also* Shin, *supra* note 189, at 481.

192. Elmore, *supra* note 45, at 1330.

193. *Id.*

194. *Id.*

195. *Id.*

196. Dillard, *supra* note 50, at 969.

197. Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following Atkins v. Virginia*, 11 WIDENER L. REV. 121, 121 (2004).

198. Bonnie & Gustafson, *supra* note 2, at 812–13, 819.

199. *Id.* at 818–19.

200. Dillard, *supra* note 50, at 979.

201. 477 U.S. 399 (1986). “[T]he Eighth Amendment prohibits states from carrying out the death penalty on defendants who are insane. . . . However, the Court left it to the individual states to determine the definition of competence for execution and the procedures they should use to assess whether a prisoner meets the standard [for] insanity.” Shin, *supra* note 189, at 474.

appropriate means of enforcement.<sup>202</sup> Many states have chosen to use the DSM-IV-TR as their guidelines for making the determination of whether or not a defendant is mentally retarded.<sup>203</sup> If a state were to fail to exclude the mentally retarded from facing the death penalty, that state would be in direct violation of the Eighth Amendment.<sup>204</sup> Despite this, after the decision was made, state courts that did not agree with the decision could potentially use this freedom from the Court and lack of a uniform standard as a way to evade the *Atkins* decision.<sup>205</sup>

The possibility of other complications arose for all states that complied; for example, the differences and discrepancies between the states allow for the possibility that one individual “could be found [to be] mentally retarded in one state, but not . . . another.”<sup>206</sup> It depends on the exact language that was chosen by the state to be enacted in its legislation to determine what constitutes mental retardation.<sup>207</sup> Even without giving a direct definition for mental retardation, some argue that the Court should have advised that the states not place as much weight on IQ test scores as they do.<sup>208</sup> However, many states seem to agree that the IQ score cutoff is a particularly important factor to include in their legislation.<sup>209</sup> There are significant differences amongst the states; some are strict on the IQ score requirement, while others are more vague by only demanding subaverage intellectual functioning.<sup>210</sup>

In addition to a definition, the Court also left it up to the states to determine the specifics of the procedure, including determining who would be the fact finder, at which stage the mental functioning of the defendant should be assessed, and what the suitable burden of proof would be.<sup>211</sup> For example, a majority of states with judicial procedures in place have chosen to make this determination prior to the start of trial.<sup>212</sup> Some states give the task of determining mental retardation to a jury, while others give it to a trial judge.<sup>213</sup> By neglecting to designate a specific definition and procedure to

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202. *Ford*, 477 U.S. at 416–17; Dillard, *supra* note 50, at 978.

203. Clark, *supra* note 7, at 137.

204. White, *supra* note 130, at 688.

205. See John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 626 (2009).

206. Hagstrom, *supra* note 26, at 260.

207. See *id.*

208. *Id.* at 262–63, 265.

209. *Id.* at 265.

210. Paul S. Appelbaum, *Mental Retardation and the Death Penalty: After Atkins*, 60 PSYCHIATRIC SERVICES 1295, 1296 (2009).

211. Blume et al., *supra* note 205, at 626–27.

212. Tobolowsky, *supra* note 103, at 114.

213. Dillard, *supra* note 50, at 966.

follow, the Court allows for considerable differences to exist from state to state.<sup>214</sup> These inconsistencies and differences in procedure and definition could cause contradictory rulings on whether or not a defendant has mental retardation.<sup>215</sup>

## 2. Other Issues in Applying the Decision

Several other points of ambiguity and perplexity came to light with the *Atkins* decision, such as the fact that the Court created a categorical exemption in the *Atkins* case.<sup>216</sup> The use of this general categorization of exemption for those with mental retardation eliminates the entire idea of individual sentencing in our legal system as far as this specific group of individuals is concerned; it separates those with mental retardation from everyone else.<sup>217</sup> Beyond the separation between those with normal cognitive functioning and those with impairments, the categorization treats all those with mental retardation the same without any sort of distinction made for the varying degrees of mental retardation.<sup>218</sup> This creates a level of equality amongst those with the disorder while diagnosis makes a differentiation.<sup>219</sup>

In neglecting to provide a uniform standard for mental retardation, there is also an issue with IQ assessment.<sup>220</sup> Multiple assessment tools exist to make an assessment, but each has their own set of norms.<sup>221</sup> The lack of uniform testing requirements may be highly problematic.<sup>222</sup> Without a set rule as to which test to use, psychologists must be ethical in their determination of which test to administer; they must administer a current edition of an assessment that they have the appropriate level of proficiency to administer.<sup>223</sup> The presence of a uniform rule as to which test to use would eliminate some of the possible errors and ethical violations that can potentially occur.<sup>224</sup> The uniform rule would have to be updated frequently as these tests are often revised and the courts would have to use a current test.<sup>225</sup> However, on the other side, the benefits of uniformity could be

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214. Hall, *supra* note 2, at 385.  
 215. Hagstrom, *supra* note 26, at 260.  
 216. *Id.* at 250; *see also* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).  
 217. Elmore, *supra* note 45, at 1337.  
 218. *Id.*  
 219. *See id.*  
 220. Dowling, *supra* note 130, at 807.  
 221. *See id.* at 799–800.  
 222. *See id.* at 807.  
 223. *See id.* at 808.  
 224. *See id.* at 810.  
 225. Bonnie & Gustafson, *supra* note 2, at 828.

outweighed by other disadvantages such as individualized selection for the defendant and that the clinician should administer the test they feel most competent using.<sup>226</sup>

Another important point is potential ethical dilemmas that will be faced by the mental health professionals who will be assessing the specific defendant.<sup>227</sup> One of the main issues that will be faced by any forensic psychologist is that they have the potential to do harm to their client; psychologists, under their ethics code, are not to do any harm to their clients.<sup>228</sup> Additionally, these psychologists must be sure to go into their assessment of the defendant without any sort of preconceived thoughts about the crime on trial or what the outcome should be.<sup>229</sup> Psychologists have to be mindful of any possible factor that may cause an unfair or incorrect result on the IQ assessment and properly account for these potential issues in their determination and assessment.<sup>230</sup> The psychologists in these cases are faced with several potential ethical issues that they must avoid while trying to generate the most honest and truthful assessment that they can.<sup>231</sup>

### 3. Cases Since *Atkins*

In the time since the *Atkins* decision, many courts have encountered cases with mentally retarded defendants.<sup>232</sup> However, the floodgates did not open for this type of litigation as was feared in the dissent by Justice Scalia; there has not been a complete overflow of claims by criminal offenders claiming to have mental retardation.<sup>233</sup> Research shows that of the claims made that have lost, most failed to prove either subaverage intellectual functioning or significant limitations in adaptive functioning.<sup>234</sup> Data also shows that the *Atkins* decision has not been applied to the states in a uniform way as could be expected from the differing legislation created by each state.<sup>235</sup>

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226. *Id.*

227. Knauss & Kutinsky, *supra* note 197, at 124.

228. *Id.*

229. *Id.* at 125.

230. *Id.* at 128.

231. *See id.* at 121–23.

232. *E.g.*, Jackson v. State, 963 So. 2d 150, 152 (Ala. Crim. App. 2006); *see also* Blume et al., *supra* note 205, at 625, 628, 630.

233. *See Atkins v. Virginia*, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting); Blume et al., *supra* note 205, at 639.

234. *See* Blume et al., *supra* note 205, at 629–30.

235. *Id.* at 629, 639; Elizabeth Dilts, *Lawyers Worry New Measure of Mental Retardation Could Prompt More Executions*, REUTERS LEGAL, May 13, 2013, available at <http://archive.is/ToBPv>.



In regard to intellectual functioning, or analysis of the IQ score, prior clinical research suggests that this should be only “a gateway to a rigorous assessment of adaptive functioning.”<sup>236</sup> This is because it is believed that the employment of a strict cut-off of a score of seventy may wrongly exclude those who deserve protection under *Atkins*.<sup>237</sup> In an analysis of multiple jurisdictions with various IQ cutoff points, it was found that over sixty percent of those who successfully prove intellectual impairment had no reported IQ scores over the score of seventy; it is also noted that fifteen percent of defendants that have been successful with their *Atkins* claim have had IQ scores that exceed seventy.<sup>238</sup> A small number of successful *Atkins* claims involve defendants that have never scored below a seventy on any intellectual assessment.<sup>239</sup> However, there have also been cases with less success that focus on IQ score; one example is a case in Texas, where a defendant met the requirement of having an IQ below seventy, but was not exempted from capital punishment.<sup>240</sup>

There have been almost one hundred cases since the ruling in *Atkins* in which defendants with death penalty sentences have been reduced when the courts found that they met the necessary requirements to prove they were mentally retarded.<sup>241</sup> This is an impressive statistic considering that between 1976 and 2002, prior to *Atkins*, there were at least forty-one defendants executed who would have been found to be mentally retarded and could have been exempted.<sup>242</sup> However, it seems less impressive when it is stated that only a quarter of the inmates that have claimed to be mentally retarded have received a stay of execution since the *Atkins* holding.<sup>243</sup> Data shows that there have been varying levels of success for proving adaptive deficits; depending on which skill set was chosen as the definition for mental retardation, which includes several.<sup>244</sup> There have also been very few cases that lose solely on the third prong, which requires onset before the age of

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236. Blume et al., *supra* note 205, at 631.

237. *Id.* at 631–32.

238. *Id.* at 632.

239. *Id.*

240. Dilts, *supra* note 235.

241. John Blume, *Sentence Reversals in Intellectual Disability Cases: Defendants Whose Death Sentences Have Been Reduced Because of a Finding of “Mental Retardation” Since Atkins v. Virginia (2002)*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases> (last updated July 19, 2012).

242. *List of Defendants with Mental Retardation Executed in the United States: 1976–2002*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states> (last visited Feb. 16, 2014).

243. Dilts, *supra* note 235.

244. Blume et al., *supra* note 205, at 634.

eighteen.<sup>245</sup> Together, these results show the inconsistency of the implementation of *Atkins*.<sup>246</sup>

### III. THE DSM-5

The latest edition of the Manual was released in late May of 2013.<sup>247</sup> This edition has been a work in progress for fourteen years as its development began immediately following the release of DSM-IV.<sup>248</sup> DSM-5 was developed in hope of addressing concerns that had existed with the prior editions.<sup>249</sup> It was also created in order to match up more closely with the World Health Organization (“WHO”) and their International Classification of Diseases (“ICD”) as well as other important leading health organizations; this will provide for more uniform diagnoses in the health system.<sup>250</sup> The newest edition of the Manual features several differences compared to prior editions, such as a different organizational layout and a removal of the prior multi-axial system.<sup>251</sup> In this edition, all mental disorders are considered to be on a single axis and are therefore, given equal weight; prior editions had five axes of unequal weight.<sup>252</sup> It is also the first edition not to make use of traditional Roman Numerals because this edition is intended to be a *living document*.<sup>253</sup> The believed explanation for this change to Arabic Numeration is that when new evidence surfaces or changes occur, the Manual can be changed online which will produce constant revisions, which will produce more editions labeled with a decimal.<sup>254</sup> That is the hypothesis as to why the decision was made to use the regular numerical display for this edition.<sup>255</sup> Each change and revision was made

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245. *Id.* at 636.

246. *Id.* at 639.

247. *Timeline*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/about/Pages/Timeline.aspx> (last visited Feb. 16, 2014).

248. Hass, *supra* note 87, at 699; Darrel A. Regier et al., Commentary, *The Conceptual Development of DSM-V*, 166 AM. J. PSYCHIATRY 645, 646 (2009); *Timeline*, *supra* note 247.

249. Regier et al., *supra* note 248, at 646.

250. Regier et al., *supra* note 248, at 647; Luis Salvador-Carulla et al., *Intellectual Developmental Disorders: Towards a New Name, Definition and Framework for “Mental Retardation/Intellectual Disability” in ICD-11*, 10 WORLD PSYCHIATRY 175, 175 (2011); *Intellectual Disability*, *supra* note 9.

251. Jerome C. Wakefield, *DSM-5: An Overview of Changes and Controversies*, 41 CLINICAL SOC. WORK J. 139, 140 (2013); *Intellectual Disability*, *supra* note 9.

252. Wakefield, *supra* note 251, at 142; *Intellectual Disability*, *supra* note 9.

253. Wakefield, *supra* note 251, at 140.

254. *Id.*

255. *Id.*

carefully to improve the Manual and provide more effective treatment and services.<sup>256</sup>

A. *Intellectual Disability (Intellectual Developmental Disorder)*

The American Psychiatric Association states that “[t]he significant changes [to intellectual disability] address what the disorder is called, its impact on a person’s functioning, and criteria improvements to encourage more comprehensive patient assessment.”<sup>257</sup> In DSM-5, the first and most noticeable difference to mental retardation is the name change; mental retardation is now referred to as intellectual disability (intellectual developmental disorder).<sup>258</sup> “[T]he parenthetical name . . . is included in the text to reflect deficits in cognitive capacity beginning in the developmental period.”<sup>259</sup> This change occurred for reasons including “policy, administrative, and legislative purposes.”<sup>260</sup> The new terms were carefully selected to be widely used and understood<sup>261</sup> as of when this name was determined.<sup>262</sup> The phrase *intellectual disability* is one that is commonly used in the medical, educational, and other professional fields.<sup>263</sup> This name change will allow for a more universal understanding of what exactly the disability is.<sup>264</sup>

In addition to the name change, the fifth edition emphasizes adaptive functioning of the individual as opposed to the more heavy reliance on the IQ score that is seen in DSM-IV-TR.<sup>265</sup>

DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone. By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person’s overall

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256. *Intellectual Disability*, *supra* note 9.

