

# THE CULTURAL (RE)TURN: THE CASE FOR TEACHING CULTURALLY RESPONSIVE LAWYERING

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*Recent changes to the American Bar Association's (ABA) accreditation standards require law schools to adopt learning outcomes that demonstrate competencies for legal practice and to measure progress toward this goal. Absent from the new requirements, however, is any mention of "culture." Instead, "cultural competence" is included as an optional skill, which law schools may choose to identify and measure (or not). But culture is anything but optional. In light of contributions from psychology and cognitive science, and calls from the bench and bar, law schools can no longer avoid including culture in meaningful, sustained, and integrated instruction throughout the curriculum. Building on critical legal scholarship and the movement to foster cross-cultural lawyering competencies in clinical education, this article proposes culturally responsive lawyering as a new orienting framework for legal education and for law practice. Culturally responsive lawyering specifically rejects the notion that cultural competence is an optional skill, divorced from other core competencies. Rather, culturally responsive lawyering is grounded in a deliberative process, which extends deeper than outward-facing performative skills. Culturally responsive lawyering acknowledges that culture and law exist in a mutually constitutive relationship and employs both transformative legal analysis and intercultural sensibility to meet the ethical requirements of competent lawyering. In addition to sketching a theoretical framework, this article proposes learning outcomes and curricular strategies for culturally responsive lawyering that can be interwoven into any law school course.*

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#### INTRODUCTION

*“[I]f y’all, this is how I feel, if y’all think I did it, I know that I didn’t do it so why don’t you just give me a lawyer dog cause this is not what’s up.”<sup>1</sup>*

In law school, professors train their students to analyze the law, evaluate facts, and render decisions. They teach law students that reasonable minds can differ. But, when reasonable minds differ, what should law students (or, for that matter, attorneys) do? What training and experience can they rely on to determine how the law applies to a specific set of facts, in a particular context, during a moment in time? What obligation do they have to their clients and, more broadly, to the justice system to consider not only the legal landscape—the “context”—but also the larger human contexts in which decisions are made? And what obligation, if any, do law schools have to provide every law school graduate with direct instruction and experiential learning opportunities to foster the critical mindset and skills needed to address this complex interplay?

These questions are not new. In fact, they have been thoroughly debated for decades.<sup>2</sup> Scholars and practitioners alike have conducted studies, drafted

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1. *State v. Demesme*, 228 So. 3d 1206, 1206 (La. 2017).

2. See, e.g., Carrie Menkel-Meadow, *Taking Law and \_\_\_ Really Seriously: Before, During and After ‘The Law’*, 60 VAND. L. REV. 555, 560-80 (2007) (chronicling the history of legal education reform). For examples of scholarly critiques and reform proposals, see

reports, and made recommendations.<sup>3</sup> At the heart of the debate for legal education is whether law schools should teach students to “think like” lawyers or to “be” lawyers.<sup>4</sup> “Thinking like” lawyers has long been associated with critical thinking and abstract reasoning.<sup>5</sup> But legal thinking need not and should

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Sharon L. Beckman & Paul R. Tremblay, *Foreword: The Way to Carnegie*, 32 B.C. J.L. & SOC. JUST. 215, 216 (2012) (arguing that the Langdellian case method “erases the context of practice and, in doing so, fails to teach students to recognize and take account of the social, economic, and political forces constraining the choices of others”); Kimberlé W. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1988) (calling for a critical collective pedagogy that centers minority student perspective and experiences in law school classrooms); Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 212-15 (1948) (describing the prevailing “case teaching” method and critiquing its “concentrat[ion] upon subject matter at the expense of training in craft-skills”); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007) (arguing for the inclusion of problem-solving materials requiring students to generate alternative solutions that include legal, normative, and practical considerations).

3. See, e.g., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-207 (1992) [hereinafter MACCRATE REPORT], <https://perma.cc/R86E-KULB>; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007), <https://perma.cc/K59F-ZJMF>; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (2014), <https://perma.cc/4S9N-TX3R>; see also Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 64-71 (2009); Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661, 668-71 (2016).

4. See, e.g., Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701, 713 (1989) (arguing the goal of legal education should be “to teach students to *be* lawyers, not just to ‘think like lawyers’ or ‘act’ like lawyers”); Menkel-Meadow, *supra* note 2, at 559 (arguing there is also ambiguity in the term “a” lawyer and stating there are “too many different forms of legal practice to construct a generalizable or uniform idea of ‘a’ lawyer for educational purposes”).

5. See Angela P. Harris & Marjorie M. Shultz, *“A(nother) Critique of Pure Reason”*: *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1777 (1992) (“The prevailing image of the law is of blindfolded Justice balancing the scales of decision. Because lack of bias or prejudice is essential to adjudication, Justice wears a blindfold to shut out persons and passions that might inappropriately influence her inward deliberation. Even where lawyers are advocates or advisors rather than adjudicators, the profession emphasizes ‘thinking like a lawyer.’”); see also Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education: A Case for Cultural Competency*, 38 S.U. L. REV. 1, 16-17 (2011) (discussing EDUCATING LAWYERS and stating “[s]tudents discover that thinking like a lawyer means redefining messy situations of actual or potential conflict as opportunities for advancing a client’s cause through legal argument before a judge or through negotiation”); Crenshaw, *supra* note 2, at 2 (defining the dominant mode of legal academe as “perspectivelessness”).

not be so limited.<sup>6</sup>

Warren Demesme's case makes this point loud and clear. In October 2017, grammarians, bloggers, and lawyers alike took to the internet to hash out the meaning of these words: "[i]f y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."<sup>7</sup> Mr. Demesme, a criminal defendant charged with first-degree rape and indecent behavior with a juvenile, claimed this statement was his request for an attorney.<sup>8</sup> The Criminal District Court for the Parish of Orleans disagreed and denied his motion to suppress.<sup>9</sup> Subsequently, the Supreme Court of Louisiana denied his application for a writ of certiorari review in a 6-1 decision without written opinion.<sup>10</sup> Likely, this decision would have faded into the archives were it not for a concurring opinion penned by Justice Crichton.<sup>11</sup> There, Justice Crichton concluded, "the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview . . . ."<sup>12</sup>

The decision and the debates that ensued illustrate the interplay between cognition, context, culture, and the law. Memes of dogs in suits flooded Twitter feeds. Angela Helm, writing for *The Root*, asserted that this decision demonstrated how "the court system does not work for black people—especially those who lack resources."<sup>13</sup> Jordana Rosenfeld, writing in *The*

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6. See Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM. J. RACE & L. 55, 56-61 (2013) (critiquing the post-racial narrative present in the typical law school curriculum and identifying it as part of dominant social and legal culture); Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 180 (2014) (arguing that thinking like a lawyer requires cultural sensibility); Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612-13 (2008) (explaining that "thinking like a lawyer" includes mastering doctrine, including theories related to doctrine and criticisms, and being skilled with how to use this knowledge in context); Stephen Wizner, *Is Learning to 'Think Like a Lawyer' Enough?*, 17 YALE L. & POL'Y REV. 583, 589 (1998) (suggesting that it is "possible to discourage fuzzy thinking and sentimentalism, and to teach 'abstract hypothetical-deductive critical thinking skills,' while at the same time raising and addressing moral issues and encouraging humane responses to human experience").

7. *State v. Demesme*, 228 So. 3d 1206, 1206 (La. 2017).

8. Petition for Supervisory Writs to Review the Trial and Appellate Courts' Denial of Mr. Demesme's Motion to Suppress Statements at 6-9, *Demesme*, 2017-0954 (La. Oct. 27, 2017) [hereinafter Petition].

9. *Id.* at 7-8.

10. *Demesme*, 228 So. 3d 1206.

11. *Id.* at 1206 (Crichton, J., concurring) (agreeing Mr. Demesme's request for an attorney was ambiguous).

12. *Id.* at 1207.

13. Angela Helm, *La. Court Rules That Man Who Said 'Give Me a Lawyer, Dog' Wasn't Asking for Counsel*, ROOT (Nov. 5, 2017), <https://perma.cc/W96J-5LLK>.

*Nation*, argued that the decision reflected the continued refusal of the U.S. legal system to acknowledge language outside of Standard American English, which results in “the unfair treatment of an individual based solely on the characteristics of their speech.”<sup>14</sup>

The decision made its way through legal circles as well.<sup>15</sup> Scholars questioned whether the transcription of Mr. Demesme’s quote fairly captured his intent or whether “the transcript didn’t do the request justice.”<sup>16</sup> If Mr. Demesme paused and said “dawg,” then perhaps his request was clear: “why don’t you just give me a lawyer, dawg.”<sup>17</sup> Or perhaps the ambiguity wasn’t in the word “dog” but in the “conditional” statement that preceded it: “if y’all think I did it.”<sup>18</sup> According to the State of Louisiana, Mr. Demesme never unambiguously invoked his right to counsel because his statement suggested he only wanted an attorney if the interrogating officers thought he was guilty.<sup>19</sup> Under this analysis, “[a] reasonable officer under the circumstances would have understood, as [the] Detective . . . did, that the defendant only *might* be invoking his right to counsel.”<sup>20</sup> Therefore, denying his motion to suppress wasn’t “obviously wrong.”<sup>21</sup>

But does that somehow make it right? The result in Mr. Demesme’s case was severe: If he invoked an attorney with those words, nothing he said after would be admissible in court. On the other hand, if those words weren’t a

14. Jordana Rosenfeld, *In the Legal System, Talking White Is a Precursor to Justice—and That’s Wrong*, NATION (Jan. 29, 2018), <https://perma.cc/5HNN-WHAM>.

15. See, e.g., Holly Howell, *Improper Grammar and Our Modern Day Vernacular Collide Raising Questions About Whether One Louisiana Man’s Fifth Amendment Rights Were Violated*, AM. J. TRIAL ADVOC. (2019), <https://perma.cc/ZZF6-D7TP>; Norman Tabler, *The Unspeakable Comma*, 65 FED. LAW. 18, 18 (2018); Elie Mystal, *Suspect Asks for a ‘Lawyer, Dog,’ Willfully Ignorant Court Denies Comma, Counsel*, ABOVE THE LAW, (Oct. 30, 2017), <https://perma.cc/NF6G-52GH>; see also Orin Kerr, *The Lawyer Dog’ Decision Isn’t Obviously Wrong*, WASH. POST (Nov. 3, 2017), <https://perma.cc/6G38-UTSH>; Eugene Volokh, Opinion, *You Have the Right to Ask for a Lawyer Dog — But It Won’t Do You Any Good*, WASH. POST (Oct. 31, 2017), <https://perma.cc/G4JS-8Q3T>. See generally Christopher A. Hebert, Note, *Context is King: Lawyer Dogs, Pure Applesauce, and Your Miranda Right to Counsel*, 92 TUL. L. REV. ONLINE 1 (2018).

16. Volokh, *supra* note 15.

17. Kerr, *supra* note 15. Hyperlinking to the definition of “dawg” on urbandictionary.com, Kerr writes, “[t]he funny part of *Demesme*, of course, is that there’s a sentence in the opinion suggesting that Crichton may have misunderstood the vernacular ‘dawg,’ roughly meaning ‘friend,’ as if it meant ‘dog’ as in the animal.” *Id.*

18. *Id.* Kerr noted that the ambiguity wasn’t in the word “dog,” but in the “conditional” statement that preceded it. According to Kerr, Mr. Demesme’s use of conditional phrasing (“if y’all think I did it”) and his subsequent question (“so why don’t you get me a lawyer”) make the *Davis* test determination a close call.

19. Opposition to Defendant’s Original Writ Application at 7-8, *State v. Demesme*, 228 So. 3d 1206 (2017) (No. 2017-0954).

20. *Id.* at 8.

21. Kerr, *supra* note 15.

request for counsel, then anything he said after could be introduced at trial and used against him. For Mr. Demesme, the exercise wasn't academic—and it certainly wasn't funny. Law, for most who experience it, is seldom either.

Legal education is partly to blame for the deft combination of willful blindness and technical parsing used to deny Mr. Demesme's writ. For too long, law schools have perpetuated the notion that lawyers and judges merely call "balls and strikes," immune from bias and subjectivity.<sup>22</sup> Further, first year courses—taught almost exclusively from edited appellate decisions—gloss over human context, both flattening and distorting the law's development and its interpretation by focusing on black letter law to the exclusion of most everything else.<sup>23</sup>

There is hope. Recent changes made to the Standards and Rules governing law school accreditation (the ABA Revised Standards)<sup>24</sup> finally reflect an understanding that preparing students to participate in the legal profession as effective, ethical, and responsible lawyers requires competencies that go far beyond legal knowledge. At their most basic, the ABA Revised Standards require law schools to evaluate their curricula and instructional methods and to ensure that students meet minimum knowledge, skills, and values competencies. But as Mr. Demesme's case makes clear, law schools should do more than this: They should reimagine their curricula to make certain their students are prepared to fulfill their ethical duty to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."<sup>25</sup> Clinical and critical legal theory scholars have been making this plea for decades, yet first-year required courses have remained largely unchanged.