257. *Id.*

258. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33; *Intellectual Disability*, *supra* note 9.

259. *Intellectual Disability*, *supra* note 9.

260. Salvador-Carulla et al., *supra* note 250, at 175.

261. *Id.* at 176–77.

262. *Id.* at 177.

263. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33.

264. *See id.*

265. Wakefield, *supra* note 251, at 143.

ability, without adequately considering functioning levels. This is especially important in forensic cases.<sup>266</sup>

Furthermore, the specification that the disability must be present prior to the age of eighteen is removed and replaced with a more generalized categorization of beginning in the developmental stage.<sup>267</sup> This edition does have some consistency with the prior edition as it states that the prevalence rate of intellectual disability remains at one percent of the population<sup>268</sup> and still makes use of the four specifications for the degrees of intellectual disability: Mild, moderate, severe, and profound.<sup>269</sup> However, these degrees of severity are now “defined on the basis of adaptive function[], and not IQ scores” as it is the level of adaptive functioning that determines the level of support that will be required for each level of severity.<sup>270</sup>

### 1. Diagnostic Features

DSM-5 defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.”<sup>271</sup> In order to receive this diagnosis, there are three criteria that must be met by the individual, which was also true in the prior edition.<sup>272</sup> In this edition, the diagnostic features of intellectual disability are:

The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual’s age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.<sup>273</sup>

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266. *Intellectual Disability*, *supra* note 9.

267. *Compare* AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41, *with* AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 38.

268. *Compare* AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 46, *with* AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 38.

269. *Compare* AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 42, *with* AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33.

270. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33.

271. *Id.*

272. *Id.*; AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at 41.

273. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 37.

In regard to Criterion A, this refers to intellectual functioning.<sup>274</sup> To meet this, there must be “[d]eficits in intellectual functions . . . confirmed both by clinical assessment and individualized, standardized intelligence testing.”<sup>275</sup> This includes things such as abstract thinking, practical understanding, planning, and problem solving.<sup>276</sup> IQ scores are used to determine part of this and are only approximations of the individual’s intellectual functioning.<sup>277</sup> Clinical judgment should always be used when interpreting the results of an IQ assessment to determine the level of intellectual function.<sup>278</sup>

Criterion B assesses “[d]eficits in adaptive functioning that result in [the] failure to meet developmental and sociocultural standards for personal independence and social responsibility.”<sup>279</sup> Adaptive functioning is assessed in two ways; it is done with both clinical evaluations as well as with the use of individualized psychometric measures.<sup>280</sup> “Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life . . . .”<sup>281</sup> There are three domains that are assessed by this criterion: Conceptual, social, and practical.<sup>282</sup>

The *conceptual—academic—domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.<sup>283</sup>

This criterion is met when at least *one* of the domains of adaptive functioning is sufficiently impaired.<sup>284</sup> Sufficient impairment is when the person needs continual support in order to perform that function adequately in at least one

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274. *Id.*  
 275. *Id.* at 33.  
 276. *Id.* at 37.  
 277. *Id.*  
 278. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 37.  
 279. *Id.* at 33.  
 280. *Id.* at 37.  
 281. *Id.* at 33.  
 282. *Id.* at 37.  
 283. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 37.  
 284. *Id.* at 38.

life setting.<sup>285</sup> Additionally, these adaptive functioning deficits must be directly related to the intellectual deficit assessed for Criterion A.<sup>286</sup>

The final necessity, Criterion C, is that “[o]nset of intellectual and adaptive deficits [is] during the developmental period.”<sup>287</sup> Specifically, the phrase *developmental period* refers to either childhood or adolescence; there is no specific numerical age assigned to this period of time.<sup>288</sup> The removal of the cut-off age of eighteen is a significant change as this new term allows for more subjective discretion.<sup>289</sup> The DSM-5 states that the time of onset may vary from person to person as it is dependent upon the specific and individualized level of brain dysfunction.<sup>290</sup> In order to make a proper diagnosis, Criterion C, as well as both Criterion A and B, must be met by the individual either within their specific history or past presentations or their current presentation; in other words, all three must be met in order for an individual to receive this diagnosis.<sup>291</sup> The intended purpose of all of these revisions was to “help clinicians develop a fuller, more accurate picture of patients, a critical step in providing them with” treatment personally tailored to each specific individual which will make it as effective as possible.<sup>292</sup>

#### B. *Cautionary Statement for Forensic Use*

In its first few pages, the DSM-5 offers a cautionary statement towards its use in forensic settings;<sup>293</sup> this warning receives much more emphasis compared to prior editions as it receives its own full page and separate heading.<sup>294</sup> It warns that it has been designed to assist mental health clinicians in their work such as with assessments, diagnosis of patients, and treatment plans.<sup>295</sup> The warning stresses that the definition in this edition was not developed to meet the needs of legal professionals.<sup>296</sup> However, the statement also states that if used appropriately, the DSM-5 can serve as a useful tool to assist those in the legal profession to make necessary decisions by providing the necessary information for a legal decision maker to

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285. *Id.*

286. *Id.*

287. *Id.* at 33.

288. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 38.

289. *See id.*

290. *Id.*

291. *Id.*

292. *Intellectual Disability*, *supra* note 9.

293. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 25.

294. *Compare* AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at xxxvii, with AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 25.

295. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 25.

296. *Id.*

understand the specific characteristics of a certain mental disorder.<sup>297</sup> An important point, particularly when assessing mental retardation, is that the DSM-5 provides “diagnostic information about the longitudinal course [which] may improve decision making when the legal issue concerns [the] individual’s mental functioning at a past or future point in time.”<sup>298</sup>

However, as with prior editions, this edition does stress that the information within its pages poses a risk for misuse or misunderstanding.<sup>299</sup> It is noted that there is an imperfect fit between the DSM-5 information for a clinical diagnosis and “the questions of ultimate concern to the law.”<sup>300</sup> It also stresses the importance of only trained, mental health professionals using the Manual for the diagnosis of mental disorders.<sup>301</sup> Finally, the warning concludes that while the DSM-5 could be a helpful tool in the legal field when used appropriately, it is important to note that the meeting of all criteria for a certain disorder does not demonstrate the person’s behavior in the particular moment in question.<sup>302</sup>

#### IV. IMPLICATIONS OF THESE CHANGES

As the DSM-5 has just been released, the direct result of the changes remains to be seen, but it is inevitable that there will be ramifications regarding the nation’s categorical ban of defendants with intellectual disability from the death penalty.<sup>303</sup> The now outdated DSM-IV-TR was used as a guideline for many states when they created their legislation regarding capital punishment for offenders with intellectual disability.<sup>304</sup> As mental retardation was revised to intellectual disability and the diagnostic criteria has been revised, discrepancies and issues are likely to surface over time in regard to the exact definition of intellectual disability for diagnosis.<sup>305</sup> It will be important to deal with any issues quickly as this determination could mean the difference between life and death for criminal defendants.<sup>306</sup> The issues that will arise will be the direct result of the varying procedures and definitions implemented by the each state’s legislation at the result of the

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297. *Id.*

298. *Id.*

299. *See* AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at xxxvii; AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 25.

300. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 25.

301. *Id.*

302. *Id.*

303. *See id.* at 33; Dilts, *supra* note 235; Hass, *supra* note 87, at 684.

304. AM. PSYCHIATRIC ASS’N, DSM-IV-TR, *supra* note 5, at xxiii, 39; Clark, *supra* note 7, at 137.

305. Appelbaum, *supra* note 210, at 1296.

306. *Id.*

*Atkins* case and definition and diagnostic criteria for the psychological field in the DSM-5.<sup>307</sup> The importance and use of the DSM in fields outside of psychology is often overlooked, as are the implications of revisions made to the Manual.<sup>308</sup>

The IQ score is highly emphasized in many state definitions, but has been removed from the diagnostic criteria in the DSM-5.<sup>309</sup> It can easily be understood why it is hypothesized that this will cause confusion; a defendant may meet the criterion for intellectual disability by an expert witness, but may not meet the legislative standards for that state.<sup>310</sup> The removal of the focus on the objective assessment of an IQ score will inevitably cause trouble in the courtroom as it “has traditionally been at the core of diagnosing” intellectual disability.<sup>311</sup> The focus for judges, attorneys, and psychologists tends to remain on the IQ score.<sup>312</sup> Even with the possible negative effects, such as the Flynn Effect, the IQ score earned an important spot in many state definitions.<sup>313</sup> Variation did exist in the exact cut-off IQ score used by states.<sup>314</sup> For example, several states require an IQ below sixty-five while others chose the traditional cut-off of seventy; however, there are also states that chose not to identify a minimum IQ score in their legislation.<sup>315</sup> While it has been established that there are discrepancies amongst the states as to how they define and implement their post-*Atkins* procedures, regardless of their current system, problems are likely to arise.<sup>316</sup> Most states modeled their current laws off of the clinical definition in the DSM-IV-TR, that was current at the time of the *Atkins* decision, and made a focus on the IQ score.<sup>317</sup> With the revisions made to DSM-5, it is inevitable that there are now differences between the state’s legal and new clinical definition of intellectual disability.<sup>318</sup> This will become problematic when discrepancies exist between a diagnosis made by a testifying clinical forensic

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307. *See id.*

308. *See* Hass, *supra* note 87, at 684.

309. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33; *see* Hagstrom, *supra* note 26, at 265.

310. *See* Appelbaum, *supra* note 210, at 1296.

311. *See* Bonnie & Gustafson, *supra* note 2, at 825.

312. Fabian et al., *supra* note 82, at 421.

313. *See* Gresham, *supra* note 122, at 93; Tobolowsky, *supra* note 103, at 90.

314. Natalie Cheung, Note, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317, 327 (2013).

315. Dowling, *supra* note 130, at 789–91.

316. *See* Clark, *supra* note 7, at 136, 139; Tobolowsky, *supra* note 103, at 114.

317. Clark, *supra* note 7, at 137; *see also* Tobolowsky, *supra* note 103, at 89.

318. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33; Clark, *supra* note 7, at 137; Tobolowsky, *supra* note 103, at 89.



psychologist who focuses on adaptive behavior, but the state court is looking for an IQ score to make their determination.<sup>319</sup>

The focus now, according to DSM-5, is more on adaptive functioning.<sup>320</sup> According to DSM-5, this is a positive change as the IQ scores became less valid on the lower end of the range where mild intellectual disability is located.<sup>321</sup> A focus on IQ has also been found to lead to problematic outcomes in forensic settings.<sup>322</sup> “IQ scores are too unreliable and too sensitive to external factors for courts to rely on when a person’s life is at stake.”<sup>323</sup> Additionally, the new edition of the Manual states that IQ scores are only approximations of a person’s intellectual functioning and may not be sufficient enough to assess their functioning in real life situations.<sup>324</sup> However, as mentioned, most states put emphasis on the IQ score in their legislation—which is no longer relevant for diagnosis—and less concentration on adaptive behavior.<sup>325</sup>

Another problematic function of this shift is that adaptive functioning is almost entirely based on third party accounts; while assessments do exist, that is not the type of behavior that is easily assessed with standardized testing.<sup>326</sup> When it comes to adaptive behavior, there is more difficulty in measurement and presentation of conclusive evidence to the fact finder in court.<sup>327</sup> Therefore, even as the need for clinical judgment in the diagnosis has always been significant, the role of the psychologists will become even more important.<sup>328</sup> Their clinical judgment will be relied upon even further for the subjective assessment of adaptive behavior.<sup>329</sup>

Even though it may seem minor, the change of the onset from age eighteen to during the developmental period is also a cause for concern.<sup>330</sup> This diagnostic factor was in place to help clinicians rule out other possible

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319. Hagstrom, *supra* note 26, at 260.

320. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33; *see also Intellectual Disability*, *supra* note 9.

321. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 33.

322. Wakefield, *supra* note 251, at 143.

323. Sharp, *supra* note 49, at 247.

324. AM. PSYCHIATRIC ASS’N, DSM-5, *supra* note 8, at 37.

For example, a person with an IQ score above seventy may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

*Id.*

325. Hagstrom, *supra* note 26, at 265.

326. *Id.* at 254, 260, 262, 265.

327. *Id.* at 262, 265.

328. *See Bonnie & Gustafson*, *supra* note 2, at 825, 849.

329. *Id.*

330. *Id.* at 854–55.

diagnoses—such as brain injury—that can occur later in life.<sup>331</sup> In the alternative, it could provide protection for younger defendants who never took an intellectual assessment when they were below the age of eighteen.<sup>332</sup> While before the age of eighteen and during the developmental period are intended to refer to the same time frame, the lack of a solid age cut-off may allow more room for malingering.<sup>333</sup> The age-of-onset criterion served as a safeguard to keep a defendant from being able to feign an intellectual disability, but with a less restrictive terminology now in place, this safeguard may not be as strong.<sup>334</sup>

So, why is this important? Changes and complications are in store for the legislation that requires use of the DSM, particularly *Atkins* cases.<sup>335</sup> The exact result will be dependent on the state in which the trial is occurring.<sup>336</sup> The reasons for that are the varying definitions and procedures in place in each state for dealing with capital punishment and intellectually disabled criminal offenders.<sup>337</sup> However, despite these differences, a strong fear has developed among defense attorneys, as their hypothesis is that this new edition will allow for more executions of those that *Atkins* sought to protect.<sup>338</sup>

Death penalty lawyers fear that this revision will allow courts to execute offenders with IQ scores below seventy more easily.<sup>339</sup> Arguably, this shift in focus can give states more room to subvert the decision made in *Atkins* and allow the execution of a mentally retarded defendant in the mild range.<sup>340</sup> The determination of adaptive functioning is exceptionally more subjective than an IQ score, which will undoubtedly allow for each side to have an expert witness arguing the alternative opinions on the diagnosis.<sup>341</sup> By replacing a diagnosis that requires one objective part and one subjective part with a fully subjective assessment, it gives courts more room to avoid following the *Atkins* decision if they so choose.<sup>342</sup> Research has found that jurors have stereotypes of how they believe intellectual disability should manifest.<sup>343</sup> If a jury is the fact finder, it is more likely for a person with

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331. *Id.* at 854.  
 332. *See* Cheung, *supra* note 314, at 340–41.  
 333. Bonnie & Gustafson, *supra* note 2, at 854.  
 334. *Id.* at 854–55.  
 335. *See* Hass, *supra* note 87, at 684.  
 336. Hagstrom, *supra* note 26, at 260.  
 337. *Id.*  
 338. *See* Dilts, *supra* note 235.  
 339. *Id.*  
 340. *See* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); Dilts, *supra* note 235.  
 341. Cheung, *supra* note 314, at 339.  
 342. Dilts, *supra* note 235.  
 343. *See* Cheung, *supra* note 314, at 342.

mild mental retardation to be executed, as they are unlikely to meet the standards of the stereotype; the jury may not accept the subjective assessment by a psychological expert witness because they will realize there is room for interpretation in the diagnosis.<sup>344</sup> If the decision is for a judge to make and the defendant falls into a gray area for diagnosis based on their level of adaptive behavior, the judge has room to interpret the facts and use his or her own discretion to make a decision;<sup>345</sup> this is a cause for concern as judges are not trained in this field.<sup>346</sup> Defendants with IQ scores lower than seventy have been executed in the past several years despite the *Atkins* decision, and the DSM revision is highly likely to make this worse with the change to more subjective diagnostic criterion.<sup>347</sup>

With a focus on adaptive function, this could lead to more executions of those the *Atkins* holding was intended to protect.<sup>348</sup> It is believed that the removal of adaptive behavior from the requirements could actually bar more executions than required by the *Atkins* decision.<sup>349</sup> A focus on this requirement of adaptive functioning allows for more erroneous findings of intellectual disability.<sup>350</sup> With adaptive function, the focus is always on the weaknesses and never the strengths.<sup>351</sup> If the focus were to return to the IQ score, the reach of *Atkins* exemption could arguably be expanded.<sup>352</sup>

The DSM work group defends their decision and states that they do not agree with the fear of the defense attorneys.<sup>353</sup> The American Psychiatric Association is a large organization that represents thousands of psychiatric professionals; its goal is for them to all work together and create the best mental health care possible.<sup>354</sup> Additionally, the prior focus on IQ scores is more likely to result in a mentally retarded defendant facing the death penalty due to its inherent limitations.<sup>355</sup> A single IQ point could be the difference between life and death for an offender if additional clinical interpretation and analysis is not considered.<sup>356</sup> For example, in a stricter

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344. *Id.* at 339, 342–43.

345. Fabian et al., *supra* note 82, at 421.

346. *See id.* at 401.

347. AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 37–38; Dilts, *supra* note 235.

348. Bonnie & Gustafson, *supra* note 2, at 824.

349. *Id.*; *see Atkins v. Virginia*, 536 U.S. 304, 319, 320–21 (2002).

350. Bonnie & Gustafson, *supra* note 2, at 824.

351. Fabian et al., *supra* note 82, at 421.

352. Bonnie & Gustafson, *supra* note 2, at 824.

353. *See Dilts, supra* note 235.

354. Cheung, *supra* note 314, at 321.

355. Hagstrom, *supra* note 26, at 264–65; Rumley, *supra* note 128, at 1338–39.

356. Dilts, *supra* note 235.

cut-off state, such as Kentucky, a defendant must have an IQ score of seventy or lower in order to be considered to have an intellectual disability.<sup>357</sup> An IQ score does not allow a legal fact finder to see the whole picture of who the defendant is and why they did what they did, but it does give them a numerical value as a comparison to assess their intellectual function, which makes their execution more likely.<sup>358</sup> The DSM work group believes that their revision should be helpful to the courts by shifting the attention to adaptive behavior; this way, the courts can analyze the defendant more thoroughly and make more accurate decisions about the defendant's mental abilities.<sup>359</sup>

If the DSM does have a negative impact and results in the death of more mentally retarded defendants, this is a violation of the protection ensured to mentally retarded offenders by the *Atkins* decision.<sup>360</sup> That holding was intended to protect them from cruel and unusual punishment.<sup>361</sup> In the *Atkins* holding, the Supreme Court of the United States intended to provide a categorical protection to those with intellectual disability by providing exemption from the death penalty that is now challenged by the changing diagnostic criteria of intellectual disability.<sup>362</sup> With this new update to the diagnostic criteria of intellectual disability and the already existing discrepancies amongst the states, confusion is inevitable and the need for a uniform definition is even clearer.<sup>363</sup>

#### A. *Possible Solutions*

In cases where the court is unclear as to whether or not a defendant has an intellectual disability, the court should revisit the deciding factors in the *Atkins* holding.<sup>364</sup> The court should consider the goals of capital punishment—deterrence and retribution—and whether they will in fact be furthered by the death of the defendant.<sup>365</sup> In the end, “the court[] must conclude both that the defendant was more morally culpable than the average criminal and that the rationale behind the death penalty applies” appropriately to justify the most severe punishment in the country.<sup>366</sup> In

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357. Cheung, *supra* note 314, at 327.

358. Hagstrom, *supra* note 26, at 264–65.

359. See Dilts, *supra* note 235.

360. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

361. *Id.*

362. Cheung, *supra* note 314, at 337; Dilts, *supra* note 235; see *Atkins*, 536 U.S. at 321.

363. See Cheung, *supra* note 314, at 337.

364. Hagstrom, *supra* note 26, at 274; see also *Atkins*, 536 U.S. at 320–21.

365. Hagstrom, *supra* note 26, at 274–75; see also *Atkins*, 536 U.S. at 319.

366. Hagstrom, *supra* note 26, at 275.

addition, the states may just want to consider revising their legislation to include the updated diagnostic criteria.<sup>367</sup> Each state still has the ability to determine the definition used to make their legislation to categorically exempt intellectually disabled defendants.<sup>368</sup> By making a revision, the court can be assured that they will properly determine if the death penalty is appropriate when faced with an *Atkins* case.<sup>369</sup> Going back to the original decision may help courts make a more appropriate decision.<sup>370</sup>

Another seemingly simple solution, however, would be to implement a uniform national standard.<sup>371</sup> A countrywide standard would eliminate the state-to-state discrepancies.<sup>372</sup> The new standard should be made in accordance with the current psychological definition and diagnostic criteria in the DSM-5 as well as the *Atkins* decision.<sup>373</sup> In addition to eliminating the confusion created by having multiple definitions, the standard should also include procedural information such as when this determination should be made, as well as whether the judge, jury, or both should make it.<sup>374</sup> This would prevent the possibility of different holdings for the same person depending on which state their trial was held in.<sup>375</sup> By embracing the new edition of the DSM and finally creating a uniform way to enforce the *Atkins* holding, those that the *Atkins* decision intended to protect are more likely to be spared from execution.<sup>376</sup>

## V. CONCLUSION

In 2002, the Supreme Court of the United States made a groundbreaking decision in *Atkins v. Virginia* and their decision created a categorical exemption for mentally retarded offenders.<sup>377</sup> However, their lack of a uniform standard or specific guidance for the states regarding a definition of mental retardation led the states to make their own decision regarding legislation.<sup>378</sup> Many states relied upon the DSM-IV-TR definition

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367. Cheung, *supra* note 314, at 344–45; *see also* Hall, *supra* note 2, at 385.  
 368. Dilts, *supra* note 235.  
 369. *See* Cheung, *supra* note 314, at 344.  
 370. Hagstrom, *supra* note 26, at 274–75; *see also* *Atkins*, 536 U.S. at 321.  
 371. Cheung, *supra* note 314, at 344.  
 372. *See id.*  
 373. *Atkins*, 536 U.S. at 321; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33.  
 374. Cheung, *supra* note 314, at 348–49.  
 375. *See id.* at 344, 348–49.  
 376. *See* *Atkins*, 536 U.S. at 321; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 25.  
 377. *Atkins*, 536 U.S. at 304, 321.  
 378. *Id.* at 317; Cheung, *supra* note 314, at 326.

that was cited in the Court's decision, as it is not only present in the written decision, it is also an important and highly used book in the psychological field throughout the United States.<sup>379</sup> The newly released fifth edition of DSM makes significant revisions to intellectual disability, previously known as mental retardation.<sup>380</sup> In doing so, it is possible that the already complicated implementation of post-*Atkins* legislation will become even more convoluted.<sup>381</sup> Defense lawyers fear that these changes will undermine *Atkins* by allowing the courts to more easily execute a mentally retarded defendant, but those behind the new edition of the DSM do not agree and do not believe their revisions will be problematic.<sup>382</sup> As the edition was released so recently, these fears have yet to become reality.<sup>383</sup> However, it is an important point to be aware of, as it will inevitably have an effect on criminal defense lawyers and courts that hear capital punishment cases with mentally retarded offenders.<sup>384</sup> These revisions and their implications are something that the courts should be vigilant of and the states may want to take in consideration.<sup>385</sup>

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379. See, e.g., *Jackson v. State*, 963 So. 2d 150, 154 (Ala. Crim. App. 2006); see *Atkins*, 536 U.S. at 308 n.3; AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at 39.

380. Compare AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33, with AM. PSYCHIATRIC ASS'N, DSM-IV-TR, *supra* note 5, at 41–42.

381. Dilts, *supra* note 235; see AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33.

382. Dilts, *supra* note 235; see *Atkins*, 536 U.S. at 321; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33.

383. See AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33; Dilts, *supra* note 235.

384. See Dilts, *supra* note 235.

385. Dilts, *supra* note 235; see AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 33.

## THE RX AND THE AR: A PRODUCTS LIABILITY APPROACH TO THE MASS SHOOTING PROBLEM

MARISSA DUQUETTE\*

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### I. INTRODUCTION

With mass murders on the rise, the public demanded legislative action to ameliorate the issue. Thus far, the legislature’s response has been primarily comprised of gun reform proposals.<sup>1</sup> Congress has been flooded with bills and acts that call for stricter licensing practices, more in-depth background checks, or bans on assault weapons and high capacity magazines.<sup>2</sup> However, the solution to the mass murder problem does not likely lie within gun control, but rather, within prescription drug control.<sup>3</sup> Antidepressant and antipsychotic medications are known to increase suicidal, homicidal, and violent tendencies in some users.<sup>4</sup> Individuals such as James E. Holmes, Seung-Hui Cho, and Eric Harris were prescribed antidepressant or antipsychotic medications.<sup>5</sup> Afterward, these same individuals committed the mass murders at Aurora Century movie theater, Virginia Polytechnic

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1. See Jana R. McCreary, “Mentally Defective” Language in the Gun Control Act, 45 CONN. L. REV. 813, 831 (2013).

2. See *id.* at 832; JEFFREY A. ROTH & CHRISTOPHER S. KOPER, NAT’L INST. OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–96 1 (1999).

3. Jerome R. Corsi, *Psych Meds Linked to 90% of School Shootings*, WND (Dec. 18, 2012, 10:16 PM), <http://www.wnd.com/2012/12/psych-meds-linked-to-90-of-school-shootings/>; Bob Unruh, *Are Meds to Blame for Cho’s Rampage?*, WND (Apr. 23, 2007, 1:00 AM), <http://www.WND.com/2007/04/41218>.