Building on the movement to foster cross-cultural lawyering competencies

22. Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,' CNN (Sept. 12, 2005), <https://perma.cc/FAE5-PMHG>; see also Kevin Bennardo, *Abandoning Predictions*, 16 LEGAL COMM. & RHETORIC 39, 43 (2019) (noting that judges are "all-too-human workers," who "cannot be counted on to apply legal rules to the facts in a purely mechanical manner").

23. See Eduardo R.C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 23 CLIN. L. REV. 37, 39-42 (noting that students encounter "prospective clients from the perspective of institutions far removed from ordinary human existence—appellate courts"); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1196 n.226 (2008) (stating legal reasoning "privileges technical form and levels of legal authority over social contexts and moral issues"); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1735-36 (1993) ("The arguments the students make, arrived at entirely without reference to the clients, are determined by and confined within structures of argumentation that reflect the available and acceptable categories of legal analysis.").

24. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018, <https://perma.cc/9KRG-9QNJ> [hereinafter ABA STANDARDS].

25. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. 6 (2015).

in clinical and experiential teaching, and harnessing reform momentum spurred by the learning outcome requirements, this Article proposes that law schools adopt a new conceptual framework—culturally responsive lawyering—to ground curricular reforms. The term “culturally responsive lawyering” is inspired by the work of education scholars who have been developing pedagogy and curricula aimed at transforming the educational experiences of students of color in the U.S.<sup>26</sup> Culturally responsive lawyering is not cultural competence repackaged. It is much more. Like the critical pedagogy that inspired its connection to law, culturally responsive lawyering is not a prescriptive program but a way of thinking about, interacting with, and practicing law that supports dignity, equity, and systemic transformation. To this end, the culturally responsive lawyering framework includes three tenets. Culturally responsive lawyering: (1) accepts that culture and law exist in a mutually constitutive relationship; (2) utilizes transformative legal analysis<sup>27</sup>—a reconceptualized approach to traditional legal analysis that specifically evaluates how culture, context, and cognition affect what the law is and encourages law students and practitioners to make normative assertions about what the law should be; and (3) employs this transformative legal analysis along with inter-cultural sensibility in the provision of legal services or when otherwise operating within the legal profession.

This Article proceeds in four parts. Prior to sketching the three tenets of culturally responsive lawyering, Part I defines “culture” and summarizes how culture and social cognition interact. It then briefly describes the inclusion of “culture work” in legal scholarship and pedagogy. Here, “culture work” refers to the various ways that culture is explored and taught in law schools. Culture work encapsulates the inclusion of culture in theoretical legal studies

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26. See generally GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE (3d ed. 2018) (collecting works that explore the development of culturally responsive pedagogy through theory, research, scholarship, and practice); ZARETTA L. HAMMOND, CULTURALLY RESPONSIVE TEACHING AND THE BRAIN: PROMOTING AUTHENTIC ENGAGEMENT AND RIGOR AMONG CULTURALLY AND LINGUISTICALLY DIVERSE STUDENTS (2015). According to Hammond, culturally responsive teaching (CRT) “[e]mphasizes communal orientation focused on relationships, cognitive scaffolding, and critical social awareness.” *Id.* at 156. Hammond approaches CRT not as a prescriptive program, but as a “way of thinking about and organizing instruction to allow for great flexibility in teaching.” *Id.* at 5. To date, the term culturally responsive lawyering has not been adopted by the legal profession. *But see* Debra Chopp et al., *Arguing on the Side of Culture*, LITIG. J. (MICH.), Fall 2014, at 10-13 (describing culturally responsive professional practice as including four components: knowledge, awareness, affective or cultural sensitivity, and the integration of “professional and cultural knowledge and skills”).

27. The term “transformative legal analysis” is inspired by the work of legal writing and rhetoric scholar Professor Lucy Jewel, who wrote: “The law is not just a static system of rules to be studied; rather, students and practitioners engage in a dynamic intellectual enterprise of remixing and reconstituting precedential legal texts, with the goal of forging new and transformative legal meanings.” Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 680 (2017).

scholarship and in competence, sensibility and awareness frameworks taught primarily through clinical education. Part II critiques the requirements imposed on law schools by revised ABA Standard 301, which lays out *the Program of Legal Education's Objectives*, and Standard 302, which establishes *Learning Outcomes and Minimum Competencies*.<sup>28</sup> It argues that although the ABA Guidance for Standard 302 includes “cultural competence” as an optional “other professional skill[,]” the inclusion of “culture” here belies the powerful influence that culture has on law, law practice and legal systems, and undermines adopting culture work throughout the legal curriculum. Part III sketches out the three tenets of culturally responsive lawyering in addition to proposing learning outcomes aligned with these tenets. Part IV returns to the article’s opening scene and considers how a law student or lawyer might begin to think through Mr. Demesme’s case using the tenets of culturally responsive lawyering. The Article concludes by calling on law schools and their faculty to situate culture at the heart of legal education and law practice by adopting culturally responsive lawyering as a guiding framework. In addition to supporting students’ ability to demonstrate the minimum competencies outlined in ABA Standard 302, the tenets of culturally responsive lawyering foster ethical practice, enhance the legal profession, and advance equity and justice.

#### I. WHAT’S CULTURE GOT TO DO WITH IT?

*“[C]ulture is everywhere invoked and virtually nowhere explained.”*<sup>29</sup>

##### A. Culture Defined

Despite (or perhaps because of) the term’s adoption across disciplines, a concrete definition of culture is both contested and elusive.<sup>30</sup> For the purposes of describing culturally responsive lawyering, this article adopts the definition proposed by Professor Naomi Mezey in “Law as Culture.”<sup>31</sup> Culture, then, is

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28. ABA STANDARDS, *supra* note 24.

29. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001).

30. See Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 15-16 (2001) (noting “culture” has ascended in legal scholarship while at the same time “[t]alking about culture at the start of the twenty-first century means venturing into a field where there are almost as many definitions of the term as there are discussions of it, and where arguments rage inside as well as outside the academy”); see also Verlyn F. Francis, *Infusing Dispute Resolution Teaching and Training with Culture & Diversity*, 33 OHIO ST. J. DISP. RESOL. 171, 180-96 (2018) (outlining what culture is not); 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, 134-35 (2006) (noting “[s]everal disciplines, such as cultural anthropology and sociology, are devoted in part to the task [of defining culture] and [are] deeply divided in the effort”).

31. Mezey, *supra* note 29, at 42. For this definition, Professor Mezey drew from the

“any set of shared, signifying practices—practices by which meaning is produced, performed, contested or transformed.”<sup>32</sup> While demographic markers are routinely used to define the variables that constitute culture,<sup>33</sup> no single characteristic or membership determines a person’s culture. Each person embodies and reflects multiple cultures and each culture generates its own values, customs, and traditions.<sup>34</sup> Additionally, the very act of naming and categorizing constituent parts of “culture” belies its dynamism. By naming its parts, we lose sight of the role people play in defining and shaping culture.<sup>35</sup>

Legal culture is one such culture.<sup>36</sup> As with any macro-cultural

work of Raymond Williams and William Sewell. *See id.* at 38-45 (discussing “culture”).

32. *Id.* at 42-43 (proposing this definition for the term “culture” and expressly describing culture as both a semiotic system and as the practices that make, reproduce, and contest this system, and arguing that rather than a “self-contained whole made up of coherent patterns,” culture is “porous” and fluid).

33. For example, narrow definitions of culture may include only ethnicity or nationality, whereas broader definitions include additional demographic variables. *See* Neil Hamilton & Jeff Maleska, *Helping Students Develop Affirmative Evidence of Cross-Cultural Competency*, 19 SCHOLAR 187, 188-89 (2017) (listing age, gender, race, ethnicity, sexual orientation, physical ability, nationality, religion, and socio-economic group, and acknowledging that sharing a category does not equate with sharing a culture or experience). *See generally* Christina A. Zawisza, *Teaching Cross-Cultural Competence to Law Students: Understanding the ‘Self’ as ‘Other’*, 17 FLA. COASTAL L. REV. 185 (2016) (discussing results from exercises conducted with legal academics and law clinic students and adding categories such as politics, profession, geography, and generation).

34. *See* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 368 (2017) (noting “we are each a part of several cultures, and each culture generates its own norms”); Leslie G. Espinoza, *Solidarity, Inclusion, and Representation: Tensions and Possibilities Within Contemporary Feminism*, 2 VA. J. SOC. POL’Y & L. 23, 24-27 (1994) (discussing how language reflects culture and how an individual can belong to multiple overlapping subcultures); Piomelli, *supra* note 30, at 135 (noting we each belong “to multiple cultures—some of which we choose, some to which others assign us”); Zawisza, *supra* note 33, at 194 (“Every person assumes hundreds, perhaps thousands, of culturally learned identities and affiliations at one time or another.”). *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-45 (1991) (explaining intersectional identity theory and “highlight[ing] the need to account for multiple grounds of identity when considering how the social world is constructed”).

35. *See* Milton J. Bennett, *The Ravages of Reification: Considering the Iceberg and Cultural Intelligence, Towards De-reifying Intercultural Competence*, Keynote Presentation for the Forum for Intercultural Learning and Exchange (Sept. 28, 2013), <https://perma.cc/D7YW-K779> (noting that “[w]hen we talk about culture as if it is a thing, we are neglecting our authorship of the construct”).

36. *See* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW 47, 48 (Kimberly Holt Barrett & William H. George eds., 2005); *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985) (describing a lawyer’s rhetorical life as always culturally situated). Legal institutions and other entities (inside and outside of law) can also have “culture.” Additionally, as Naomi Mezey notes, “[l]aw can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings.” Mezey, *supra* note 29, at 45.

identification, legal culture contains myriad micro-cultures. These micro-cultures can be affected by geography and practice area.<sup>37</sup> Law school and legal curricula also produce and affect culture because, as Professor Leslie Espinoza recognized over twenty-five years ago, “[l]aw school is where the power and possibilities of law are learned.”<sup>38</sup>

Although an imperfect metaphor, culture is like a river.<sup>39</sup> Made up of water molecules, a river is “constrained by its banks but at the same time slowly carving those banks in different ways.”<sup>40</sup> Tearing away rock and soil, a river changes slowly over time. At any given moment, whether viewed from 30,000 feet or from a perch along its bank, a river appears fairly stable.<sup>41</sup> So too with culture. People perceive and internalize culture through a process of assimilation to their human and natural environments.<sup>42</sup> Like a river, people also affect their culture(s)—altering its shape, density, and course over time.<sup>43</sup>

Culture, described this way, is influenced by and influences social cognition, the embedded knowledge structures in the human brain.<sup>44</sup> Working in the background at the subconscious level, these structures and the processes

37. See generally Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 CLIN. L. REV. 183 (2011) (discussing how culture influences lawyering within communities of practice).

38. Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL’Y & L. 23, 28 (1994). Professor Espinoza explains that traditional law teaching exposes students to “a whole new way of thinking, of categorizing and conceptualizing information. They learn: to think of problems as issues, divorced from emotion; to think of justice in terms of economic cost-benefit analysis; to think of judging as the application of preset rules; to evaluate power; and to speak in the language that will be heard by the law.” *Id.* at 30.

39. See Bennett, *supra* note 35 (proposing and explaining this metaphor). Various other metaphors have been employed to capture culture’s essence. Susan Bryant and Jean Koh Peters, in their ground-breaking article on the Five Habits, wrote “culture is like the air we breathe—it is largely invisible and yet we are dependent on it for our very being.” Susan Bryant & Jean Koh Peters, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 40 (2001). Prominent socialist Edward T. Hall analogized culture to an iceberg, where readily perceived physical characteristics like skin color and gender exist above the waterline and represent only a small portion of factors that comprise a society’s (or a person’s) culture. This metaphor has been widely adopted and critiqued. See, e.g., Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 712 (2003) (noting widespread adoption and suggesting that the model can be misleading).

40. Bennett, *supra* note 35.

41. *Id.*

42. See Bryant & Peters, *supra* note 36, at 48 (noting “[c]ulture is the logic through which we give meaning to the world”); Chopp, *supra* note 34, at 372 (“People learn their culture through a process of assimilation, which entails learning and internalizing group preferences, evaluations, and values.”).

43. See Piomelli, *supra* note 30, at 135 (“One might thus analogize culture to a current that we and other members of our social group[s] move with, or against, and occasionally even redirect, as we strive to make sense of and act in the world.”).