4. Corsi, *supra* note 3; Unruh, *supra* note 3.

5. Corsi, *supra* note 3; see McCreary, *supra* note 1, at 823, 824 n.54.

Institute and State University, and Columbine High School, respectively.<sup>6</sup> A simple analogy illustrates the point.

A drunk driver swerves off of the road and onto a crowded sidewalk, killing some and injuring others. Nobody blames the vehicle. Legislators do not call for sports car bans. The Department of Motor Vehicles is not criticized for its failure to perform a more thorough background check before issuing the driver's license. Rather, society blames alcohol and its ability to impair normal human functions.

Contrastingly, a drug-addled college student storms onto campus and proceeds to slaughter thirty-two students with two semiautomatic handguns: A Walther P22 .22 caliber and a Glock 19 9-mm.<sup>7</sup> A sizeable number of people blame the firearms.<sup>8</sup> Legislators call for assault weapon bans and high capacity magazine bans.<sup>9</sup> The Bureau of Alcohol, Tobacco, and Firearms ("ATF") is criticized for its inability to establish an effective federal background check system.<sup>10</sup> Very few people blame the college student's prescription medication and its ability to induce suicidal, homicidal, and violent behavior.<sup>11</sup>

This article proposes that the gun—like the car—should not be the subject of further regulation.<sup>12</sup> Antidepressant and antipsychotic medications should bear the blame for their capacity to induce violent behavior in users.<sup>13</sup> As such, the pharmaceutical industry—not the gun industry—should be the legislature's focus if the mass murder problem is to be solved.<sup>14</sup>

This article begins with an overview of American gun control to date.<sup>15</sup> It then analyzes the legislature's failure to curb mass shootings through stricter gun laws.<sup>16</sup> In doing so, the article negates two common misconceptions: First, that gun control reduces the number of firearms in criminal hands; and second, that a European-style ban on firearms would be a possible and effective solution to the mass shooting problem.<sup>17</sup> While

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6. McCreary, *supra* note 1, at 823–24; Corsi, *supra* note 3.

7. McCreary, *supra* note 1, at 824, 829; *see also* Corsi, *supra* note 3; Unruh, *supra* note 3.

8. *See* Unruh, *supra* note 3.

9. *See* ROTH & KOPER, *supra* note 2, at 1.

10. *See* Mark B. Melter, *The Kids are Alright; It's the Grown-ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZAGA J. INT'L L. 33, 55–56 (2012).

11. *See* Corsi, *supra* note 3.

12. *See infra* Part IV.

13. *See infra* Part IV.

14. *See infra* Part IV.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.



invalidating those false impressions, the article displays how increased gun availability actually lowers mass shooting rates.<sup>18</sup> The article then discusses the link between mass shootings and prescription drug use and details how such violence can actually be a treatment-induced problem.<sup>19</sup> Finally, the article closes with a new way for legislators to respond to the mass murder problem.<sup>20</sup> This involves a shift in responsibility from the gun industry to the pharmaceutical industry by putting liability on the latter, and requiring drug compatibility tests to be administered prior to prescribing a medication.<sup>21</sup>

## II. THE HISTORY OF AMERICAN GUN LEGISLATION

Modern gun control debates in the United States are typically preceded by a tragic event; most often it is a mass shooting.<sup>22</sup> However, prior to the 1900s, gun control laws were enacted in response to slave uprisings and were primarily aimed at keeping slaves and freedmen from obtaining firearms.<sup>23</sup> In 1911, New York enacted the Sullivan Law as a response to the widely publicized shooting of novelist David Graham Phillips.<sup>24</sup> The Sullivan Law required that a permit be obtained before an individual was allowed to possess or carry a handgun.<sup>25</sup> This was among the first major forms of gun control outside of the South.<sup>26</sup>

Prohibition in 1919 spurred alcohol smugglers and distillers to engage in turf wars with one another, culminating in the St. Valentine's Day Massacre ten years later.<sup>27</sup> Such extreme gun violence prompted legislators to pass the National Firearms Act ("NFA"), which targeted the gangs' weapons of choice: Machine guns and short-barreled shotguns.<sup>28</sup> This Act did not expressly prohibit the possession of such arms, but it did make ownership of them financially infeasible.<sup>29</sup> For example, the Thompson M1928 ("Tommy Gun")—a notoriously popular gun for smugglers and

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18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part V.

21. See *infra* Part V.

22. McCreary, *supra* note 1, at 831; Corsi, *supra* note 3.

23. David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1529 (2012).

24. Peter Duffy, *100 Years Ago, a Killing that Spurred a Gun Law*, N.Y. TIMES, Jan. 24, 2011, at A.21; *Author Phillips Shot Six Times; May Recover*, N.Y. TIMES (Jan. 24, 1911), <http://query.nytimes.com/mem/archive-free/pdf?res=F20911F93C5517738DDDAD0A94D9405B818DF1D3>.

25. Kopel, *supra* note 23, at 1529.

26. *Id.*

27. *Id.* at 1531.

28. See *id.* at 1531, 1533.

29. See *id.*

gangsters—typically sold for around two hundred dollars in that time period.<sup>30</sup> The NFA placed a two hundred dollar flat tax for possessing that gun, as well as any other machine gun or short-barreled shotgun.<sup>31</sup> Hence, owning a Tommy Gun after the ratification of the NFA would cost four hundred dollars.<sup>32</sup> Taking inflation into consideration, that is the equivalent of \$5,386.29 today, thus making possession of such a weapon practically unachievable.<sup>33</sup>

Shortly after the NFA, Congress passed the Federal Firearms Act of 1938 (“FFA”).<sup>34</sup> Under this Act, firearms dealers had to keep a record of all gun sales and obtain a license before they could acquire or ship any weapon over state lines.<sup>35</sup> Additionally, the Act made it “unlawful for any person who [was] convicted of a [violent crime] ‘to receive any firearm or ammunition which had been shipped’” over state lines; as such, firearms dealers were responsible for ascertaining that any prospective buyer had not been previously convicted of a violent crime.<sup>36</sup>

In 1939, the NFA and the FFA were discussed in detail by the Supreme Court of the United States in *United States v. Miller*.<sup>37</sup> In that case, two defendants were charged with violating the NFA and the FFA when they transported a sawed-off, double-barreled shotgun over state lines.<sup>38</sup> In response, the defendants argued that the Acts violated their Second Amendment rights.<sup>39</sup> Justice McReynolds, writing for the majority, found that the Second Amendment did not protect the individual right to possess a sawed-off double-barrel shotgun since it was not a common-use weapon and bore no relationship to the preservation of a well-regulated militia.<sup>40</sup> Although the Court tried to make it clear that the right to bear arms was an individual right rather than a collective or states’ right,<sup>41</sup> the decision in

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30. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, THE FBI: A CENTENNIAL HISTORY, 1908–2008 16 (2008); see BILL YENNE, TOMMY GUN: HOW GENERAL THOMPSON’S SUBMACHINE GUN WROTE HISTORY 86 (2009).

31. Kopel, *supra* note 23, at 1533.

32. See YENNE, *supra* note 30, at 86; Kopel, *supra* note 23, at 1533.

33. See U.S. Dep’t of Labor, *CPI Inflation Calculator*, BUREAU LAB. STAT., [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Feb. 16, 2014).

34. 15 U.S.C. § 902(f) (1938) (current version at 18 U.S.C. § 922 (2012)); Kopel, *supra* note 23, at 1533–34.

35. 15 U.S.C. § 902(f); Kopel, *supra* note 23, at 1534.

36. 15 U.S.C. § 902; *United States v. Tot*, 131 F.2d 261, 263 (3d Cir. 1942), *rev’d*, 319 U.S. 463 (1943); Kopel, *supra* note 23, at 1534.

37. 307 U.S. 174 (1939).

38. *Id.* at 175.

39. *Id.* at 176.

40. *Id.* at 175, 178.

41. *District of Columbia v. Heller*, 554 U.S. 570, 579–80, 592 (2008).

*Miller* resulted in nationwide misinterpretation of the Second Amendment.<sup>42</sup> One example comes from *Commonwealth v. Davis*,<sup>43</sup> in which the state's supreme court said:

[T]he declared right to keep and bear arms is that of the people, the aggregate of citizens; the right is related to the common defense; and that in turn points to service in a broadly based, organized militia.

....

[The Second Amendment] is not directed to guaranteeing the rights of individuals, but rather, as we have said, to assuring some freedom of State forces from national interference.<sup>44</sup>

From 1939 to 2008, courts across the United States erroneously used *Miller* to justify otherwise unconstitutional restrictions on Second Amendment rights.<sup>45</sup>

In 1967, New York City mandated long-gun registration.<sup>46</sup> Eventually, the registry information was used to confiscate those firearms after the city council erroneously decided that rifles and shotguns were assault weapons.<sup>47</sup> When federal legislators attempted to adopt New York City's gun registration methods, the House of Representatives amended statutes to explicitly forbid federal agencies from compiling any information that could be used for a national gun registry.<sup>48</sup>

The Gun Control Act of 1968 ("GCA") slightly altered the record-keeping requirements set forth by the FFA.<sup>49</sup> It required firearms dealers to record a buyer's personal information and the gun's identifying features such

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42. *Id.* at 627 (citing *Miller*, 307 U.S. at 179); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (citing *Miller*, 307 U.S. at 178); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (citing *Miller*, 307 U.S. at 178); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943) (citing *Miller*, 307 U.S. at 174); *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976) (citing *Miller*, 307 U.S. at 177–78); Kopel, *supra* note 23, at 1550.

43. 343 N.E.2d 847 (Mass. 1976).

44. *Id.* at 848–50.

45. *Warin*, 530 F.2d at 106–07 (citing *Miller*, 307 U.S. at 178); *Stevens*, 440 F.2d at 149 (citing *Miller*, 307 U.S. at 178); *Tot*, 131 F.2d at 266 (citing *Miller*, 307 U.S. at 174); *Davis*, 343 N.E.2d at 850 (citing *Miller*, 307 U.S. at 177–78).

46. Kopel, *supra* note 23, at 1541.

47. *Id.*

48. *Id.* at 1565–66.

49. *Id.* at 1534, 1545. Compare 18 U.S.C. § 922(b)(5) (2012), with 27 C.F.R. § 478.11 (2014).

as its model and serial number on Form 4473 for each gun sale.<sup>50</sup> Although Form 4473 is a federal form, the gun sale would be registered by the dealer and “would not be collected in a [national] registration list.”<sup>51</sup> The pool of civilians who were legally allowed to purchase or possess a firearm from a licensed dealer was also the subject of GCA restrictions.<sup>52</sup> Whereas the FFA only prohibited gun sales to individuals convicted of a violent crime, the GCA further prohibited gun and ammunition sales to illicit drug users and those who were *mentally defective*.<sup>53</sup>

In the years following the enactment of the GCA, the phrase *mentally defective* was interpreted differently by courts across the United States.<sup>54</sup> In 1973, the Eighth Circuit decided that a mental illness was not synonymous to a mental defect.<sup>55</sup> Rather, the court determined that “[a] mental defective . . . is a person who has never possessed a normal degree of intellectual capacity, whereas . . . an insane person[’s] faculties which were originally normal have been impaired by [a] mental disease.”<sup>56</sup> Therefore, in the Eighth Circuit, individuals with a subnormal level of intelligence were barred from owning guns, but individuals suffering from schizophrenia, bipolar disorder, or a personality disorder were entitled to full Second Amendment rights.<sup>57</sup>

In *Huddleston v. United States*,<sup>58</sup> the Supreme Court attempted to improve the lower courts’ ability to analyze the language of the GCA’s prohibited persons categories.<sup>59</sup> The Court stated that the ultimate goal of the GCA was to keep “lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.”<sup>60</sup> Although this statement may have provided lower courts with the legislative

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50. Kopel, *supra* note 23, at 1545; *see also* 18 U.S.C. § 922(b)(5).

51. Kopel, *supra* note 23, at 1545–46.

52. McCreary, *supra* note 1, at 816.

53. Kopel, *supra* note 23, at 1546; McCreary, *supra* note 1, at 816. *Compare* 18 U.S.C. § 922(d)(4) (2012), *with* 27 C.F.R. § 478.11 (2014).

54. *See* *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988); *United States v. Hansel*, 474 F.2d 1120, 1123–24 (8th Cir. 1973); *United States v. Vertz*, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000).

55. *Hansel*, 474 F.2d at 1124.

56. *Id.*

57. *Id.* at 1125; McCreary, *supra* note 1, at 818 n.17, 844–45.

58. 415 U.S. 814 (1974).

59. *Id.* at 823, 825.

60. *Id.* at 825.

intent behind the Act, it merely replaced the phrase *mentally defective* with *mentally disordered*, which did little to actually clarify the definition.<sup>61</sup>

The ATF eventually revised its definition of the *mentally defective* class of individuals who were not allowed to possess a firearm.<sup>62</sup> To belong to this class, an individual needed:

- (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
  - (1) Is a danger to himself or to others; or
  - (2) Lacks the mental capacity to contract or manage his own affairs.
- (b) The term shall include—
  - (1) A finding of insanity by a court in a criminal case; and
  - (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility . . . .<sup>63</sup>

Correspondingly, there was no longer an issue as to whether *mentally defective* referred to mental illness or subnormal intelligence; the term encompassed both characteristics, and either one could disqualify an individual from firearm possession.<sup>64</sup> However, courts faced a new problem: Whether commitment to a mental institution qualified as an adjudication of mental defectiveness.<sup>65</sup>

In *United States v. Giardina*,<sup>66</sup> the Fifth Circuit found that involuntary hospitalization would not disqualify an individual from the right to buy and possess a firearm under the statute.<sup>67</sup> The court in *United States v. Vertz*<sup>68</sup> went even further, finding that adjudication by a probate judge that a defendant required treatment because he was mentally ill was “not

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61. McCreary, *supra* note 1, at 846 (noting that courts have been known to *muddy the waters* when it comes to interpreting the meaning of mentally defective). Compare 18 U.S.C. § 922(d)(4) (2012), with *Huddleston*, 415 U.S. at 825.

62. 27 C.F.R. § 478.11 (2014).

63. *Id.*

64. *Id.*

65. See *United States v. Rehlander*, 666 F.3d 45, 47, 49 (1st Cir. 2012); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988); *United States v. Vertz*, 102 F. Supp. 2d 787, 791 (W.D. Mich. 2000).

66. 861 F.2d 1334 (5th Cir. 1988).

67. *Id.* at 1337.

68. 102 F. Supp. 2d 787 (W.D. Mich. 2000).

sufficient to bring [the defendant] within the statute,” because “[t]he probate court made no finding that [the defendant] was a danger to himself.”<sup>69</sup> Finally, *United States v. Rehlander*<sup>70</sup> established that full due process of law was required before any individual’s Second Amendment rights could be denied; as such, a voluntary commitment to a mental institution or a commitment for observation would not bar an individual from buying a firearm in the future.<sup>71</sup> Although the ATF’s new definition was intended to clarify the Legislature’s intent in enacting the GCA—“keeping ‘[guns] out of the hands of . . . [those] whose possession of them is too high a price in danger’”—it seems as though it just shifted the courts’ focus further away from public safety concerns, and onto the Fifth Amendment rights of the mentally ill.<sup>72</sup>

In 1986, Congress decided that “the rights of citizens to keep and bear arms under the Second Amendment to the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies.”<sup>73</sup> Accordingly, the Firearms Owners’ Protection Act (“FOPA”) was made law that year.<sup>74</sup> Originally, one of the major proposals of the Act would have banned most of the center-fire rifle ammunition in the United States, since Republican Mario Biaggi put forward a *cop-killer bullet* ban and over-broadly defined what that would include.<sup>75</sup> Fortunately, the National Rifle Association made a compromise with Biaggi and modified the text of the Act to simply “ban[] a category of ammunition that was no longer being produced for the retail market.”<sup>76</sup> In addition to banning certain types of ammunition, “FOPA . . . banned the sale of new machine guns . . . to the public,” placed restrictions on the ATF’s power, forbade federal gun registration, and required firearms dealers to report certain gun sales directly to the Attorney General.<sup>77</sup> Specifically, FOPA required firearms dealers to provide a report to the Attorney General when any one purchaser bought two or more firearms within a five-day period.<sup>78</sup>

Although the FFA, GCA, and FOPA all specified classes of the population that were ineligible to purchase a firearm, licensed firearms

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69. *Id.* at 788.

70. 666 F.3d 45 (1st Cir. 2012).

71. *Id.* at 48–49.

72. *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

73. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449, 449 (1986) (codified as amended at 18 U.S.C. § 922 (2012)).

74. *Id.*

75. Kopel, *supra* note 23, at 1572.

76. *Id.* at 1573.

77. § 103, 100 Stat. at 455; Kopel, *supra* note 23, at 1574.

78. § 103, 100 Stat. at 455.

dealers had no way of confirming a prospective buyer's eligibility.<sup>79</sup> Purchasers simply had to certify in writing that they were not a member of a disqualified class—such as a convicted felon or adjudicated as mentally defective—and the licensed dealer had to trust that this information was true.<sup>80</sup> Of course, ineligible individuals wishing to obtain a firearm were inclined to falsely certify their eligibility, so in 1993, Congress attempted to ameliorate this problem through the Brady Handgun Violence Prevention Act (“Brady Bill”).<sup>81</sup>

The Brady Bill mandated a five-day waiting period before a licensed dealer could release a gun to a purchaser.<sup>82</sup> In that five-day period, licensed dealers collaborated with the local chief law enforcement officers, who conducted a background check to verify the purchaser's eligibility.<sup>83</sup> Five years later, the waiting period requirement expired pursuant to the terms of the Brady Bill and was replaced with the National Instant Criminal Background Check System (“NICS”).<sup>84</sup> The NICS, maintained by the Federal Bureau of Investigation (“FBI”), cut out the chief local law enforcement middleman and allowed firearms dealers themselves to conduct background checks on potential buyers.<sup>85</sup> To accommodate a prospective gun buyer's right to privacy, the NICS background check would only reveal the buyer's eligibility status, and not the reason behind it; i.e., the system would only display *ineligible* rather than adjudicated as *mentally defective*.<sup>86</sup> Unfortunately, even this system had its glitches.<sup>87</sup> State agencies with information related to a person belonging to a class of prohibited purchasers were under very little pressure to report this information to the FBI.<sup>88</sup> Consequently, compliance with reporting procedures was infrequent and the NICS was rarely up to date, resulting in a prospective purchaser's ineligibility failing to show up on the NICS for months.<sup>89</sup> In addition, “only ‘licensed’ importers, manufacturers, and dealers [were] federally mandated

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79. United States v. Tot, 131 F.2d 261, 263 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943); Kopel, *supra* note 23, at 1534, 1546; McCreary, *supra* note 1, at 833.

80. Kopel, *supra* note 23, at 1546; McCreary, *supra* note 1, at 833–34.

81. McCreary, *supra* note 1, at 834–35.

82. *Id.* at 835.

83. *Id.*

84. Kopel, *supra* note 23, at 1582–83; Melter, *supra* note 10, at 55.

85. Melter, *supra* note 10, at 55.

86. See McCreary, *supra* note 1, at 854.

87. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, STATE LAWS AND PUBLISHED ORDINANCES xiii–xv (31st ed. 2010–2011), available at <https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-edition/2010-2011-atf-book-final.pdf>; McCreary, *supra* note 1, at 837–38; Melter, *supra* note 10, at 55.

88. See McCreary, *supra* note 1, at 835–36.

89. See *id.* at 838.

to perform background checks on weapons purchasers,” which meant that private firearms sales—including sales at gun shows—could be conducted legally without inquiry into a purchaser’s eligibility.<sup>90</sup> Furthermore, concealed carry permits and similar firearms licenses qualified as alternatives to the background check requirements of the Brady Bill in nineteen states.<sup>91</sup> Although a background check is almost always required in order to obtain any sort of weapons permit, states had no federal obligation to keep permit record information on a readily accessible database for licensed firearms dealers to access.<sup>92</sup>

The NICS Improvement Act recognized that there were problems with the Brady Bill’s background check requirement, but failed to correctly identify them.<sup>93</sup> Rather than providing incentives for state agency reporting compliance, closing the gun show loophole, or eliminating the license alternative to a background check, it merely required federal agencies with any information regarding an individual’s ineligibility to “report that information to the Attorney General . . . quarterly.”<sup>94</sup>

In 1994, the Clinton Crime Bill was enacted as a response to Patrick Purdy’s mass murder in Stockton, California, and the intensifying turf and drug wars conducted by gangs.<sup>95</sup> It included one of the most irrational and functionally inconsequential assault weapon bans in the history of American gun control, ironically titled the Public Safety and Recreational Firearms Use Protection Act.<sup>96</sup> The ban outlawed a mere nineteen guns by name, some of which had already been banned since 1989.<sup>97</sup> Of the nineteen explicitly-banned guns in the Act, there were at least twelve legal substitutes already on the market.<sup>98</sup> The Act also banned roughly two hundred more guns based on “appearances [and] . . . accessories such as bayonet lugs and adjustable stocks,” under what was called the Features Test.<sup>99</sup>

(30) The term “semiautomatic assault weapon” means—

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90. Melter, *supra* note 10, at 55–56.

91. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 87, at xiv–xv.

92. *See id.*; McCreary, *supra* note 1, at 835.

93. *See* McCreary, *supra* note 1, at 837–38.

94. *See id.* at 837.

95. ROTH & KOPER, *supra* note 2, at 1; Kopel, *supra* note 23, at 1585.

96. *See* ROTH & KOPER, *supra* note 2, at 1; Kopel, *supra* note 23, at 1585–86.

97. ROTH & KOPER, *supra* note 2, at 2–3; Kopel, *supra* note 23, at 1585.

98. ROTH & KOPER, *supra* note 2, at 3.

99. ROTH & KOPER, *supra* note 2, at 4; Kopel, *supra* note 23, at 1585–86.



(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least [two] of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher . . . .<sup>100</sup>

The Features Tests for semiautomatic pistols and shotguns were similarly focused on aesthetics.<sup>101</sup> The overbroad and generic nature of the Features Test allowed firearms manufacturers to disconnect the frills, rename the weapons, and ultimately sell guns that were “operationally the same as the banned guns.”<sup>102</sup> Moreover, roughly six hundred firearms, such as the Ruger Mini-14, were explicitly exempted from the ban because of their large ownership base even though they were “functionally identical to banned guns like the AR-15.”<sup>103</sup>

The Act also banned the sale of high capacity magazines—defined as “ammunition-feeding devices designed to hold more than [ten] rounds”—but did not outlaw possession or use of them.<sup>104</sup> As such, this ban was futile as well because “when one considers many of the older model guns . . . such as the AR-15 (in production since the 1960s) . . . the world-wide inventory of ammunition magazines holding more than [ten] rounds was probably in the tens or even hundreds of millions.”<sup>105</sup>

Paradoxically, the most notable effect of the assault weapons ban was the influx of so-called assault weapons into civilian hands.<sup>106</sup> While the Act was being debated in Congress, the production of soon-to-be-banned guns such as the Colt AR-15, SWD M-10, and TEC-9 skyrocketed.<sup>107</sup> In 1994, 203,578 assault weapons were produced just before the ban became

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100. Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. § 2(b)(30)(B) (1994).

101. *See id.* § 2(b)(30)(C)–(D).

102. Kopel, *supra* note 23, at 1586; *see* ROTH & KOPER, *supra* note 2, at 4.

103. Kopel, *supra* note 23, at 1585–86.

104. ROTH & KOPER, *supra* note 2, at 2; Kopel, *supra* note 23, at 1586.

105. Kopel, *supra* note 23, at 1586.

106. *See* ROTH & KOPER, *supra* note 2, at 4.

107. *Id.* at 3–5.

law later that year.<sup>108</sup> This is in stark contrast to the annual average production of 91,137 assault weapons from 1989 to 1993.<sup>109</sup> Since the market became flooded with assault weapons and high capacity magazines just before the ban was enacted, the price of these commodities dropped significantly the next year.<sup>110</sup> Prior to the ban, an AR-15-type rifle sold for anywhere between \$825 and \$1325; by the very next June, the price of the same rifle had fallen to about \$660.<sup>111</sup> Although the transfer of an assault weapon was prohibited after 1994, individuals who paid a high pre-ban price and then “watched as their investment depreciated after the ban took effect” were prone to sell the weapon at a discount price to an ineligible purchaser, and then report the gun as stolen to an insurance company in order to collect on the policy.<sup>112</sup> In essence, the Public Safety and Recreational Firearms Use Protection Act made assault weapons more available and less expensive to those who could not pass a NICS background check.<sup>113</sup> Thankfully, the assault weapon ban expired in 2004.<sup>114</sup>

The Supreme Court of the United States had a chance to discuss gun bans—albeit a little late—in the 2008 case, *District of Columbia v. Heller*.<sup>115</sup> The law at issue in the case “totally ban[ned] handgun possession in the home” and was struck down.<sup>116</sup> In making its decision, the Court relied on the common use principle.<sup>117</sup> The common use principle dictates that a “prohibition of an entire class of *arms*” is unconstitutional if that class of arms is “overwhelmingly chosen by American[s]” for a lawful use, such as self-defense or sporting.<sup>118</sup> Justice Scalia poignantly stated:

It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. . . . There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and

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108. *Id.* at 6.

109. *Id.*

110. *Id.* at 5.

111. See ROTH & KOPER, *supra* note 2, at 3, 5.

112. *Id.* at 1, 4–5.

113. See Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. § 2 (1994); ROTH & KOPER, *supra* note 2, at 5; Melter, *supra* note 10, at 55–56.

114. H.R. 4296 § 6(2); Kopel, *supra* note 23, at 1604.

115. 554 U.S. 570, 573 (2008).

116. *Id.* at 628, 635.

117. *Id.* at 627; Kopel, *supra* note 23, at 1608; Melter, *supra* note 10, at 46.