44. See Bennett, *supra* note 35 (“[S]eeing cultural difference is a function of employing observational categories that have been constructed by us human beings.”).

through which they filter, store, and use information have a profound effect on the study and practice of law. The categories and schemas we rely on to create our realities are the same schema that influence law making and interpretation. As a result, social cognition affects how law students, lawyers, and judges understand client issues, interpret legal standards, and imagine solutions. For example, as Professor Chen and Hansen explain, legal disputes routinely come down to a question of categorization. “Is a business a partnership? Is a person a public figure? Is an employee a servant? Is a work environment hostile? Is a corporation a person? Is a fetus a human being? Is separate equal?”<sup>45</sup> Answering these questions competently requires that law students and legal professionals consider culture, context, and cognition. The Subpart below briefly describes social cognition and then discusses how legal scholarship and pedagogy have incorporated (or failed to incorporate) both culture and social cognition theory into legal education.

#### B. Social Cognition, Culture Work, and Law

During the past two decades, numerous studies in the fields of cognitive science, social psychology, and neuroscience have demonstrated that the organizing structure of the human brain sorts, interprets, and categorizes information.<sup>46</sup> Unbeknownst to the thinker, the brain uses schema and mapping rules to make sense of incoming information.<sup>47</sup> Schema work like a mental blueprint. As Professor Linda Berger explains, they “sort and organize our experiences and acquired knowledge of the world, plugging them into slots in an existing framework and allowing us to assess new situations and ideas without having to interpret and construct a diagram of inferences and relationships for the first time.”<sup>48</sup> In short, these embedded knowledge

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45. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1239 (2004).

46. For a review of the scientific research on social cognition, see MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* 78-87 (2013). See also Chen & Hanson, *supra* note 45, at 1103 (describing schemas, categories, and human cognition and exploring their role in legal scholarship and theory); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499-1504 (2005) (describing how racial meanings, racial categories, and mapping rules create racial schemas).

47. Chen & Hanson, *supra* note 45, at 1133-35; see also Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 60 (2017) (“[A] schema does its world-creating work before we become aware of the information it organizes.”); Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 317-18 (2012) (explaining schemas and schematic thinking).

48. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009); see also Andrea A. Curcio, *Addressing*

structures influence perception, interpretation, and behavior. As a result, they impact and are impacted by culture.<sup>49</sup>

Although slow to apply these findings to law, legal scholars have produced a recent surge of scholarship on implicit social cognition.<sup>50</sup> For example, legal scholars have explored the role of implicit bias in jury selection and sentencing,<sup>51</sup> jury and judicial decision-making,<sup>52</sup> immigration proceedings,<sup>53</sup>

*Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 545-47 (2015).

49. See Lisa W. Rozas & Joshua Miller, *Discourses for Social Justice Education: The Web of Racism and the Web of Resistance*, 18 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 24, 28-29 (2009) (“people enter a world in which their social identity [race, ethnicity, religion, gender, sexual orientation, etc.] influences what they are taught, how they are treated, and to what information and opportunities they are exposed.”); see also Jewel, *supra* note 23, at 663 (“Culture can produce unified categories that function as metaphorical ‘code’ for more implicit concepts. For example, when we use the category ‘unwed mother’ or ‘working mother,’ our mind quickly latches onto the majoritarian cultural values associated with these categories.”); Wilkins, *supra* note 47, at 330 (noting that schemas change over time with cultural shifts).

50. See, e.g., Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013) (discussing the potential effect of implicit bias in legal proceedings); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 799-80 (2000) (arguing that “the mental image of a prototypical case can alter legal categories); Curcio, *supra* note 48, at 552-53 (explaining confirmation bias and bias blind spot bias); Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, 10 MINN. J.L. SCI. & TECH. 255, 255-57, nn.1-16 (2008) (citing scholarship that applies cognitive science to diverse areas of law); Kang, *supra* note 46, at 1536-37 (discussing explicit bias and setting out a research agenda for exploring the nexus between law and racial mechanics); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012) (discussing fundamental attribution error); Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008) (discussing impact of “false consensus bias” on contract formation and interpretation); Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC: JALWD 45 (2017) (describing empirical study exploring impact of confirmation bias on oral argument).

51. See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing possible interventions to counter judge and jury bias); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 830 (2012) (critiquing proposals to use the IAT to screen and educate jurors); Wilkins, *supra* note 47, at 311-12 (discussing effect and mitigation of implicit bias in capital sentencing); M. Eve Hanan, *Remorse Bias*, MO. L. REV. 301, 306 (2018) (explaining how cognitive biases may affect judges when deciding whether to credit remorse in sentencing decisions).

52. See, e.g., Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias*, 14 LEGAL COMM. & RHETORIC: JALWD 1, 2-3 (2017) (reporting study of negativity bias and judicial decision making); Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of Plain-Language Jury Instructions*, 64 HASTINGS L.J. 643, 646 (2013); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 63 (2017) (discussing study of 239 judges that found greater implicit and explicit bias against Asians and Jews than Whites and Christians); Justin D.

and employment discrimination<sup>54</sup>—just to name a few. In response to this scholarship, numerous local bar journals have published articles calling for implicit bias and cultural competence training.<sup>55</sup> Additionally, law firms, The National State Judges Association, the American Bar Association, and law schools have provided trainings to familiarize law students, lawyers, and judges with implicit association.<sup>56</sup> Recently, courts have also begun to consider implicit bias in judicial decisions<sup>57</sup> and some judges now include information about implicit bias in their jury instructions.<sup>58</sup> Finally, lawyers seem to be acknowledging what social psychologists have long argued: “even the most

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Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007) (“Judges and jurors may unintentionally and automatically ‘misremember’ facts in racially biased ways during all facets of the legal decision-making process.”).

53. See, e.g., Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419 (2011) (arguing that the current structure for adjudicating immigration matters exacerbates biased decisions).

54. See, e.g., Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010) (exploring bias in the workplace through raced and gendered grooming regulations); Kang et al., *supra* note 51, at 1152-69 (discussing how implicit bias might affect a federal employment discrimination lawsuit).

55. See, e.g., Yasir Billoo, *Implicit Bias and Its Application in the Life of a Lawyer*, FLA. B. J., <https://perma.cc/K638-6NUZ>; Kenneth v. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, BOS. B.J. (2016), <https://perma.cc/UD78-LCWH>; Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 40 (2014); Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, 87 MICH. B.J. 38, 38 (2008); Ortega et al., *supra* note 26, at 10-13.

56. Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2238 (2017) (listing entities that have sponsored or offered implicit bias trainings).

57. See *id.* (discussing *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015), and the inclusion of “unconscious prejudices and disguised animus” as a reason for holding that disparate impact claims are legally cognizable under the Fair Housing Act); see also *United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017) (relying on a 2013 report by the Sentencing Project that “remarked on research indicating that police are more likely to stop, and arrest, people of color due to implicit bias” and holding that the lower court’s consideration of the defendant’s bare arrest record when imposing his sentence was plain error). *But see* Sherri Lee Keene, *Stories that Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 752 (2017) (noting that there has been less focus on “how courts might address implicit biases that are more firmly rooted in laws and procedures”).

58. See, e.g., ADMIN. OFF. ILL. CTS., CIVIL JURY INSTRUCTION 1.08, <https://perma.cc/7C5F-FJF2>; see also Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of Specialized Jury Instruction*, NAT’L CTR. FOR ST. CTS. (Apr. 2014), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/Can%20Explicit%20Instructions%20Reduce%20Expressions%20of%20Implicit%20Bias.ashx>; Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, MARSHALL PROJ. (Jun. 6, 2017), <https://perma.cc/RJ4U-HKR5> (describing efforts by judges in the U.S. District Court of the Western District of Washington to address juror bias by showing prospective jurors a video about unconscious bias).

well-meaning person unwittingly allows unconscious thoughts and feelings to influence seemingly objective decisions.”<sup>59</sup>

Like the scholarship on social cognition, the concept of “culture” has also become embedded in many aspects of legal scholarship in the last two decades.<sup>60</sup> Writing in 2011, Menachem Mautner identified no fewer than twelve approaches in legal scholarship that connect law and culture.<sup>61</sup> At its core, each approach struggles with identifying and explaining the relationship between law and people. Critical Race, Feminist, LatCrit, and Queer legal theory scholars have also explored this relationship and added a critique of “legal culture” as well as a call to amplify outsider voices.<sup>62</sup> The import of this inquiry—for legal scholarship and law practice—cannot be overstated.

59. Mahzarin R. Banaji et al., *How (Un)ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 56.

60. See generally Symposium, *Approaches to the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 3 (2001); see also 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 (2011); Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915, 915-23 (2005) (encouraging the use of cultural studies methods to examine race, law, and power). Predating this recent scholarship, in the late 1960s, the Law and Society (or socio-legal studies) movement emerged as a multidisciplinary group of scholars who studied law and legal institutions in context. See Menkel-Meadow, *supra* note 2, at 569-70.

61. Menachem Mautner, *The Future of Legal Theory: Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841 (2011). Of those twelve, Mautner described three “major” approaches in detail. The first category theorizes that law is a product of a nation’s culture. *Id.* Mautner traces this approach to the codification movement and specifically to the German jurist Friedrich Carl von Savigny, who proffered that law is made from culture embedded in daily practices. *Id.* at 844-48. As a result, statutes do not create new law, but they reflect existing social practices. *Id.* at 845. Influenced by the cultural studies movement, the second category, the constitutive approach, posits that law participates in the constitution of culture. *Id.* at 841. Mautner locates the third approach in twentieth century Anglo-American jurisprudence. *Id.* Discussing Karl Llewellyn, Stanley Fish, James Boyd White, and Pierre Bourdieu, Mautner describes the third approach as one in which the law of the courts forms and operates as a distinct cultural system. *Id.* at 856-67. Under this approach, a legal culture exists, and it both structures and constrains law and the practice of law.

62. See, e.g., Frank Rudy Cooper, *Understanding Depolicing: Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 355-57 (2002) (merging doctrinal analysis, cultural studies, and identity theory to analyze how discourse around policing practices results in depolicing); Bridget J. Crawford et al., *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 181-82 (2018) (explaining how the feminist judgments project bridges the gap between legal theory and practice and shows how “careful attention to issues of gender, race, sexuality, and other aspects of individual identity can be incorporated into judicial decisions while still following precedent”); Sarudzayi M. Matambanadzo et al., *Afterword: Kindling the Programmatic Production of Critical and Outsider Legal Scholarship*, 37 WHITTIER L. REV. 439 (2016) (reflecting on the evolution and development of LatCrit theory); Menkel-Meadow, *supra* note 2, at 575-76 (discussing the influence of ‘outsider jurisprudence’ on legal scholarship and pedagogy); Francisco Valdes, *Afterword & Prologue: Queer Legal Theory*, 83 CAL. L. REV. 344 (1995).

Whether law reflects a nation's culture or law and culture exist in a dialectic, law is not a value-free or value-neutral mechanism. Nor is law static.<sup>63</sup> Rather, law and culture are mutually constitutive. Together they are engaged in a symbiotic meaning-making process: law shapes social practices and social practices give rise to law.<sup>64</sup>

Complementing the law and cultural studies movement, rhetoric and narrative theory scholars, particularly in the Legal Writing discipline, have relied on discourse analysis to unearth law's dynamism and to critique pedagogy. For example, a rich body of scholarship investigates the interplay between culture, metaphor, narrative, and persuasion.<sup>65</sup> Employing communication and linguistic theory, others have investigated how legal writing pedagogy contributes to muting outsider voices.<sup>66</sup> Legal Writing

63. See Jewel, *supra* note 27, at 679-81 (discussing how the common law is both dynamic and recursive); White, *supra* note 36, at 691 (“[T]he process of law is at once creative and educative. Those who use this language are perpetually learning what can and cannot be done with it as they try—and fail or succeed—to reach new formulations of their positions.”).

64. See Mezey, *supra* note 29, at 46 (describing the relationship between culture and law as “dynamic, interactive, and dialectical” and asserting that “law is both a producer of culture and an object of culture”); see also Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 861-69 (2002) (applying cultural studies and discourse analysis to explore how the drug war encodes and decodes and investigating this meaning-making relationship).

65. See, e.g., Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 275 (2011) (exploring culture, metaphor, and persuasion); Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects*, 7 J. ASS'N LEGAL WRITING DIRECTORS 311, 311-16 (2010) (discussing the connection between audience familiarity and effective analogy); Lindsay Head, *Standing (Near)by Things Decided: The Rhetorical and Cultural Identifications of Law*, 15 LEGAL COMM. & RHETORIC 189, 191 (2018) (discussing the import of rhetorical culture to law and law practice); Katie Rose Guest Pryal, *The Rhetoric of Sissy-Slogans: How Denigrating the Feminine Perpetuates the Terror Wars*, 15 J. GENDER RACE & JUST. 503, 504-08 (2012); Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 586 (2018) (using narrative theory to discuss master narratives as legal principles); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, LEGAL WRITING 53, 55-56 (2008); see also Graham and McJohn, *supra* note 50, at 281 (suggesting that including the cognitive role of stories would broaden legal reasoning).