118. *Heller*, 554 U.S. at 627–28.

aim a long gun; it can be pointed at a burglar with one hand . . . .  
 Whatever the reason, handguns are the most popular weapon  
 chosen by Americans for self-defense in the home, and a complete  
 prohibition of their use is invalid.<sup>119</sup>

Under this common use interpretation, a future ban on semiautomatic AR-15s and the like would arguably be unconstitutional as well, because they are some of the most popularly owned guns in America.<sup>120</sup>

### III. THE PROBLEMS WITH GUN LEGISLATION

Unfortunately, the GCA and FOPA were not enough to stop Laurie Dann from obtaining a firearm and shooting seven children in 1988.<sup>121</sup> The Acts were insufficient to keep Patrick Purdy from killing five children and wounding thirty others in Stockton, California with a Kalashnikov-style semi-automatic rifle in 1989.<sup>122</sup> The Public Safety and Recreational Firearms Use Protection Act did not keep Eric Harris and Dylan Klebold from obtaining a Savage-Springfield 67H, Hi-Point 995, TEC-9, or Stevens 311D, all of which were used in 1999 to kill thirteen and wound twenty-four others at Columbine High School.<sup>123</sup> The NICS did not reveal that Seung-Hui Cho had been involuntarily committed to a mental institution, and was thus ineligible to buy the Walther P22 and Glock 19 that he used to kill thirty-two people at the Virginia Polytechnic Institute and State University.<sup>124</sup> These instances alone should indicate that gun control is not effectively reducing mass shootings, but they are only some of the most notable.<sup>125</sup> As of 1976 under the GCA, until FOPA was enacted, there were 190 mass shootings and 880 victims in America.<sup>126</sup> In the time span between the enactment of FOPA and the Brady Bill, there were 140 mass shooting

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119. *Id.* at 629.

120. EDWARD W. HILL, MAXINE GOODMAN LEVIN COLL. OF URBAN AFFAIRS, CLEVELAND STATE UNIV. HOW MANY GUNS ARE IN THE UNITED STATES? AMERICANS OWN BETWEEN 262 MILLION AND 310 MILLION FIREARMS 3 (2013), available at [http://www.urban.csuohio.edu/publications/hill/GunsInTheUS\\_Hill\\_032813.pdf](http://www.urban.csuohio.edu/publications/hill/GunsInTheUS_Hill_032813.pdf); Kopel, *supra* note 23, at 1608.

121. *See* Unruh, *supra* note 3.

122. *See* Kopel, *supra* note 23, at 1578; Unruh, *supra* note 3.

123. Janet L. Kaminski Leduc, *OLR Research Report: Weapons Used in Mass Shootings*, ST. CONN. GEN. ASSEMBLY (Jan. 18, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0057.htm>; Unruh, *supra* note 3.

124. McCreary, *supra* note 1, at 824, 829–30; Kaminski Leduc, *supra* note 123; Unruh, *supra* note 3.

125. *See* Melter, *supra* note 10, at 41; Unruh, *supra* note 3.

126. Melter, *supra* note 10, at 60.

incidents and 620 individuals either wounded or killed.<sup>127</sup> During the era of the Clinton Crime Bill, 193 mass shootings occurred, leaving 875 people either dead or injured.<sup>128</sup> Since 2004, when the assault weapons ban ended, there have been 178 mass shootings and 969 victims.<sup>129</sup>

Still, about twenty-four percent of the nation's citizens believe that tighter gun restrictions would prevent mass shootings in America.<sup>130</sup> This is despite the fact that countries with even more stringent gun laws than the United States have had their fair share of mass shootings.<sup>131</sup> England—with a mere 6.2 guns per one hundred people—experienced a mass shooting in 2010, which claimed the lives of twelve citizens.<sup>132</sup> Germany had “three of the five worst school shootings worldwide over the past fifteen years,” despite the country's incredibly strict gun laws.<sup>133</sup> But two instances hardly prove the point: It could be argued that Europeans have only seen about twelve mass public shootings and just over one hundred people killed by gunfire, during those shootings, since 2001, which is notably less than what Americans have experienced in the same time frame.<sup>134</sup> It is worthy of note, however, that although the number of *mass shooting* incidents in Europe is less than that in America, the number of *mass murders* is roughly the same; perpetrators simply resort to bombs and arson instead of firearms.<sup>135</sup>

Even supposing that the prevalence of guns in the United States is to blame for mass shootings, gun bans have proved ineffective in the past and government seizures of firearms would be just as unsuccessful in reducing gun availability.<sup>136</sup> There are between 262 and 310 million firearms privately owned in America.<sup>137</sup> Guns are not registered or tracked, so there is no reliable way for the government to hunt down and seize each one.<sup>138</sup> Furthermore, pursuant to the Fifth Amendment, gun owners would need to

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127. *Id.*

128. *Id.*

129. *Id.* at 60–61; MAYORS AGAINST ILLEGAL GUNS, ANALYSIS OF RECENT MASS SHOOTINGS 6–23 (2013), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A\\_U.S.%20news/US-news-PDFs/Analysis\\_of\\_Mass\\_Shootings.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_U.S.%20news/US-news-PDFs/Analysis_of_Mass_Shootings.pdf).

130. Melter, *supra* note 10, at 42; Amy Roberts, *By the Numbers: Guns in America*, CNN (Aug. 9, 2012, 1:31 PM), <http://www.cnn.com/2012/08/09/politics/btn-guns-in-america>.

131. Melter, *supra* note 10, at 42–43.

132. *Id.* at 43.

133. *Id.*

134. *Id.* at 43–44, 60–61 tbl.1.

135. See “Assault Weapons,” GUNCITE, [http://www.guncite.com/gun\\_control\\_gcassaul.html](http://www.guncite.com/gun_control_gcassaul.html) (last updated Oct. 24, 2010); see also Melter, *supra* note 10, at 42, 44, 60–61 tbl.1.

136. See Melter, *supra* note 10, at 46–47, 49–51.

137. HILL, *supra* note 120, at 2.

138. *Id.*

be adequately compensated if the government chose to confiscate their property.<sup>139</sup> This would require “hundreds of millions of taxpayer dollars,” which is simply not in national or states’ budgets.<sup>140</sup> Hence, it is highly unlikely that gun owners would receive even half of the fair market value of their firearms, let alone a single penny for their ammunition and add-ons.<sup>141</sup> Even if government agencies were able to confiscate fifty percent of the guns in the United States—with adequate compensation to the owners—over 100 million guns would still remain.<sup>142</sup> Against those numbers, it is difficult to imagine that a potential mass shooter would have any trouble gaining access to a firearm.<sup>143</sup> As such, a government seizure of guns in America would be operationally impossible, financially impracticable, constitutionally impermissible, and ultimately ineffective.<sup>144</sup>

Contrary to popular belief, research shows that the overwhelming presence of firearms actually has a deterrent effect on mass shooters.<sup>145</sup> As one author noted, “mass shootings rarely take place within the hunting aisles of Wal-Mart or at the local shooting range.”<sup>146</sup> In fact, “mass shooter[s] [almost] always pick a location in which” law-abiding citizens will not be armed, such as a school or a place of worship.<sup>147</sup> Conversely, areas where citizens can lawfully carry a concealed handgun are sixty-seven percent less likely to experience a mass-shooting incident.<sup>148</sup> This is primarily because armed civilians are not suitable prey—they possess the ability to neutralize the shooter—and mass shooters are looking for a target, not a duel.<sup>149</sup> In light of this, Americans may want to think twice before they blame mass shootings on the prevalence of firearms.<sup>150</sup>

#### IV. THE LINK TO ANTIDEPRESSANT AND ANTIPSYCHOTIC USE

Mass shooters have more in common than the fact that they all—by definition—used a firearm to effectuate death and injury.<sup>151</sup> This has led

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139. U.S. CONST. amend. V; Kopel, *supra* note 23, at 1564.

140. Kopel, *supra* note 23, at 1564.

141. *Id.* at 1564–65.

142. Melter, *supra* note 10, at 51.

143. *Id.*

144. See U.S. CONST. amend. V; HILL, *supra* note 120, at 2, 8 figs.4 & 5 (noting the sheer number of households that contain a firearm); Kopel, *supra* note 23, at 1564; Melter, *supra* note 10, at 49–51.

145. Melter, *supra* note 10, at 41–42.

146. *Id.* at 53.

147. *Id.*

148. *Id.* at 42.

149. See *id.* at 41.

150. See Melter, *supra* note 10, at 41.

151. See *id.*

authors and researchers to propose alternatives to gun control that could be used to arrive at an actual solution to the mass murder problem.<sup>152</sup> For instance, most mass shooters have a documented history of mental illness.<sup>153</sup> Hence, numerous researchers have proposed that gun buyers should be required to provide firearms vendors with a certificate guaranteeing the buyer's mental health.<sup>154</sup>

While this seems like a viable solution to the mass shooter problem, it suffers from the exact same flaws as previous gun control legislation, but with more of a negative economic impact.<sup>155</sup> Looking at the mental health certificate idea objectively, it is plain to see that it is just an additional form of permit or background check that gun purchasers would need to supply.<sup>156</sup> Firearms dealers would still have the burden of verifying the certificate's authenticity, and states would still be under no obligation to keep records in a readily searchable database in order to facilitate verification; in fact, as seen with the NICS, states are sometimes reluctant to comply even when they are urged to supply records for a federal database.<sup>157</sup> Prospective gun buyers without insurance might not be able to afford the doctor's visit, and therefore, they would be denied their Second Amendment rights purely because of their economic status.<sup>158</sup> If Medicare or Medicaid covered the cost of the doctor's visit for those without adequate funds, then the already-strained federal budget would be put under even more stress.<sup>159</sup> Furthermore, the mental health certificate may rely on the opinion of a single doctor, which may not always be accurate.<sup>160</sup> Even if accurate, the practice of denying Second Amendment rights to those diagnosed as mentally ill would be constitutionally impermissible because those individuals would not have received due process of law before their rights were stripped.<sup>161</sup> Essentially, there are too many problems with the mental health certificate idea for it to be a viable solution.<sup>162</sup>

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152. *Id.* at 56; McCreary, *supra* note 1, at 855.

153. *See* Unruh, *supra* note 3.

154. McCreary, *supra* note 1, at 855; Melter, *supra* note 10, at 56.

155. *See* McCreary, *supra* note 1, at 855–57.

156. *Id.* at 855.

157. *Id.* at 838, 856.

158. *See* U.S. CONST. amend. II; McCreary, *supra* note 1, at 838, 856.

159. *See* CONG. BUDGET OFFICE, THE IMPACT OF SOCIAL SECURITY AND MEDICARE ON THE FEDERAL BUDGET 1 (2002), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/39xx/doc3982/11-14-longrangebrief6.pdf>; McCreary, *supra* note 1, at 857.

160. *See* McCreary, *supra* note 1, at 827 (noting that Cho was released from a mental health facility after one doctor said that he was not a danger to himself or others).

161. *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012).

162. *E.g.*, McCreary, *supra* note 1, at 857.

Fortunately, the fact that many mass shooters had a documented mental illness means that they have yet another characteristic in common: Most of them sought—or were forced to undergo—treatment from a physician or psychiatrist.<sup>163</sup> Similarly, the treatments offered to these mass shooters were comparable in the sense that they were all antidepressant or antipsychotic medications.<sup>164</sup> For example: Laurie Dann, on Anafranil and Lithium, opened fire on seven children in 1988, killing one;<sup>165</sup> Patrick Purdy, prescribed Thorazine and Amitriptyline, killed five children and wounded thirty others with an AK-47 assault rifle in 1989;<sup>166</sup> that same year, Joseph T. Wesbecker gunned down twenty of his coworkers just a month after he began taking Prozac;<sup>167</sup> unnamed “prescription medications related to the treatment of psychological problems” were found in Seung-Hui Cho’s possession just after his shooting rampage at Virginia Tech left thirty-two dead;<sup>168</sup> finally, James Eagan Holmes was prescribed sertraline—a generic form of Zoloft—and Clonazepam shortly before he began stockpiling firearms and ammunition for his 2012 massacre in Aurora, Colorado;<sup>169</sup> and those are just to name a few. Thus, this pattern is a factor that cannot be ignored when trying to solve the mass shooting problem in America.<sup>170</sup>

The availability of antipsychotics and antidepressants has been steadily increasing since the 1950s, with more than twenty types being introduced to the market since then.<sup>171</sup> The number of Americans on antidepressants has doubled every ten years since the 1970s, and today, roughly ten percent of Americans are prescribed at least one of these drugs.<sup>172</sup> There are four popular types of antidepressants: Tricyclics,

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163. *Id.* at 825; Unruh, *supra* note 3; Jenny Deam, *James Holmes’ Psychiatrist Warned He May Pose Threat*, L.A. TIMES (Apr. 4, 2013), <http://articles.latimes.com/2013/apr/04/nation/la-na-james-holmes-documents-20130405>.

164. *See* Corsi, *supra* note 3; Unruh, *supra* note 3.