66. See, e.g., Anthony v. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law Essay*, 121 HARV. L. REV. 805, 810-12 (2008) (discussing cultural and social difference in classrooms and client representation); Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 579 (2018) (discussing how “nondominant cultures communicate and negotiate their identity within dominant structures”); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC 39, 50 (2016) (arguing that “discriminatory legal categories” can work “in favor of the dominant group but not at all for those left outside at the margins”); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1156-59 (2008); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9-10

scholars have also written about the need to examine and confront bias in language and legal analysis.<sup>67</sup>

While critical legal scholars proposed theoretical methods of cultural inquiry and rhetoric scholars employed discourse analysis to engage law as text, across campus another movement gained traction. Spurred by funding from the Council on Legal Education for Professional Responsibility, in the 1960s, a handful of law schools created legal clinics to serve low-income clients.<sup>68</sup> Clinics were not quickly or universally embraced,<sup>69</sup> but the clinical movement steadily carved out a place in the legal academy.<sup>70</sup> Now, clinics can be found in nearly every ABA-accredited law school,<sup>71</sup> and under the Revised ABA Standards students must complete at least six credit hours of experiential learning to graduate with a law degree.<sup>72</sup>

Along with creating clinics, professors developed robust scholarship to

(1998).

67. See, e.g., Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1 (2003); see also Elizabeth E. Berenguer, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida's Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism*, 76 MD. L. REV. 726, 727 (2017); Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 160 (1995) (observing that “professors should be aware of the biases and limitations of their cultural perspectives and should carefully consider the potential merits of a fresh perspective before rejecting an invitation to explore it further”); Keene, *supra* note 57, at 751-52 (discussing role of implicit bias in judicial review of police officer decision-making); Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L.J. 531, 560-65 (2019) (discussing findings from six-year empirical study of first-year legal writing students).

68. Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1934 (2002) (explaining that the initial goal of these newly-created legal clinics was “to get students out of the classroom into the real world of law, from which they would return to the classroom with a deeper understanding of how legal doctrine and legal theory actually work—or don’t work”).

69. Jane Aiken & Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999 (2004) (“Clinicians were a different breed from their law professor counterparts. They were often housed in different spaces, not allowed to participate in faculty governance, and offered no job security. Indeed, many, if not most, clinicians had to raise funds to ensure their own job continuation.”).

70. See Margaret Martin Berry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 16 (2000) (“While student demands for relevance in the law school curriculum and the social ferment of the 1960’s played an important role in spurring the growth of clinical programs, it was the development of a clinical teaching methodology that was critical in solidifying the place of clinical legal education in the law school curriculum during the period running from the 1970’s through the present.”).

71. See *id.* at 30; Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 58, 77-78 (2009) (describing the substantial expansion of law school clinics).

72. ABA STANDARDS, *supra* note 24; see also Chopp, *supra* note 34, at 380 (noting that this requirement substantially increases the previous single credit requirement).

support clinical teaching including initial frameworks for teaching cultural competence in experiential courses. In fact, clinical professors have been arguing for decades that cultural competence is a fundamental lawyering skill.<sup>73</sup> This deeply influential culture work has transformed clinical education over the past two decades.<sup>74</sup> From Professor Michelle S. Jacobs' 1997 article critiquing clinical education's failure to address (or even mention) the challenges of providing legal assistance in cross-cultural interactions, and Professor Sue Bryant's seminal piece on *The Five Habits*, to Professor Carwina Weng's early call to teach social psychology and cognition to clinic students, clinical pedagogy has widely embraced cross-cultural lawyering as a cornerstone of clinical instruction.<sup>75</sup>

Although this development has not been uniform, certain concepts and pedagogical practices have become widely adopted.<sup>76</sup> Early scholarship, for example, focused on preparing law students to work with clinic clients whose life experiences and backgrounds were different from their own.<sup>77</sup> These early

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73. See, e.g., Alexis Anderson et al., *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 343 (2012) (discussing "multicultural competence"); Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35-36 (2001); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 136 (2004); 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, 38-39 (2008); Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 1004-05 (2012); Piomelli, *supra* note 30, at 133 (analyzing how clinical textbooks prepare students for cross-cultural work); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 377-78 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 372-73 (2005).

74. Although described as two separate scholarship streams, work emanating from the critical legal studies and clinical movements share synergies. Writing in the early 1990s, Phyllis Goldfarb identified the overlap between CLS's desire to "reveal the inherent indeterminacy of the categories and values underlying legal thought" and the clinical movement's concern with "illuminat[ing] the assumptions, biases, values, and norms embedded in law's workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system." Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 722 (1992).

75. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997); Bryant, *supra* note 73; Weng, *supra* note 73.

76. See generally Piomelli, *supra* note 30 (assessing how five clinical legal textbooks published between 1997 and 2006 address cross-cultural work and highlighting the differences in content).

77. See Anderson et al., *supra* note 73, at 343 (noting issues of "sameness" and "the influence of interpersonal dynamics when sameness, actual or perceived, exists between lawyer and client[]" have received less attention in clinical scholarship and pedagogy).

attempts at addressing “culture” in clinical education focused largely on the client’s culture and encouraged law students to “generalize and stereotype without ever questioning their own internally-held beliefs.”<sup>78</sup> Such an approach perpetuated narratives that stigmatize individual clients and flatten their multidimensional experiences.<sup>79</sup> Significantly, as has happened in the medical profession, law clinic scholarship and pedagogy have moved away from this early reliance on tip sheets and pocket guides and now advocate for honing a set of tools based in self-awareness and reflective practice.<sup>80</sup>

Both social cognition and culture work have permeated legal scholarship, particularly over the last few decades. But in law schools, this scholarship only has a foothold in Law + courses and experiential learning.<sup>81</sup> Neither podium<sup>82</sup> nor Legal Writing courses have widely included an exploration of culture, context, or cognition in their first-year classrooms.<sup>83</sup> And while legal clinics

78. Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 244 (2017); see also Curcio et al., *supra* note 6, at 184-89 (chronicling the evolution from cultural competence to cultural sensibility).

79. See Alfieri, *supra* note 66, at 837 (arguing that cross-cultural training focused on acquiring “certain habits of thinking, speaking, and doing understates the deep-seated dimensions of difference-based identity”); see also Archer, *supra* note 6 (noting students who fail to interrogate the post-racial cultural norm that law and culture operate in will fail to understand how this norm affects lawyering).

80. See generally Chopp, *supra* note 34, at 371-72 (discussing evolution of cultural competence training in medical schools); Angela C. Jenks, *From ‘Lists of Traits’ to ‘Open-Mindedness’: Emerging Issues in Cultural Competence Education*, 35 CULTURE, MED., PSYCHIATRY 209 (2011) (discussing the development of cultural competence training in the medical profession from an early focus on a categorial approach involving “lists of traits” and “pocket guides” to a cross-cultural approach that focused on communication and care across difference).

81. Here, “Law +” denotes courses such as “Feminism and the Law,” “Race and the Law,” and “Literature and the Law.” See Bannai & Enquist, *supra* note 67, at 6; Moran, *supra* note 5, at 25 (noting “many law schools offer seminars on aspects of gender and race for interested second and third year law students”); Stanchi, *supra* note 7, at 611; see also Mary Lynch, *Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 132-34 (2014).

82. I use “podium” courses to denote traditionally large, lecture-based or Socratic-method courses that focus on discrete legal topics such as Torts, Property, and Contracts. I use this term rather than “doctrinal” because both the clinical and legal writing disciplines have doctrines. Although initially scarce, there are now numerous textbooks for core first-year courses that present various theoretical critiques and invite students to apply these approaches to legal issues. See Moran, *supra* note 5, at 35, 35-36 n.86 (collecting sources).

83. There have been recent efforts by legal writing professors to discuss whether and how to incorporate concepts like social cognition and bias into the first year legal writing curriculum. For example, in 2017, the Association of Legal Writing Directors dedicated its biennial conference to diversity and inclusion, with the theme *Acknowledging Lines: Talking About What Unites Us and Divides Us*. See ASSOC. OF LEGAL WRITING DIRECTORS, *Welcome to ALWD Conference 2017!*, <https://perma.cc/U8HL-2RHC>. Few legal writing textbooks, however, explicitly incorporate these topics. In February 2020, Boston University School of

provide students with invaluable first-hand experiential learning opportunities through which they can navigate the interplay between law, culture, and the clients they seek to represent, clinics should not be expected to shoulder this essential work alone.<sup>84</sup> In part, the very focus of clinical pedagogy on client-centered lawyering may not provide sufficient exposure to the constitutive relationship between law and culture. Additionally, exploring culture merely through a theoretical lens in practical skills electives may not sufficiently connect these concepts to actual lawyering practice. Instead of the current piecemeal, often elective approach, law students should be exposed to meaningful, sustained, and integrated instruction throughout the law school curriculum. From influencing how lawyers read, interpret and apply legal rules to communicating this information to clients, community members, public representatives, and the legal community, law students should understand that culture impacts how law is made and how the profession is practiced.<sup>85</sup>

Part II will summarize and critique the ABA's newest accreditation changes before I move on to outline the tenets of culturally responsive lawyering.

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Law convened a two-day symposium, which acknowledged that “first-year casebooks in legal education are written from a neutral perspective.” *Racial Bias, Disparities and Oppression in the 1L Curriculum*, B.U. SCHOOL L., <https://perma.cc/SE6Z-DNM4>. This symposium brought together faculty and students to explore how to build “an inclusive, rigorous, and critical first-year legal education that empowers students to be effective legal professionals.” *Id.*

84. See Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279, 293 (2012) (noting that “law school clinics have been shouldering the lion’s share of the pedagogical burden for developing in law students the sorely needed apprenticeships of skills and professional identity.”); see also Menkel-Meadow, *supra* note 2, at 577-78 (acknowledging that status and legitimacy issues continue to linger in the law school faculty hierarchy); Moran, *supra* note 5, at 19 (noting “one reason why clinical courses cannot completely bridge the gap between practical and cognitive training is their placement outside the first-year curriculum”). Although outside the scope of this article, the new six-credit experiential learning requirement combined with the high cost of providing in-house clinical courses might lead law schools to expand externship opportunities rather than their clinical programs. Such a change may jeopardize the inter-cultural sensibility training that students currently receive in clinical courses.

85. See Bannai & Enquist, *supra* note 67, at 6 (“As professionals in a multicultural society, then, today’s students are required to become ‘culturally competent’ . . . .”); Curcio, *supra* note 49, at 538 (“[T]hinking like lawyers’ requires that they become culturally sensible lawyers—lawyers who understand that we all have multifaceted cultural backgrounds, experiences, and biases that affect how we perceive and analyze legal problems and how we interact with clients and colleagues.”); Shiv Narayan Persaud, *Is Color Blind Justice also Culturally Blind: The Cultural Blindness in Justice*, 14 BERKELEY J. AFR. AM. L. & POL’Y 23, 23-24 (2012) (“[C]ompetent representation” and “the fair dispensation of justice” requires broad-based “cultural competency training among legal service providers and practitioners.”); Bonny L. Tavares, *Changing the Construct: Promoting Cross-Cultural Conversations in the Law School Classroom*, 67 J. LEGAL EDUC. 211, 227 (2018) (arguing for “includ[ing] cross-cultural awareness among the many tools they should use for effective legal analysis.”).

## II. FAILING CULTURE IN THE NEW REFORM AGENDA

“[A]ll lawyering is cross-cultural, yet few lawyers perceive it as such.”<sup>86</sup>  
 “[W]hat we fail to instill in our law students we find lacking in our lawyers.”<sup>87</sup>

Legal education has been in a perennial state of critique and reform for over a century, yet legal education has remained largely unchanged.<sup>88</sup> Straddling a “dual identity” of professional school and academic institution, law schools have attempted to strike the appropriate balance between teaching what the law is and teaching what to do with the law.<sup>89</sup> In addition to longstanding critiques about the gap between what law schools teach and what lawyers need to know, law schools face pressure to adapt to rapidly changing social, economic, and cultural forces.<sup>90</sup> In the midst of these tensions, after years of study, review, and discussion, in 2014 the ABA Council on Legal

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86. Marjorie A Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 230 (2002).

87. Wizner, *supra* note 4, at 708.

88. See Goldfarb, *supra* note 84, at 290-91. This isn't to say there haven't been any changes in legal education, or that specific law schools haven't made substantive curricular change. See Margaret Martin Barry, *Practice Ready: Are We There Yet*, 32 B.C. J.L. & SOC. JUST. 247, 263 (2012); Menkel-Meadow, *supra* note 2 (summarizing major changes to legal education generally and discussing three specific programs). But, as Professor Menkel-Meadow notes, “[t]he only really big bang has been Langdell's. If one looked at the schoolroom, the hospital, the police station, the prison, or the business office of the nineteenth century, and then compared it to today's institutions, one would see more change in each of these than in the law school classroom.” *Id.* at 579. See also Rakoff & Minow, *supra* note 3 (noting the formative first year of law school “remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the Internet, but before the telephone . . . ; not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*”).

89. See Goldfarb, *supra* note 84, at 283-84.

90. See *id.* at 279-80 (noting “changes in social, economic, and cultural forces such as the internationalization of markets, the incursion of technology, and a series of economic and global cataclysms occurring since the turn of the millennium” are causing a “seismic shift” in the legal profession); see also Am. Bar Ass'n, *Working Notes: Deliberations of the Committee on Research About the Future of the Legal Profession, On the Current Status of the Legal Profession Working Notes*, 13 ME. B.J. 236, 236 (2001) (noting that the legal profession is “undergoing unprecedented change”); Chopp, *supra* note 34, at 365-66, 366 n.7 (stating cultural misunderstandings are more likely to occur as the United States becomes increasingly more diverse); William D. Henderson, *A Blueprint for Change Symposium: The Lawyer of the Future*, 40 PEPP. L. REV. 461, 470-90 (2013) (discussing changing factors such as the decline in traditional legal service jobs, the proliferation of legal technology, and the globalization of legal services); Rosa Kim, *Globalizing the Law Curriculum for Twenty-First-Century Lawyering*, 67 J. LEGAL EDUC. 905, 908 (2018) (arguing that the increase in cross-border and transnational legal activity requires competencies in navigating multiple legal systems with diverse stakeholders).

Education and Admission to the Bar adopted the ABA Revised Standards.<sup>91</sup>

Now law schools must design their curricula to ensure that graduates “have (a) some competencies in delivering (b) some legal services” and not “just some body of knowledge.”<sup>92</sup> In addition to requiring two writing experiences and minimum credit hours for both professionalism and experiential coursework, law schools must now adopt specific learning outcomes and assess demonstrated student competencies.<sup>93</sup> Although these newly expanded requirements seem fairly tame, especially for the institutions tasked with educating people who will owe ethical and fiduciary duties to others, these additions actually signal a fundamental change. Previous standards focused largely on discrete factors unrelated to whether law students could demonstrate mastery of legal knowledge or skills.<sup>94</sup> For example, prior to the adoption of the revised ABA Standards, the only ABA accreditation requirement arguably related to student learning was bar passage rates for law school graduates.<sup>95</sup> In contrast, the new standards are meant to close the yawning gap between the current educational experience provided by law schools and what students actually need to begin ethical law practice as newly minted lawyers.

Despite these seemingly sweeping changes, it remains unclear what substantive impact they will have on student learning, especially where social cognition and culture work are concerned.<sup>96</sup> Although there is growing

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91. The ABA Council on Legal Education and Admission to the Bar began a comprehensive review in 2008 and approved revisions in June 2014. The House of Delegates concurred in August 2014. *See generally* Am. Bar Ass’n, *Task Force on the Future of Legal Education, Report and Recommendations* (Jan. 2014).

92. *Id.* at 26.

93. ABA STANDARDS, *supra* note 24, at 16. Standard 303(a) states: “A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members; (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement.” *Id.*

94. *See* Niedwiecki, *supra* note 3, at 671-72, 671-72 nn.65-67 (noting that previously law schools were evaluated on library size, faculty-student ratio, and the duration of a student’s course of study).

95. *Id.* at 672-73. As early as 2007, two contemporaneous legal reports specifically recommended that law schools adopt outcome-based measures that would focus legal education on the proficiencies that law students would be expected to demonstrate after completing their legal studies. *See generally* STUCKEY ET AL., *supra* note 3; SULLIVAN ET AL., *supra* note 3.

96. *See* Boles, *supra* note 78, at 215-16 (noting that “[u]nlike other professions, the legal profession has underemphasized the dismantling of social hierarchies through cultural proficiency efforts.”); Lynch, *supra* note 81, at 132-35 (critiquing the failure of legal education to incorporate cross-cultural and intercultural learning in the law school curriculum); Moran, *supra* note 5, at 33 (acknowledging that “although the legal profession contributes to developing and maintaining social structures, legal education does not

acceptance by lawyers and legal scholars of culture's impact on the law, legal systems, and legal representation, the term "culture" is conspicuously absent from the Revised Standards' text. Instead, the Managing Director's Guidance Memo on Standard 302 (Guidance Memo) includes "cultural competence" as an optional "other professional skill."<sup>97</sup> If the goal of legal education is to ensure law students are prepared to practice law ethically and to advance justice and equity, then including "cultural competence" as an optional "other skill" fails to be meaningful reform.

#### A. ABA Standards 301 and 302

Standards 301 and 302 finally embrace the "knowledge, skills, and values" paradigm articulated over twenty-five years ago in the ABA Task Force's 1992 *MacCrate Report* and then echoed fifteen years later by the Clinical Legal Education Association's report, *Best Practices for Legal Education*.<sup>98</sup> To this end, Standard 301, "Objectives of Program of Legal Education," reiterates that the traditional goal of a legal education is to prepare graduates for the legal profession. It states:

(a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

Standard 302, "Learning Outcomes," sets out minimum competencies for law school graduates:

A law school shall establish learning outcomes that shall, 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.

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recognize cultural competency as a core skill").

97. See A.B.A. Managing Director's Guidance Memo 2 (June 2015) ("A law school may also identify any additional learning outcomes pertinent to its program of legal education.") [hereinafter ABA Guidance Memo].

98. See MACCRATE REPORT, *supra* note 3, at 138-41 (identifying ten "Fundamental Lawyering Skills" and four "Fundamental Values of the Profession"); see also STUCKEY ET AL., *supra* note 3, at 48-67 (identifying core attributes that all law school graduates should be able to demonstrate prior to admission to the profession include: self-reflection and lifelong learning skills, intellectual and analytical skills, core knowledge of the law, core understanding of the law, professional skills, and professionalism).

According to the ABA Managing Director's Guidance Memo, "[f]ocusing on outcomes should serve as a catalyst for law schools to be intentional in curriculum development."<sup>99</sup> To be sure, the Revised Standards do not jettison the focus of traditional legal education. As confirmed by the Guidance Memo, "the traditional legal curriculum, which purports to teach students to 'think like a lawyer,' will remain at the center of law schools' J.D. programs."<sup>100</sup> The Guidance Memo also makes clear that Standard 302 is not meant to create uniform legal education across the U.S.<sup>101</sup> While Standard 302 does require students to develop knowledge, professional skills, and values through a structured, coordinated curriculum, it largely leaves the details to each law school.<sup>102</sup>

Although embedding flexibility into the Revised Standards allows law schools to respond to the needs and interests of their students and to adapt as the legal landscape shifts, it also neglects some of the direct and consistent critiques of legal education. The *MacCrate Report*, followed by *Best Practices*, called for more than merely refocusing legal education to incorporate lawyering skills and values. Together, these reports argued that law schools have an obligation to instill in their students a duty to provide access to justice.<sup>103</sup> The

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99. ABA Guidance Memo, *supra* note 97, at 3; *see also* Niedwiecki, *supra* note 3, at 675 (distinguishing course objectives, where the focus is on what the professor intends to teach, from learning outcomes, which focus on what a student is able to do upon completion of the course).

100. ABA Guidance Memo, *supra* note 97, at 3.

101. *See id.* at 4 ("Standard 302 outlines the minimum outcomes that a law school must identify for its program of legal education. Other outcomes will vary depending upon the stated mission of a law school.").

102. *See* Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. LEGAL EDUC. 489, 492 (2018); Niedwiecki, *supra* note 3, at 664. *But see* Roy Stuckey, *The American Bar Association's New Mandates for Teaching Professional Skills and Values: Impact, Human Resources, New Roles for Clinical Teachers, and Virtual Worlds*, 51 WAKE FOREST L. REV. 259, 261 (2016) (noting that "[t]he potential impact of the ABA mandates is also weakened by the absence of a requirement for law schools to organize their programs of instruction to help students develop their professional skills and values in a structured, coordinated curriculum"). On per-school flexibility, *see* ABA Guidance Memo, *supra* note 98, at 6 ("There is no one-size-fits-all set of outcomes or assessment program."). Standard 314 similarly provides law schools with wide discretion to establish formative and summative assessment methods to evaluate whether students are attaining the competency levels set forth by each law school. ABA STANDARDS, *supra* note 24, at 23 (Standard 314). ABA Standard 315, Interpretation 315-1 states "The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods." *Id.* at 24.

103. *See* STUCKEY ET AL., *supra* note 3, at 19 (calling on law schools to "give more attention to educating students about the importance of providing access to justice and to instilling a commitment to provide access to justice in their students"); MACCRATE REPORT, *supra* note 3, at 140-41 (describing four "fundamental values of the profession:" as 1) provision of competent representation; 2) striving to promote justice, fairness, and morality; 3) striving to improve the profession; and 4) professional self-development); *see also* Moran,

*MacCrate Report* emphasized that “competent, ethical practice” requires that students possess “more than just knowledge of the applicable rules and principles of professional responsibility.”<sup>104</sup> It specifically called on law schools to teach students about their duty to “promote justice, fairness, and morality” in their daily practice, to refrain from any type of discrimination, and to improve both the legal system and the profession.<sup>105</sup> Such improvement included “rationalizing the law and legal institutions” and taking corrective measures to address the legal system’s deficiencies.<sup>106</sup> Teaching justice, promoting equity, and improving the legal profession and the judicial system require a deep and nuanced understanding of the relationship between law and culture. The Revised Standards, however, do not fully incorporate this charge and actually suggest in their framing that law students may be able to graduate without ever exploring how culture impacts the law or their role as lawyers.<sup>107</sup>

As a result, these current reforms also fail to keep pace with the accrediting standards of other client-facing professional schools. A quick survey of accrediting requirements for medical,<sup>108</sup> nursing,<sup>109</sup> social work,<sup>110</sup> and dental schools<sup>111</sup> reveals that each of their accrediting bodies has some formal educational requirement tied to cultural competency. For example, since 2000, the Liaison Committee on Medical Education (LCME), the accrediting body for medical education in the U.S. and Canada, has included specific standards

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*supra* note 5, at 23 (noting the reports are “clear on the lawyer’s obligation to promote, and the law school’s obligation to teach, justice”).

104. MACCRATE REPORT, *supra* note 3, at 207.

105. *Id.* at 207-21 (describing four fundamental values of the profession).

106. *Id.* at 215. Quoting from the ABA’s Model Rules of Professional Conduct, the MacCrate Report states that “corrective measures” include “endeavoring to change [r]ules of law . . . [that] are not just, understandable, and responsive to the needs of society.” *Id.*

107. Moran, *supra* note 5, at 23. (“[I]n the twenty-first century law school, students can (and often do) graduate without any exposure to questions of gender, race, ethnicity, or class.”).

108. See Chopp, *supra* note 34, at 384-86 (discussing cultural competence standards and training in medical schools); *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the MD Degree*, LIAISON COMMITTEE ON MEDICAL EDUCATION 11, 22 (2016), <https://perma.cc/U34B-R5VS>; *ACGME Common Program Requirements (Residency)*, ACCREDITATION COUNCIL FOR GRADUATE MEDICAL EDUCATION 19, 21 (2018), <https://perma.cc/Y4R4-N2VT>.

109. See generally Suzan Kardong-Edgren & Josepha Campinha-Bacote, *Cultural Competency of Graduating US Bachelor of Science Nursing Students*, 28 NAT’L CTR. FOR BIOTECHNOLOGY INFO. 37 (2008).

110. See Chopp, *supra* note 34, at 390 (summarizing social work accreditation standards and competencies related to cultural competence); *Educational Policy and Accreditation Standards for Baccalaureate and Master’s Social Work Programs*, COUNCIL ON SOCIAL WORK EDUCATION 1, 7, 14 (2015), <https://perma.cc/9A8R-QB9U>.

111. See *Accreditation Standards for Dental Education Programs*, COMMISSION ON DENTAL ACCREDITATION, ACCREDITATION STANDARDS FOR DENTAL EDUCATION PROGRAMS 1, 16-17, 27, 31 (2016), <https://perma.cc/XL9U-PWGH>.

for cultural competence.<sup>112</sup> LCME Standard 7.6 requires that “faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments.”<sup>113</sup> It also calls for “medical students to learn to recognize and appropriately address gender and cultural biases in themselves, in others, and in the health care delivery process.”<sup>114</sup>

Similarly, the Council on Social Work Education (CSWE) has established nine competencies that a social work student should be able to demonstrate upon graduation.<sup>115</sup> These competencies describe “the knowledge, values, skills, cognitive and affective processes, and behaviors associated with competence at the generalist level of practice.”<sup>116</sup> Competency 2, “Engage Diversity and Difference in Practice,” states:

Social workers understand how diversity and difference characterize and shape the human experience and are critical to the formation of identity . . . . Social workers understand that, as a consequence of difference, a person’s life experiences may include oppression, poverty, marginalization, and alienation as well as privilege, power, and acclaim. Social workers also understand the forms and mechanisms of oppression and discrimination and recognize the extent to which a culture’s structures and values, including social, economic, political, and cultural exclusions, may oppress, marginalize, alienate, or create privilege and power.<sup>117</sup>

According to the CSWE, to demonstrate this competency social workers should be able to:

apply and communicate understanding of the importance of diversity and difference in shaping life experiences in practice at the micro, mezzo, and

112. See *Cultural Competence Education for Medical Students*, AMERICAN ASSOCIATION OF MEDICAL COLLEGES (2005), <https://perma.cc/T93N-CYRB>; see generally *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the MD Degree*, LIAISON COMMITTEE ON MEDICAL EDUCATION (Mar. 2016).