165. Unruh, *supra* note 3.

166. Robert Reinhold, *Killer Depicted as Loner Full of Hate*, N.Y. TIMES, Jan. 20, 1989, at A.8; Unruh, *supra* note 3.

167. Ronald Smothers, *Disturbed Past of Killer of 7 Is Unraveled*, N.Y. TIMES, Sept. 16, 1989, at 1.10; Unruh, *supra* note 3.

168. Corsi, *supra* note 3.

169. McCreary, *supra* note 1, at 823; Deam, *supra* note 163.

170. *See* Corsi, *supra* note 3. Approximately “[ninety] percent of school shoot[ers]” were prescribed these drugs. *Id.*

171. Bruce L. Saltz et al., *Recognizing and Managing Antipsychotic Drug Treatment Side Effects in the Elderly*, 14 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 14, 14 (Supp. 2 2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC487007/pdf/i1523-5998-6-52-14.pdf>.

172. Unruh, *supra* note 3; William Weir, *Hartford Firm’s Genetic Tests Help Identify Effective Antidepressants for Individual Patients*, COURANT (Dec. 29, 2011), [http://articles.courant.com/2011-12-29/health/hc-hartford-hospital-depression-0102-20111229\\_1\\_antidepressants-dna-analysis-genomas](http://articles.courant.com/2011-12-29/health/hc-hartford-hospital-depression-0102-20111229_1_antidepressants-dna-analysis-genomas).

monoamine oxidase inhibitors (“MAOIs”), selective serotonin reuptake inhibitors (“SSRIs”), and serotonin and norepinephrine reuptake inhibitors (“SNRIs”).<sup>173</sup> Popular SSRI brand names include Prozac, Paxil, Celexa, and Zoloft, whereas popular SNRIs are marketed under names such as Effexor and Cymbalta.<sup>174</sup> SSRIs and SNRIs are more popular than tricyclics and MAOIs because they are newer, and, in comparison, users may have a decreased risk of developing long-term involuntary movement disorders.<sup>175</sup> However, patients react to drugs differently and “no one-size-fits-all approach to medication exists.”<sup>176</sup>

Doctors and patients have to conduct trial-and-error experiments with different psychoactive drugs and different dosages in order to “maximize relief while minimizing side effects.”<sup>177</sup> This is because antipsychotics and the four most popular categories of antidepressants are metabolized in the human body by two enzymes: Cytochromes P2D6 and P2C19 (“CYP2D6” and “CYP2C19”).<sup>178</sup> The body’s production of these enzymes determines how an individual will react to psychoactive medications.<sup>179</sup> Accordingly, if a patient’s body naturally produces high amounts of CYP2D6 or CYP2C19, then the patient will metabolize an antidepressant such as Prozac very quickly, the drug will only effect the patient minimally, and only for a short amount of time.<sup>180</sup> Conversely, if a patient’s body does not produce enough of these enzymes, then a normal dose of the psychoactive drug will cause the active ingredient to build up in the patient’s system.<sup>181</sup> Such an accumulation of the drug in the human body causes serious side effects.<sup>182</sup>

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173. 117 AM. JUR. *Trials* § 1 (2010).

174. *Id.*

175. *Id.*; Jack J. Chen, *Drug-Induced Movement Disorders: A Primer*, U.S. PHARMACIST (Nov. 19, 2007), [http://www.uspharmacist.com/content/c/10205/?+=alzheimer's\\_and\\_dementia,neurology](http://www.uspharmacist.com/content/c/10205/?+=alzheimer's_and_dementia,neurology).

176. *Trials*, *supra* note 173, § 1.

177. *Id.*

178. *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, CEPMED, <https://cepmed.dnadirect.com/grc/patient-site/psychiatric-drug-response/index.html> (last visited Feb. 16, 2014); *see also Weir*, *supra* note 172.

179. *See Sara Hoffman Jurand, Lawsuits Over Antidepressants Claim the Drug Is Worse than the Disease*, TRIAL, Mar. 2003, at 14, 16–17; *see also M.J. Kuhar & A.R. Joyce, Is the Onset of Psychoactive Drug Effects Compatible with a Protein-Synthesis Mechanism?*, 28 NEUROPSYCHOPHARMACOLOGY 94, 94–95 (Supp. 2003), available at <http://www.nature.com/npp/journal/v28/n1s/pdf/1300140a.pdf>; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

180. *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

181. Jurand, *supra* note 179, at 16–17.

182. *Id.*



The side effects experienced by poor metabolizers can range anywhere from nausea and dizziness to aggression and violence.<sup>183</sup> Akathisia is a reported side effect of psychoactive drug use that is characterized by “a terrible inner sensation of agitation accompanied by a compulsion to move about.”<sup>184</sup> Patients experiencing akathisia often “describe it as wanting to ‘jump out of their skin.’”<sup>185</sup> This condition has been known to trigger violent behavior and drive patients to commit suicide and homicide.<sup>186</sup>

Nevertheless, pharmaceutical manufacturers insist that akathisia is not a side effect at all: “[P]atients taking [antidepressants and antipsychotics] suffer from clinical depression—and . . . depressed people can be suicidal.”<sup>187</sup> However, doctors often prescribe these drugs for medical conditions other than depression, and with good reason.<sup>188</sup> Zoloft alone has been approved by the FDA as suitable for treating panic disorder, pediatric OCD, premenstrual dysphoric disorder, and social anxiety disorder, to name a few.<sup>189</sup> Patients who received psychoactive drugs as a treatment for ailments such as these, and showed no homicidal or suicidal behaviors prior to taking the medication, suddenly committed violent acts up to and including homicide.<sup>190</sup> For example, Vicky Jo Hartman received Zoloft from a family doctor despite the fact that “[s]he was not diagnosed with—or even evaluated for—clinical depression, anxiety attacks, or any other psychological disorder.”<sup>191</sup> After a short period of taking the medication as directed, Vicky shot her husband and then committed suicide.<sup>192</sup> Furthermore, in spite of the confident facade that pharmaceutical companies

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183. John Alan Cohan, *Psychiatric Ethics and Emerging Issues of Psychopharmacology in the Treatment of Depression*, 20 J. CONTEMP. HEALTH L. & POL’Y 115, 122–23, 149 (2003); see Corsi, *supra* note 3; Unruh, *supra* note 3; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

184. Unruh, *supra* note 3.

185. Jurand, *supra* note 179, at 14.

186. *Id.*; Corsi, *supra* note 3; Unruh, *supra* note 3; see Geoffrey Ingersoll, *The Antipsychotic Prescribed to Adam Lanza Has a Troubled History All Its Own*, BUS. INSIDER (Dec. 18, 2012, 2:36 PM), <http://www.businessinsider.com/adam-lanza-taking-antipsychotic-fanapt-2012-12>.

187. Stephanie Francis Cahill, *Luvox Lawsuit: Columbine Survivor Claims Antidepressant Caused Gunman’s Actions*, A.B.A. J. Sept. 13, 2001, available at Westlaw, 1 No. 35 ABA J. E-Report 2; Jurand, *supra* note 179, at 14.

188. See Jurand, *supra* note 179, at 16.

189. Michael A. Rosenhouse, Annotation, *Liability of Prescription Drug Manufacturer for Drug User’s Suicide or Attempted Suicide*, 45 A.L.R. 6th 385, 402 (2009).

190. See *Estates of Tobin v. SmithKline Beecham Pharm.*, 164 F. Supp. 2d 1278, 1280, 1283–84 (D. Wyo. 2001); Jurand, *supra* note 179, at 14; Corsi, *supra* note 3.

191. Jurand, *supra* note 179, at 14.

192. *Id.*

put up—that the disease is to blame, not the drug—Solvay Pharmaceuticals settled with Columbine victims after it was alleged that Luvox caused Eric Harris’s high school rampage in 1999.<sup>193</sup> In another case, the manufacturer of Paxil was found liable in a wrongful death suit in excess of six million dollars after expert testimony revealed that some individuals experience severe reactions to SSRIs such as Paxil and Prozac, that the shooter was one such individual, and that his ingestion of Paxil caused his homicidal and suicidal behavior.<sup>194</sup> Instances such as these are evidence that homicidal and suicidal tendencies are not always a symptom of a pre-existing mental illness, but are sometimes a treatment-induced problem.<sup>195</sup>

Despite the increasingly clear connection between psychoactive drug use and akathisia-related side effects, it was not until 2006 that the Food and Drug Administration (“FDA”) even considered requiring the warning labels to include these risks.<sup>196</sup> Still, the failure to adequately warn about suicidal and homicidal tendencies has been the main source of litigation against pharmaceutical companies in recent years.<sup>197</sup> Much of this litigation has proved to be unsuccessful for the plaintiffs for a few reasons.<sup>198</sup>

According to Comment k in Section 402A of the Second Restatement of Torts, there are some products—such as antidepressants and antipsychotics—that are unavoidably unsafe.<sup>199</sup> Unavoidably unsafe products are those that have the potential to pose a serious risk to users even if the product is used as directed.<sup>200</sup> Manufacturers of products that fall under the meaning of Comment k are generally exempted from strict liability in suits for injuries related to the use of the product.<sup>201</sup> Manufacturers are able to put unavoidably unsafe products—such as psychoactive medications—on the market as long as the medication is not unreasonably dangerous.<sup>202</sup> A product is only unreasonably dangerous when its benefits

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193. Taylor v. Solvay Pharm. Inc., 223 F.R.D. 544, 549 (D. Colo. 2004); Cahill, *supra* note 187.

194. *Estates of Tobin*, 164 F. Supp. 2d at 1280, 1283–84, 1290.

195. Cahill, *supra* note 187; *see* Corsi, *supra* note 3.

196. *Trials*, *supra* note 173, § 5.

197. *Id.* §§ 1, 5; Cahill, *supra* note 187; Jurand, *supra* note 179, at 14.

198. Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R. 5TH 1, 26–27 (1998); Rosenhouse, *supra* note 189, at 396–97.

199. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); *Trials*, *supra* note 173, § 10.

200. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k; *Trials*, *supra* note 173, § 10.

201. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k; *Trials*, *supra* note 173, § 10.

202. *Trials*, *supra* note 173, § 10.

fail to outweigh its risks.<sup>203</sup> Since the medical utility of an antipsychotic or antidepressant is so great, pharmaceutical manufacturers are rarely held liable for putting an unavoidably unsafe product on the market.<sup>204</sup> As such, they can usually only be held liable for injury resulting from use of their product when they failed to provide an adequate warning.<sup>205</sup>

In order to be sufficient, the warning label on psychoactive drug packaging “must: (1) indicate the scope of the danger, (2) communicate the extent or seriousness of the potential danger, (3) alert a reasonably prudent practitioner to the danger, and (4) be conveyed in a satisfactory manner.”<sup>206</sup> The third adequate warning requirement brings up a problem known as the learned-intermediary doctrine (“LID”).<sup>207</sup>

The LID functions as a major obstacle to plaintiffs asserting a failure to warn claim against pharmaceutical manufacturers.<sup>208</sup> Under the LID, a pharmaceutical manufacturer has no duty to warn a patient of possible side effects.<sup>209</sup> Rather, the manufacturer is only obligated to warn the medical practitioners who will be prescribing the drug.<sup>210</sup> The LID applies to claims in strict liability and negligence, and it is used to break the chain of causation between the pharmaceutical manufacturer and the drug-induced violence of the patient.<sup>211</sup> The rationale behind the LID is that the “physician is in the best position to evaluate the often complex information provided by the manufacturer concerning the risks and benefits of its drug . . . and to make an individualized medical judgment, based on the patient’s particular needs and susceptibilities, as to whether the patient should use the product.”<sup>212</sup> In order to prove that a drug was not accompanied by a sufficient warning, a doctor, qualified as an expert, must testify that had a stronger warning been given, he would not have prescribed the drug to his patient.<sup>213</sup> This requirement almost always sets the plaintiff up for failure, and the reason why is clear when one considers the abovementioned information about CYP2D6 and CYP2C19.<sup>214</sup> Under the current scheme, doctors do not test a patient’s rate

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203. *Id.*

204. *Id.*

205. *Id.*

206. Kane, *supra* note 198, at 29.

207. Rosenhouse, *supra* note 189, at 397.

208. Kane, *supra* note 198, at 26; Rosenhouse, *supra* note 189, at 397.

209. Kane, *supra* note 198, at 27; Rosenhouse, *supra* note 189, at 397.

210. Kane, *supra* note 198, at 27; Rosenhouse, *supra* note 189, at 397.

211. Rosenhouse, *supra* note 189, at 397.

212. Kane, *supra* note 198, at 26.

213. *Id.* at 30–31.