113. See *Functions and Structure of a Medical School*, *supra* note 112, at 11. Additionally, Standard 7.6 requires that the medical curriculum include instruction in “[t]he basic principles of culturally competent health care. The recognition and development of solutions for health care disparities. The importance of meeting the health care needs of medically underserved populations. The development of core professional attributes (e.g., altruism, accountability) needed to provide effective care in a multidimensional and diverse society.” *Id.*

114. *Id.* at 11. Supporting these curriculum requirements, The American Association of Medical Colleges also developed the Tool for Assessing Cultural Competence Training (TACCT), which medical schools can use to assess whether students are developing cross-cultural sensibilities. See Chopp, *supra* note 34, at 385; see also AMERICAN ASSOCIATION OF MEDICAL COLLEGES, *supra* note 114, at 4-6. The Code of Medical Ethics further reinforces the import of culture and working to counteract both explicit and implicit bias. See Chopp, *supra* note 34, at 393-94.

115. See *Educational Policy and Accreditation Standards*, *supra* note 110, at 1, 7-9.

116. *Id.* at 11 (Educational Policy 2.0—Generalist Practice).

117. *Id.* at 7 (Competency 2: Engage Diversity and Difference in Practice).

macro levels; present themselves as learners and engage clients and constituencies as experts of their own experiences; and apply self-awareness and self-regulation to manage the influence of personal biases and values in working with diverse clients and constituencies.<sup>118</sup>

Even the National Architecture Accreditation Board requires accredited degree programs to demonstrate that graduates possess knowledge and skills relating to how culture impacts their profession.<sup>119</sup> Under competencies for “critical thinking and representation,” graduates of accredited architecture programs should be able to demonstrate the following understanding:

A.7 History and Global Culture: *Understanding* of the parallel and divergent histories of architecture and the cultural norms of a variety of indigenous, vernacular, local, and regional settings in terms of their political, economic, social, ecological, and technological factors.

A.8 Cultural Diversity and Social Equity: *Understanding* of the diverse needs, values, behavioral norms, physical abilities, and social and spatial patterns that characterize different cultures and individuals and the responsibility of the architect to ensure equity of access to sites, buildings, and structures.<sup>120</sup>

Each of those professional standards and competencies require schools to demonstrate that graduates understand how culture and context affect clients and the professional/client relationship. They even go further to require that students recognize and address systemic and structural inequity.

In contrast, the ABA Revised Standards do not explicitly require that law students be able to demonstrate how culture and context impact clients and the professional/client relationship. Nor do they require law students to question, challenge, or remedy the American legal system’s biased foundations.<sup>121</sup> Such competencies, however, are essential to legal education and to ethical law practice.<sup>122</sup> Neglecting to require them is particularly problematic because law, like medicine and social work, is historically and culturally situated.

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118. *Id.* In addition to these accreditation competencies, the National Association of Social Workers (NASW) adopted Standards for Cultural Competence in Social Work Practice and Indicators for the Achievement of the NASW Standards for Cultural Competence in Social Work Practice. The social work code of ethics also charges social workers with the ethical responsibility to be culturally competent. See *CODE OF ETHICS*, NATIONAL ASSOCIATION OF SOCIAL WORK, Standard 1.05, at 4 (Cultural Awareness and Social Diversity) <https://perma.cc/CMR9-FHGB>.

119. NAT’L ARCHITECTURAL ACCREDITING BD., INC., *2014 Conditions for Accreditation* 15-16 (2015), <https://perma.cc/24DZ-YJT8>.

120. *Id.*

121. Boles, *supra* note 78, at 221-22.

122. See Nora Freeman Engstrom et al., *Dear SLS Students, We Can Do Better*, STAN. DAILY (Feb. 25, 2018), <https://perma.cc/4ASA-F6MY>; see also *supra* note 74 (listing a number of clinical professors who argue that cultural competency is a fundamental skill).

## B. The Problem with 302(d): Cultural Competence as an “Other” Professional Skill

Unlike the changes made by accrediting bodies for other professions, the ABA has neglected to account for the way that culture and social cognition impact the study and practice of law. Excluding “culture” from the Revised Standards and then including “cultural competence” as an *optional* “other skill” in the Interpretation to Standard 302 poses numerous problems. Interpretation 302-1 states:

For the purposes of Standard 302(d), other professional skills are determined by the law school and *may include skills* such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, *cultural competency*, and self-evaluation.<sup>123</sup>

First, by being optional, the Guidance Memo suggests that “cultural competence” is not required for competent lawyering. Even though the ABA Model Rules of Professional Responsibility do not specifically address an attorney’s duty to consider social cognition or to engage in culturally competent practice,<sup>124</sup> lawyers, scholars, and even ABA Section groups have been calling for such an interpretation for at least a decade.<sup>125</sup> The preamble to the Model Rules of Professional Responsibility specifically calls on lawyers to “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”<sup>126</sup> Paragraph 6 goes on to say:

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123. ABA STANDARDS, *supra* note 24, at 16 (emphasis added).

124. *See* Chopp, *supra* note 34, at 395-96 (noting that MRPR 2.1 “is th[e] rule that comes closest to acknowledging a client’s embeddedness in his/her own culture, but does not explicitly acknowledge it”). In August 2016 the ABA House of Delegates adopted changes proposed by the ABA Standing Committee on Ethics and Professional Responsibility. *Id.* at 398. The Model Rules now include a prohibition on knowingly or negligently engaging in conduct that “is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” *Id.*; MODEL RULES OF PROF. CONDUCT r. 8.4 (AM. BAR ASS’N 2016). As Chopp notes, revised Rule 8.4 represents an improvement, but it fails to acknowledge in the text or the Comments that unconscious bias plays a significant role in everyday professional interactions. Chopp, *supra* note 34, at 398.

125. *See, e.g.,* Sylvia E. Stevens, *Is There an Ethical Duty?: Cultural Competency*, 69 OR. ST. B. BULL. 9, 9-10 (2009) (arguing that Oregon RPC 1.1 should be read to include cultural competence); Chopp, *supra* note 34, at 390, 396 (stating “[i]t is clear from the rule and from the cases that have interpreted the rule that ‘competence’ does not include cultural or linguistic competence, nor does it include competence to recognize and address biases” and arguing for the inclusion of additional guidance in the Comment to MRPR 1.1); Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, PROB. & PROP. MAG. (2018) 1-3, <https://perma.cc/H54Z-E26J>; BLANCA BANUELOS ET AL., EMBRACING DIVERSITY AND BEING CULTURALLY COMPETENT IS NO LONGER OPTIONAL 5-6 (2012), <https://perma.cc/MM5D-Y5SQ>.

126. MODEL RULES OF PROF. RESP. Preamble (AM. BAR ASS’N 2016) section 6.

As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."<sup>127</sup>

In addition to the Preamble, MRPR 1.1 (Competence),<sup>128</sup> MRPR 1.3 (Diligence),<sup>129</sup> and MRPR 1.4 (Communication)<sup>130</sup> require attorneys to consider cultural context and social cognition in the provision of legal services.<sup>131</sup> Such a reading of the Model Rules of Professional Responsibility

127. *Id.*

128. MODEL RULES OF PROF. RESP. r. 1.1 (AM. BAR ASS'N 2016). The language in MRPR 1.1 specifically acknowledges that a lawyer owes a duty of competent representation to her client, and that this requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Neither the rule nor the commentary includes any reference to culture. The most recent addition to the Commentary added a requirement that lawyers keep abreast of relevant technology, but it fails to require that lawyers consider developments in other fields, like cognitive and medical sciences, which may impact an attorney's ability to provide counsel. *Id.* But, as Andrea Curcio notes, "[i]n today's multi-cultural world, regardless of practice area, lawyers cannot accurately analyse a case without understanding the context, and they cannot understand the context if they are unaware of the cultural forces that may be in play." Andrea 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. 98, 103 (2012).

129. MODEL RULES OF PROF. RESP. r. 1.3 (AM. BAR ASS'N 2016). MRPR 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* Comment 1 to MRPR 1.3 explains in part that "[a] lawyer must [] act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF. RESP. r. 1.3 cmt. 1 (AM. BAR ASS'N 2015).

130. MODEL RULES OF PROF. RESP. r. 1.4 (AM. BAR ASS'N 2016). MRPR 1.4 regulates when a lawyer must communicate with a client. As Professor Debra Chopp notes, the rule and the comments to it "are centered on the lawyer's perspective—they dictate when a lawyer must provide details about trial strategy or proposals made during negotiation. They address client comprehension only in the situation of a client who is a minor or has a disability." Chopp, *supra* note 34, at 393. She argues that failing to account for the client perspective and how culture impacts trust building and communication is a "significant defect." *Id.* at 394. *See also* Curcio et al., *supra* note 128, at 102 ("Because culture affects verbal and non-verbal communication . . . lack of cultural sensibility skills make it more difficult for lawyers to effectively interview, counsel, negotiate, strategise, or resolve conflicts."); 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, 115 (2008) (discussing "communication" as one of five main categories for cultural competency).

131. *See* BANUELOS ET AL., *supra* note 125, at 5-6; Hamilton & Maleska, *supra* note 33, at 189 ("For a lawyer to truly provide competent representation to his or her clients, the lawyer must not only understand the law, but also understand the culture of: (1) the client; (2) the groups with whom the lawyer works to advance the client's interests; and (3) the adversaries and decision-makers whom the lawyer seeks to influence."); *see also* Moran, *supra* note 6, at 26-31 (describing the *MacCrate Report* and *Educating Lawyers* and their call for law schools to include values education and the eradication of bias as part of ethical training).

makes culture's absence from the ABA's Revised Standards (and many law school classrooms) that much more stark.

And, if legal education's past reform pace is prologue, law schools will make the fewest changes possible to comply with the new accreditation standards. This trend is already apparent. While some law schools have adopted cultural competence as a learning outcome, many have adopted learning outcomes that do not explicitly require consideration of culture or any facility with intercultural law practice. The Holloran Center for Ethical Leadership in the Professions has compiled a database of learning outcomes published by law schools.<sup>132</sup> As of its last update in June 2019, the Holloran Center had analyzed the learning outcomes from 177 law schools. Of these, it identified only 46 law schools that had included some form of cultural competency as a learning outcome.<sup>133</sup> Even within those listed under "Cultural Competence," the learning outcomes vary wildly. For example, Penn State Dickinson requires under "Professional Values" that each graduating student will understand "the important role that cultural competency serves in a lawyer's ability to deliver competent legal services to clients."<sup>134</sup> The University of Washington School of Law expects law graduates to work collaboratively with others, which includes "[u]nderstand[ing] and appreciat[ing] the diverse backgrounds and perspectives of clients, colleagues, adversaries, and others."<sup>135</sup> University of Minnesota

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132. See, e.g., *Holloran Center Learning Outcomes Database*, U. ST. THOMAS, <https://perma.cc/P6LY-RUSN> (cataloging law schools' published learning outcomes and identifying those that have identified cultural competence).

133. While useful for thinking about how law schools are fulfilling the ABA requirement to adopt and publish learning outcomes, the Holloran Center website does not contain clear guidance on the criteria used for the identifying whether a learning outcome should be placed in the sub-category for "Cultural Competence." See *id.* For example, both Northeastern University School Law (NUSL) and Stanford Law School are not included in the "Cultural Competence" database, but both schools specifically include "culture" in their learning outcomes. For example NUSL's commitment to the ideals of culturally responsive lawyering is evident from both its published core values, which acknowledge that "social and cultural awareness [] are essential to serving clients and pursuing social justice" and from its learning outcomes that require students to "understand law in its social context." *History and Mission*, NORTHEASTERN UNIV. SCHOOL OF LAW, <https://perma.cc/EKT8-EBT9>. Stanford Law School includes "cultural competency" in its Learning Outcome 7 as "other professional skills." In addition, while not specifically mentioning "culture," Learning Outcome 2 requires that students "Demonstrate facility with legal analysis and reasoning. This may include, but will not necessarily include, a combination of skills such as synthesizing cases, identifying and applying relevant principles, and mastering modes of inquiry (whether scientific, social scientific, or humanistic) that inform and contextualize legal analysis and reasoning." *Student Handbook 2018-2019*, STANFORD LAW SCHOOL, <https://perma.cc/HP2P-7J7E>.

134. *Learning Outcomes*, PENN STATE DICKINSON LAW, <https://perma.cc/8ZGE-AVB3>.

135. *Student Learning Outcomes*, UNIV. OF WASHINGTON SCHOOL OF LAW, <https://perma.cc/Z337-GGC7>. Although not identified by the Holloran Center as a "Cultural Competence" learning outcome, arguably all of Learning Outcome 6 could fit under this umbrella. That learning outcome states that law graduates of the University of Washington

School of Law expects their graduates to be able to “(4) collaborate, including the ability to . . . (ii) Respect diverse views and perspectives and work effectively across difference.”<sup>136</sup>

In part, this variety may be a result of the Revised Standards’ requirement that law schools not only identify learning outcomes, but that they also assess whether their students are meeting the standards. Faculties and Learning Outcomes Committee members struggle to find consensus on competencies like “legal analysis” that have been core to legal education for over a hundred years. “Cultural competence” is perhaps even more difficult.<sup>137</sup> As a concept, “cultural competence” has been described as “amorphous,” “nebulous,” and even “tautolog[ical].”<sup>138</sup> The term “competence” as it relates to “culture” has additional issues. In learning theory, “competence” illustrates a process of mastery.<sup>139</sup> And while some scholars have mapped the development of self-reflection and cross-cultural intrapersonal skills onto the stages of competence,<sup>140</sup> “culture” cannot be mastered. Where culture is concerned, seeking mastery is particularly dangerous because such an approach has often led to acquiring knowledge of the “other” and prioritizing specific performative dos and don’ts.

Second, in a framework setting out three competence spheres (knowledge, skills, and values), identifying “cultural competence” as an “*other* professional skill” ignores the complex relationship between culture, law, and competent lawyering. It suggests, among other things, that law and its participants operate outside of “culture.”<sup>141</sup> For example, law schools could identify “cultural

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School of law should be able to: “Situate issues in their extra-legal context. This includes the ability to: 1) Understand the law from diverse and global perspectives; 2) Recognize the political, social, and economic forces that shape various areas of the law; and 3) Consider not only the likelihood of an argument or strategy’s legal success, but also the moral, economic, social, political, and other factors implicated by the argument or strategy.”

136. *Learning Outcomes for the JD Program*, UNIV. OF MINNESOTA LAW SCHOOL, <https://perma.cc/P3HM-XMV2>.

137. See Lynch, *supra* note 81, at 134 (noting that “law schools have not yet addressed intercultural learning in *systematic* ways nor *prioritized* its importance in pre-professional legal education”).

138. Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564, 567 (2014).

139. Curcio et al., *supra* note 128, at 100.

140. See Boles, *supra* note 78, at 248-57 (discussing the cultural continuum utilized by Dr. Kikanza Nuri-Robins). Additionally, a number of assessments have been developed for industry and educational use. For example, the Intercultural Development Inventory (IDI) is a 50-item questionnaire that “assesses intercultural competence—the capability to shift cultural perspective and appropriately adapt behavior to cultural differences and commonalities.” See IDI, *The Roadmap to Intercultural Competence Using the IDI*, <https://perma.cc/SUU9-UPJF>.

141. See Jane H. Aiken, *Provocateurs for Justice Papers Presented at the Rutgers-Newark Law School Conference on the Social Justice Mission of Clinical Education*, 7 CLIN. L. REV. 287, 290 (2001) (“The law does not exist ‘out there’ to be found; rather it is a

competence” but treat it as a performative skill, confining it to courses specifically designated as “skills” or “experiential.”<sup>142</sup> Even if exposed to “cultural competence” in a law school clinic or other “skills” course, law students may only see “culture” as related to individualized client representation. Such a perspective risks limiting law students’ understanding of the ways that culture infiltrates and creates human interaction and understanding and the impact it has on law, legal decision makers, and legal institutions. It also reifies a false theory/practice divide.<sup>143</sup> This divide belies what any practicing attorney knows: competent lawyering requires a holistic approach in which these spheres intermingle and reinforce one another. Additionally, many law school courses that focus on the “skills” and “values” spheres—like Legal Writing and in-house legal clinics—are taught by faculty with less status, rights, and remuneration than those who teach courses focused primarily on the “knowledge” sphere.<sup>144</sup> Such hierarchies impede the type of imagination and collaboration necessary for durable, institution-wide reform.

Finally, to thrive in practice, law students’ socialization to the legal profession should enhance, not undermine, their ability to understand how culture impacts the law and the lawyering process.<sup>145</sup> But current legal training, particularly in the critical first-year curriculum, does not prepare future lawyers to understand or mitigate the effects of implicit social cognition and other cognitive processes on legal analysis, decision-making, and client representation.<sup>146</sup> Nor does it prepare law students to navigate the myriad ways that culture affects lawyering. If it did, then law schools could continue to

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reflection of a complex interplay of information, experience, and value choice.”).

142. Moran, *supra* note 5, at 19-20.

143. See generally Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014) (criticizing the existence of a theory/practice divide in legal education as impossible factually and semantically); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education Symposium: Clinical Education*, 34 UCLA L. REV. 577, 577 (1986) (critiquing the division of traditional legal education “into the theoretical and the practical: the main tent and the sideshow”); Goldfarb, *supra* note 85, at 285-86 (explaining “[a]nalysis, synthesis, reasoning, and application to new situations of the legal doctrine that emerges from judicial opinions are fundamental lawyering skills, which are at once both intellectual and practical endeavors.”); Lynch, *supra* note 81, at 988 (arguing “[t]he claim of a dichotomy, that ‘theory’ is somehow in opposition to, or unrelated to, ‘practice,’ should no longer have a place in serious discussion of legal education.”); see also Curcio et al., *supra* note 6, at 193-94 (noting that the knowledge-attitudes-skills framework is used by many disciplines to develop student learning outcomes but there is invariably overlap in these spheres).

144. See Lynch, *supra* note 81, at 988.

145. Miller et al., *supra* note 130, at 112-13 (arguing cultural competencies can, and should be, taught by integrating “cultural-competency work” into the law school curriculum).

146. Curcio, *supra* note 48, at 552 (noting that “[l]egal training in rational and analytical thinking does not immunize one from having and acting upon biases”).

replicate their current curricula with the confidence that newly-minted lawyers could operate bias-free, or minimally bias-aware, and culturally proficient.

A recent survey of law students by Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, however, demonstrates the opposite.<sup>147</sup> In general, the law students surveyed minimized the impact of culturally biased assumptions on their decision-making and believed they possessed a strong ability to identify when bias affected their behavior or judgment.<sup>148</sup> For example, students thought a client would be more influenced by cultural background than a lawyer would.<sup>149</sup> According to their analysis, “Students felt fairly confident that they could identify when they were acting based upon stereotypes or culturally biased assumptions.”<sup>150</sup> The results suggested that law students may actually think that “legal training somehow immunizes lawyers from viewing legal problems and clients through their own cultural lenses, and from having cultural biases that affect their analyses and interactions.”<sup>151</sup>

This mismatch between what students believe and what scholars (and many practitioners) know has been exacerbated by the failure of law schools to adopt curriculum-wide reforms. Even though law schools remain responsible for training future lawyers, they have consistently failed to provide students with sufficient direct instruction and experiential learning opportunities that might address such concerns. As explained above, modern scholarship in legal theory and social cognition suggests that law students will be hard-pressed to demonstrate the competencies required by Standard 302 without sustained instruction and opportunities to explore and reflect on how culture influences law and its practice.<sup>152</sup> Without this foundation, practicing lawyers may fall short of their ethical duties to their clients and to the profession.<sup>153</sup>

As a result, even when law schools do not specifically identify cultural competence as an “other professional skill” under Standard 302(d), they should nonetheless view culturally responsive lawyering as essential to fulfilling the requirements of Standards 301 and 302. That is because law schools provide a powerful unifying experience for future lawyers as they become acculturated to the profession.<sup>154</sup> Law schools teach the “craft of law” and “inculcate[]

147. *See id.* at 541-43; *see also* Curcio et al., *supra* note 7.

148. Curcio, *supra* note 48, at 543-44.

149. *Id.* at 542-43 (“589 law student respondents thought lawyers are less likely than clients, and somewhat less likely than judges, to look at legal problems through their own cultural lens. Students were even less likely to think that they, personally, viewed the legal system through a culturally biased lens”).

150. *Id.* at 544.

151. *Id.* at 540.

152. *See* Bryant, *supra* note 73, at 53-54; Piomelli, *supra* note 30, at 162 (arguing that we must “direct[] attention to what we know about others [and ourselves], how we feel about them [and ourselves], and how we act on our knowledge and feelings”).

153. Persaud, *supra* note 85, at 24.

154. *See* SULLIVAN ET AL., *supra* note 3, at 5-6. The Educating Lawyers report

professional values, explicitly or implicitly.”<sup>155</sup> Although inserting the term “ethical” into Standard 301(a) is a small addition compared to the new learning outcomes requirements announced in 301(b) and further outlined in Standard 302, this addition provides support for adopting culturally responsive lawyering as an orienting framework for curricular reform. In combination with the language in Standards 301(b) and 302(c), the new objectives signal that all law schools should teach and provide opportunities for students to demonstrate ethical lawyering.<sup>156</sup> Explicitly interweaving culture work throughout the curriculum and specifically embedding learning outcomes within each sphere—knowledge, skills, and values—will help to ensure that all graduates can demonstrate how social cognition, culture, and context impact law and can provide culturally sensible legal services once in practice.

### III. TEACHING CULTURALLY RESPONSIVE LAWYERING

*“[L]aw is the quintessential form of ‘active’ discourse, able by its own operation to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates law.”<sup>157</sup>*

Culturally responsive lawyering rejects the notion that “cultural competence” is an *optional* skill, divorced from other core competencies. Rather, culturally responsive lawyering is grounded in a deliberative process that extends deeper than outward-facing performative skills and embraces what scholars and lawyers already know: culture matters. There are three core tenets of culturally responsive lawyering. These tenets specifically build on two pillars: scholarship that grapples with the relationship between law and culture, and clinical pedagogy that seeks to build inclusive lawyering models and teach

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observed that the first months of law school provide “rapid socialization into the standards of legal thinking” (Observation 1), that this socialization occurs mostly through the case method, which provides students with a “deep, largely uncritical level” of understanding (Observation 2); and “the task of connecting [abstracted legal] conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through social consequences or ethical aspects of the conclusions, remains outside the case-dialogue methods.” *See also* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 61 (1995) (arguing that “casebooks have the power to influence students’ and readers’ views beyond the closed confines of classroom black-letter law”).

155. Wizner, *supra* note 4, at 591; *see also* Moran, *supra* note 5, at 29 (“Legal education’s null curriculum works against producing well trained lawyers by letting students believe that gender, race, ethnicity, and class are not important to their future practice.”); *see also* Lynch, *supra* note 81 (discussing the 2007 *Educating Lawyers* report, which described legal education as an acculturation process).

156. *See* ABA Guidance Memo, *supra* note 97, at 1-4.

157. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 839 (1987).

those models to students as they learn to be lawyers.

Culturally responsive lawyering:

- (1) Accepts that culture and law exist in a mutually constitutive relationship;
- (2) Uses transformative legal analysis, a transparent and integrated approach to legal problem-solving that evaluates the impact of culture, context, and cognition on what the law is and makes normative assertions about what the law should be; and
- (3) Employs transformative legal analysis along with inter-cultural sensibility in the provision of legal services or when otherwise operating within the legal profession.

Embedding the tenets of culturally responsive lawyering from the very first day of law school will demonstrate to students that understanding culture is essential in the legal profession.<sup>158</sup> While these tenets should be adopted institution-wide and appear in every law school course regardless of size or content area, minimally they should be incorporated throughout the first-year curriculum and in the courses that meet the ABA-required Legal Writing, professional responsibility, and experiential learning credits.<sup>159</sup>

In the first year, other than the ABA's requirement that law schools provide their students with "a rigorous writing experience,"<sup>160</sup> law schools have autonomy to design their course curricula. In addition to Legal Research and Writing, which introduces students to legal discourse and the structure and function of the legal system, and requires them to apply substantive and procedural law through a series of written and oral assignments,<sup>161</sup> most law schools require first-year students to take Torts, Civil Procedure, Property, Contracts, Criminal Law, and Constitutional Law. While critiques of this formula abound,<sup>162</sup> the proposal here does not ask law schools or law professors to abandon this framework. Rather, it asks them to adopt an approach to teaching these courses that develops competencies in culturally

158. See Moran, *supra* note 5, at 19 ("[T]he first year of law school is the time when students learn what 'really counts' in their profession.").

159. ABA STANDARDS, *supra* note 24, at 16.

160. Kenneth D. Chestek, *MacCrate (in)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. COLO. L. REV. 115, 122 (2007).