214. See *Trials*, *supra* note 173, § 16; Jurand, *supra* note 179, at 16–18; Kuhar & Joyce, *supra* note 179, at 94–95; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

of enzyme production prior to prescribing an antipsychotic or antidepressant.<sup>215</sup> They operate under the assumption that every patient's body has a normal level of CYP2D6 and CYP2C19 and will thus be capable of metabolizing the drugs properly.<sup>216</sup> Since violent akathisia-related side effects do not occur when a drug is metabolized properly, doctors are justified in prescribing a medication—regardless of the known possible side effects—because a patient with normal CYP2D6 and CYP2C19 levels is statistically unlikely to suffer them.<sup>217</sup> As such, physicians typically cannot testify that a stronger warning would have deterred them from prescribing a drug to a particular patient because it is not the content of the warning that has the most effect on their decision, but the probability that the warning's content will occur.<sup>218</sup>

If a doctor *is* capable of providing the necessary testimony in a failure to warn claim, the plaintiff's next major obstacle is the pharmaceutical company's federal preemption defense.<sup>219</sup> Since the failure to warn is a state law cause of action, pharmaceutical companies are inclined to argue that "the federal regulatory scheme is so pervasive as to leave no room for supplementary state regulation, or state law conflicts with federal law, making compliance with both either impossible or frustrating to the purpose of the federal law."<sup>220</sup> In cases such as these, the pharmaceutical companies insist that the FDA regulations create "both a floor and a ceiling for drug labeling" requirements.<sup>221</sup> Under this theory, which was the common understanding of FDA regulations until 2008, pharmaceutical companies were discouraged from strengthening their warnings above what was required for FDA compliance.<sup>222</sup> This was intended to reduce the risk of over-warning, because over-warning would "exaggerate [the drug's] risk[] . . . to avoid liability," which could "discourage [the] appropriate use of a beneficial drug" or "cause meaningful risk information to lose its significance."<sup>223</sup>

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215. See Jurand, *supra* note 179, at 16–17 (noting that a test exists and implying that it is not used); Weir, *supra* note 172.

216. See Jurand, *supra* note 179, at 16; Weir, *supra* note 172; but see *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

217. Kuhar & Joyce, *supra* note 179, at 94–95; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

218. See *Trials*, *supra* note 173, § 16.

219. *Id.* § 4; Kane, *supra* note 198, at 31; Rosenhouse, *supra* note 189, at 400–01.

220. Kane, *supra* note 198, at 127.

221. Rosenhouse, *supra* note 189, at 401.

222. *Id.* at 396–97, 399, 401, 403.

223. *Id.* at 401.

However, some courts have noted that the federal regulations imposed by the FDA do not always preempt a state law cause of action against pharmaceutical manufacturers.<sup>224</sup> One such case was *Tucker v. SmithKline Beecham Corp.*,<sup>225</sup> which involved a wrongful death claim against the manufacturer of the antidepressant Paxil.<sup>226</sup> In that case, the court analyzed the language of the federal statutes that govern changes to a psychoactive drug's warning label.<sup>227</sup> The court noted that "the FDA regulations allow a manufacturer to modify pharmaceutical labels unilaterally and immediately, without prior FDA approval, when the manufacturer has reasonable evidence of a serious hazard."<sup>228</sup>

[T]he ongoing ability, authority, and responsibility to strengthen a label still rest squarely with the drug manufacturer. . . . [T]he FDA's power to disapprove does not make the manufacturer's voluntarily strengthened label a violation of federal law, which is what it would take to establish an actual conflict between state tort law and federal law.<sup>229</sup>

Many cases after *Tucker* have followed a similar line of reasoning, finding that a pharmaceutical manufacturer has the duty to revise its warning label as soon as a possible risk is brought to light.<sup>230</sup> Rather, the manufacturer's duty to warn is dependent on the risks that it has reason to know about, and it is under a continuous obligation to notify prescribing physicians of any possible side effects that could possibly be related to the drug's use.<sup>231</sup> A causal relationship between the drug's use and the purported risk does not need to be established in order for the duty to warn to apply.<sup>232</sup>

Although a causal relationship need not be shown in order for the manufacturer to have the duty to warn, causation is a key element that plaintiffs need to prove at trial.<sup>233</sup> The causation element is another large problem in failure to warn cases, because it requires the plaintiff to show that the suicide, homicide, or other event would not have occurred if the patient was not prescribed the medication.<sup>234</sup> Since pharmaceutical manufacturers

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224. *E.g.*, *Tucker v. SmithKline Beecham Corp.*, 596 F. Supp. 2d 1225, 1237–38 (S.D. Ind. 2008).

225. 596 F. Supp. 2d 1225 (S.D. Ind. 2008).

226. *Id.* at 1226–27.

227. *Id.* at 1227–29.

228. *Id.* at 1227.

229. *Id.* at 1229.

230. *Trials*, *supra* note 173, § 21.

231. *See id.*

232. *Id.* § 5.

233. *Id.* §§ 5, 16.

234. *Id.* § 16.

are typically the only party with access to information about a drug's ability to actually cause suicidal and homicidal behavior in patients, the plaintiff often has trouble establishing the required showing of causation.<sup>235</sup>

## V. THE SOLUTION

In recent years, biomedical companies have been investing in pharmacogenetic studies, the results of which “offer[] the promise of ‘personalized medicine.’”<sup>236</sup> Pharmacogenetics is the study of differences in drug metabolism and response due to differing levels of enzyme production.<sup>237</sup> Pharmacogeneticists recognize that some individuals are chemically incompatible with—or poor metabolizers of—certain prescription drugs.<sup>238</sup> As a result, pharmacogeneticists have developed a simple test, which allows a physician to determine the CYP2D6 and CYP2C19 levels in a patient's body.<sup>239</sup> This *compatibility test* begins with a cheek swab, and after two days, a prescribing doctor is able to tell whether a patient will experience adverse side effects if prescribed a certain type of medication.<sup>240</sup> According to pharmacogenetic researchers, “[t]he solution . . . is to assess enzyme activity and then prescribe medication compatible with that . . . activity.”<sup>241</sup> Accordingly, the compatibility test is intended to ensure that individuals suffering from psychosis, depression, anxiety, or other psychological disease will receive a medication that will work with their body chemistry.<sup>242</sup> Administering the test to patients prior to prescribing an antipsychotic or antidepressant will reduce the likelihood that a patient will experience violent, homicidal, and suicidal side effects.<sup>243</sup>

The proposal, then, is to require pharmaceutical companies to provide physicians and psychiatrists with the means necessary to conduct one of these tests for each patient who may need a psychoactive medication. If less people suffer from akathisia-related side effects, then there is a decreased likelihood that individuals will engage in mass shootings.<sup>244</sup>

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235. See *Trials*, *supra* note 173, § 20.

236. Weir, *supra* note 172.

237. See *id.*

238. See *id.*

239. Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

240. Weir, *supra* note 172.

241. *Id.*

242. See Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

243. See Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

244. See *supra* Part IV.

The financial burden of providing the compatibility tests should not fall squarely on the doctors or medical facilities for a few reasons. First, medical facilities such as hospitals, doctors' offices, mental institutions, and psychiatrists' offices are under a huge financial burden as it is.<sup>245</sup> Their budgets should not be put under additional stress, especially because requiring them to foot the bill for the compatibility test could have a negative impact on patient treatment: If the medical institution is required to foot the bill for the compatibility test, then doctors may be convinced to avoid prescribing psychoactive drugs in order to save the facility money. This would be an undesired effect, as it may result in patients not receiving the treatment they need. Putting the cost of providing the test on the prescribing physician or the medical facility could also cause doctors to continue prescribing psychoactive drugs, but simply not administer the test in an effort to save money. If akathisia-related side effects in the patient occurred thereafter, then the doctor could lose his or her license and be held civilly liable to the patient.<sup>246</sup> This would be yet another undesired effect. Instead, putting the cost of the compatibility tests on the pharmaceutical manufacturers easily avoids these issues.

Second, it is a standard principle of tort law that the duty to warn falls on the party with the most information available about the product, which is the manufacturer.<sup>247</sup> The compatibility test is no more than a tool that establishes a personalized warning for each patient by providing the statistical likelihood of adverse side effects on the user.<sup>248</sup> Therefore, the duty of providing the test or warning should fall on the manufacturer.<sup>249</sup> Third, this proposal complies with FDA regulations regarding manufacturer-supplied warnings, because there is no federal law explicitly prohibiting pharmaceutical companies from providing the statistical likelihood that an individual patient will experience side effects.<sup>250</sup>

Finally, this proposal serves as a way around the often-troubling LID: If pharmaceutical companies were required to provide compatibility tests to medical practitioners in order to satisfy the adequate warning requirement and they failed to do so, then doctors could testify that they

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245. Parija Kavilanz, *Doctors Driven to Bankruptcy*, CNN MONEY (Apr. 8, 2013, 11:20 AM), <http://www.money.cnn.com/2013/04/08/smallbusiness/doctors-bankruptcy/>.

246. See *Trials*, *supra* note 173, § 20; Peter Eisler & Barbara Hansen, *Six Types of Misconduct that Get Doctors in Trouble*, USA TODAY (Aug. 21, 2013, 1:29 PM), <http://www.usatoday.com/story/news/nation/2013/08/20/troubled-doctors-misconduct-findings/2678511/>.

247. Rosenhouse, *supra* note 189, at 405.

248. See Weir, *supra* note 172.

249. See Rosenhouse, *supra* note 189, at 405.

250. *Id.* at 396–97.

would not have prescribed the drug if they knew that the patient was a poor metabolizer. Currently, doctors, patients, and shooting victims bear the risk of loss for injury when akathisia-related side effects occur.<sup>251</sup> This proposal places the risk of loss onto pharmaceutical manufacturers instead because they are in a better position to financially handle “the loss by distributing it as a cost of doing business.”<sup>252</sup> Ultimately, this proposal opens the door for pharmaceutical company liability.

## VI. CONCLUSION

Mass shootings in America are not going to be stopped by simple gun regulations.<sup>253</sup> The failures of previous gun laws and the sheer number of mass shootings that occurred during America’s strictest gun control eras should testify to that point.<sup>254</sup> Government-sponsored gun buy-backs, future gun bans, and mental health certificates are not viable solutions either because of their inherent unconstitutionality and impracticability.<sup>255</sup> When it comes to mass shootings, gun restrictions are analogous to treating a symptom; it is never going to cure the disease because it does not target the root cause.<sup>256</sup> Instead, if Americans wish to find a solution to the mass-shooting problem, they need to focus on targeting the source of mass shooters’ suicidal and homicidal proclivities.<sup>257</sup> One such source is akathisia as a result of psychoactive drug use.<sup>258</sup> Accordingly, the best way to reduce the likelihood of mass shootings is to reduce the likelihood that patients will suffer from akathisia after taking a prescription medication.<sup>259</sup> One way to help ensure that this side effect will not occur is by conducting a simple compatibility test to determine the patients’ ability to metabolize psychoactive drugs.<sup>260</sup> The compatibility test requirement also makes the pharmaceutical companies vulnerable to civil suit.<sup>261</sup>

The doors for pharmaceutical company liability need to be opened when it is discovered that a mass shooter was using that company’s drug, and rightly so. If it is discovered that an antipsychotic or antidepressant was being used by a mass shooter at the time of the massacre in question, then

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251. *See supra* Part IV.  
 252. *Trials, supra* note 173, § 20.  
 253. *See supra* Parts II–III.  
 254. *Id.*  
 255. *See supra* Parts II–IV.  
 256. *See supra* Part III.  
 257. *See supra* Part IV.  
 258. *Id.*  
 259. *Id.*  
 260. *See supra* Part V.  
 261. *Id.*



pharmaceutical companies should bear some risk of liability. This will undoubtedly help the survivors and the families of the deceased. Typically, these individuals cannot recover from the shooter because he is either dead—shot by the police or committed suicide at the scene—or because he is not financially capable of adequately compensating his victims. The victims cannot recover from gun manufacturers under the current regulatory scheme because they are immune from suit in these circumstances.<sup>262</sup> Survivors and the families of the deceased cannot recover from the owner of the shooting's location because they would have to prove that the owner knew or should have known that this venue would be the place of an attack and he failed to hire security accordingly, which oftentimes requires a previous, similar violent instance at that location.<sup>263</sup> Opening liability on the pharmaceutical companies gives the victims a chance to recover damages, have their medical expenses covered, or have their loved ones' funeral service paid for. It will also help because it will encourage the pharmaceutical companies to independently—on their own time and dime—work toward reducing the likelihood of their product causing a violent event.

Aside from lifting the burden off of the gun industry, saving money on ineffectual gun legislation attempts, helping to reduce the mass shooting problem, and assisting victims in their struggle to recover, this solution also secures the rights of those suffering from mental illness. With the compatibility test administered, these individuals do not have to suffer through a *trial-and-error* method of treatment; it is likely that they will get the most effective medication for their ailment the very first try—the best possible treatment for their illness—thus securing their right to comprehensive mental health care. Further, this solution will assist in securing the Second Amendment rights of all American citizens—regardless of their health—because it does not impose additional disqualifiers for firearm ownership, nor does it mandate additional certifications or checks.

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262. See Katrina vanden Heuvel, *The Case for Gun Liability Laws*, NATION (Sept. 24, 2013, 9:42 AM), <http://www.thenation.com/blog/176317/case-gun-liability-laws#>.

263. Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 WHITTIER L. REV. 409, 409–10 (2006).

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