161. See Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 913 (2011) (noting legal research and writing instruction in the first year focuses on "traditional legal authority—statutes, cases, regulations, treatises, law review articles, and legislative history").

162. See, e.g., Rakoff & Minow, *supra* note 2 (arguing for problem-solving, fact-forward curriculum from the first year of law school); Menkel-Meadow, *supra* note 2, at 580-86.

responsive lawyering.

Blending the three tenets of culturally responsive lawyering, learning outcomes that could be adopted in any law course might include the following:

- (1) Students will be able to identify the mutually constitutive relationship among law, legal actors, and the people and relationships law regulates;
- (2) Students will be able to identify, analyze, and work within the cultural contexts in which legal problems emerge;
- (3) Students will be able to identify how social cognition impacts law, legal systems, and the provision of legal services;
- (4) Students will be able to understand how their own identities and cultures interact and interface with legal analysis, decision-making, and communication;
- (5) Students will be able to identify and use narrative structures in various forms of legal communication with their clients and other members of the legal profession;
- (6) Students will be able to identify, understand, evaluate, and employ various types of authority in context;
- (7) Students will be able to identify structural barriers to the equitable provision of legal services.

When students can demonstrate competence in the learning outcomes above, they will be able to integrate transformative legal analysis into the provision of culturally sensible legal services—both in their experiential courses and later in practice. These learning outcomes satisfy the minimum competencies set out in Standard 302. Specifically, the components of transformative legal analysis, discussed in Subpart B below, meet Standards 302(a) and 302(b) by requiring students to demonstrate an understanding of and facility with law as process and product, historically grounded and culturally informed. Additionally, the components of intercultural sensibility, discussed in Subpart C below, satisfy Standard 302(c) and (d), which require students to demonstrate the skills and values required to exercise their ethical responsibilities to clients and the legal profession.

Interweaving the tenets of culturally responsive lawyering throughout the law school curriculum will help students become ethical, effective lawyers. The Subparts below provide a conceptual sketch of culturally responsive lawyering's three tenets and some suggestions for how to include them in any law school course.

### A. Acknowledging That Culture and Law Exist in a Mutually Constitutive Relationship

Although few mandatory law school courses explicitly teach about the relationship between law and culture, the concept is not novel. As discussed in Part I.B, which summarized scholarship from the fields of critical theory, rhetoric, and clinical pedagogy, law is created and implemented in culturally specific contexts.<sup>163</sup> Similar to the function of language as a symbolic system, law's "intended and unintended meanings circulate and are transformed. Those whom the law seeks to govern may redefine the law, the law may redefine them, or both."<sup>164</sup> This is to say: culture impacts law and legal structures as well as the relationships that law often regulates, informs, and defines. For example, as Eduardo Capulong notes, in the pages of legal decisions humans are legal categories: "human identity and circumstances are defined by legal doctrine and formal legal institutions."<sup>165</sup> Culture impacts these categories by affecting social and political norms.<sup>166</sup> At the same time, law feeds back into this loop by "shap[ing] individual and group identity, social practices as well as the meaning of cultural symbols."<sup>167</sup> When viewed within a constitutive framework, legal terms and concepts—whether "marriage," "reasonable person," or "dwelling house"—are historically and culturally grounded and have both descriptive and generative functions.

What does this mean for legal education? Inquiry into law and culture should not remain neatly bound in scholarly journals or cabined to discussions at academic conferences.<sup>168</sup> From the first day of their first class, law students should be taught to engage in critical thinking about the law. As they pore over casebooks and pick apart statutes, they should be taught to deconstruct and reconstruct meaning from various perspectives, situating culture and context at

163. See Mezey, *supra* note 29, at 60 (noting that implementing law "always takes place in culturally specific contexts"); see also Frank Rudy Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 23 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006), <https://perma.cc/L3K4-KMSK> ("Law is a set of discourses that hold sway over our very ways of seeing the world"); see also Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 *CLINICAL L. REV.* 329, 329 (2006) (suggesting the dominant discourse around gender impacts which stories law understands); Aiken, *supra* note 141, at 290 ("The law does not exist 'out there' to be found; rather it is a reflection of the complex interplay of information, experience, and value choice.").

164. Mezey, *supra* note 29, at 60.

165. Capulong, *supra* note 23, at 39; see also Chase, *supra* note 154.

166. Mezey, *supra* note 29, at 46 (noting that culture impacts "what is socially desirable, politically feasible, [and] legally legitimate").

167. *Id.*

168. See Menkel-Meadow, *supra* note 2, at 573 (noting, for example, the law and literature movement has produced substantial scholarship but that "the core of legal education has hardly been touched by these developments, except for a more informed set of interpretive moves and principles in the legal interpretation").

the heart of this inquiry. Although particular professors may expose their law students to the widely accepted theory that “all interpretations of law are cultural interpretations,”<sup>169</sup> too often the way in which law and legal analysis are taught (and even practiced)—as objective and neutral—masks this reality.<sup>170</sup>

Returning to this article’s opening scene, the concurring decision denying Mr. Demesme’s writ confirms that cultural ignorance has the potential to harm individuals, create bad law, and undermine the legal system.<sup>171</sup> If we accept that law and culture constitute one another, then understanding the constitutive relationship is essential to competent lawyering. Adopting transformative legal analysis, a more transparent and integrated approach that illuminates the complex relationship between law and culture, will ground student learning and help them to develop critical cognitive architecture for interpreting and practicing law.

#### B. Using Transformative Legal Analysis

Transformative legal analysis incorporates concepts from discourse analysis, cultural studies, and critical legal theory to evaluate the impact of culture, context, and cognition on what the law is and to make normative assertions about what the law should be.<sup>172</sup> These theoretical underpinnings provide rich dimensionality and perspective to the study and practice of law. In particular, transformative legal analysis borrows and expands upon Professor Naomi Mezey’s cultural interpretation of law framework, which sets out three spheres of inquiry: (1) the site of production; (2) the cultural practices that “inspire the law and those that the law confronts when applied”; and (3) the “encounter between law and culture.”<sup>173</sup> While course content will certainly vary, before graduation students should become comfortable identifying and interrogating two spheres: law’s sources and the socio-cultural contexts in

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169. Mezey, *supra* note 29, at 58.

170. See Moran, *supra* note 5, at 15 (“[T]he case method, which is generally accepted as the central defining feature of the last one hundred years of legal education, tends to maintain, and even reinforce, class gender, and race hierarchies.”); Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 1033 (2012) (noting “rules derive meaning only in use. To talk of the meaning of rules, however, is senseless without focusing on whose *meaning* and in what *use*”).

171. See generally Hebert, *supra* note 15.

172. The argument for teaching legal theory—particularly critical legal theory—is not new. In fact, in a 1998 article Professor Kathryn Stanchi advocated for incorporating critical theory and methodology in first year courses. See generally Stanchi, *supra* note 66. But, as she noted a decade later, podium courses largely taught using the case method remain paramount, while both skills and theory are marginalized. See Stanchi, *supra* note 6, at 611.

173. Mezey, *supra* note 29, at 63.

which law operates.<sup>174</sup>

The Subparts below include suggestions for teaching transformative legal analysis through exploring these two spheres.

### 1. Investigating law's sources

Exploring law and its sources is the bread and butter of law school curricula. This sphere of inquiry includes traditional sites of legal meaning such as the text of federal and state constitutions, judicial opinions interpreting statutory or common law rules, legislative history, and scholarly commentary. Like Professor Mezey's framework, transformative legal analysis also incorporates learning about these sources of authority and the relationship they have to one another.<sup>175</sup> It asks students to complexify their understanding of the law and legal system by understanding these sources as part of a larger cultural project in which they operate.<sup>176</sup> To do this, in each first-year course, students should be instructed how to situate legal sources in context. As Professor Amy Griffin explains, "[t]he landscape of legal authority is not fixed and flat."<sup>177</sup> Recognizing such dynamic terrain, transformative legal analysis requires the broad exploration of the following contexts:

- (1) The source of law (or institutional author);
- (2) The source's human author(s);
- (3) The source's underlying and missing narrative(s); and
- (4) The source's purpose.

Even when exploring these traditional sites of legal meaning, whether in Legal Writing or in Property, slight shifts in discourse can open students' perspectives. For example, transformative legal analysis requires that students go beyond traditional notions of legal hierarchy and enacted law versus common law. As Professor Griffin suggests, while "[t]he very purpose of the hierarchy of authority is to rank authorities so that some outweigh others," the hierarchy metaphor is inapt at best and, at worst, is actively detrimental to deep

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174. *Id.* at 62.

175. *See id.*

176. *See id.* at 63. Describing a cultural interpretation of law approach to understanding the Columbine shootings, Mezey suggests inquiring into the laws around school funding, zoning, mental health care, and law enforcement "and attempt[ing] to make sense of them as law, and also as metaphor and symbol, understanding them as part of a larger set of social discourses of which they are an inextricable part." *Id.*

177. Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 93-94 (2018) ("The landscape of authority is not fixed and flat; authority is used differently depending on factors such as the field of law, the identity of the decisionmaker, the reason why the legal question is a difficult one, and the amount or quality of mandatory authority on the issue.").

legal inquiry and understanding.<sup>178</sup> Rejecting or at least qualifying the hierarchy metaphor is particularly important in the first year of law school when students are striving to learn a new language and its many norms and rules.<sup>179</sup>

Rather than perpetuate a dangerous myth that law is neutral and that lawyers merely need to find the right law and apply it as it has always been applied, law students should be taught to consider the relative “weight” of authority along a continuum, and understand that the relative weight of any given authority can and does change over time.<sup>180</sup> Sometimes weight shifts because of new rules. For example, before the adoption of Federal Rule of Appellate Procedure 32.1, courts could restrict or prohibit citation to unpublished authority.<sup>181</sup> Such a limitation severely affected the type of persuasive authority that a lawyer could present to a court. Sometimes weight shifts because a source gains or loses force. Recent lawsuits evaluating the import of presidential tweets reflect how changes in human communication and technology have led to using new sources in legal analysis.<sup>182</sup> Exploring these weight shifts helps to situate legal analysis in historical and cultural context. Here, Legal Writing professors can take the lead as they introduce foundational concepts and help students acclimate to law’s discursive structure.

In particular, whether discussing enacted law, executive order, or judicial decision, students should understand that a “finite group of authors”—both

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178. *Id.* at 60. Professor Griffin notes “[t]he fixed boundaries of mandatory authority are a bit like political boundaries of a state. On a map, the line between two states appears perfectly clear—conceptually the boundary is distinct. But on the ground, that line is often invisible. Every lawyer and law student understands the difference between binding and nonbinding authority. But on the ground—in the work of building legal arguments—the distinction is much less clear.” *Id.* at 66-67.

179. Professor Jeff Lipshaw characterizes the mismatch between a law student’s desire for coherent rules and the reality of American law by recalling the classic first-year law student frustration: “can you just tell me what the rules are?” Lipshaw, *supra* note 170, at 1032. Lawyers and law professors “know that the question is meaningless: the rules arise in a clash of instrumental interests in which competing parties assert competing rules that would dictate competing outcomes, and judges attempt to resolve disputes in a way that keeps all of those rules coherent and consistent.” *Id.*

180. Griffin, *supra* note 177, at 63. Griffin explains that “[w]eight, as applied to legal sources, is not specific; typically, the most that can be said is that one source weighs more or less than another. Greater and lesser weights make more sense given a continuum of weight, where the value and persuasiveness of sources are relative. Sources are balanced against one another, the weight of a source might fall anywhere along the spectrum, and that weight can change over time.” *Id.* at 92.

181. *See id.* at 78; FED. R. APP. P. 32.1.

182. *See, e.g., Knight First Amend. Inst. v. Trump*, 302 F. Supp. 3d 541, 567 (2018) (noting the parties’ joint stipulation states that tweets from the @realDonaldTrump Twitter account are public records and must be preserved and that the “account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy”); *see also* Margolis, *supra* note 161, at 911 (arguing that online research is blurring the lines between traditional and non-traditional legal sources).

institutional and human—have produced the law.<sup>183</sup> Even though there have been efforts to diversify voices at the student, lawyer, law professor, and judge level, the demographics of the legal profession have never reflected the U.S. polity.<sup>184</sup> Further, most first-year law professors continue to teach law from a white, largely male, normative perspective—what Professor Kimberlé Crenshaw has described as “perspectiveless.”<sup>185</sup> Students are rewarded for parroting this contrived objectivity.<sup>186</sup> However, when law professors in a first-year course acknowledge law’s historic and enduring exclusivity, and explore the four context spheres above, they invite students to question and wrestle with the law. They also create space for and center students’ diverse identities and experiences.

Similarly, introducing law students to the subjectivity of the law and the U.S. legal system counters the notion that a neutral body of law exists. Part of this inquiry includes considering the identity of a particular decision-maker and how that identity may affect their choice of authority. While the institutional identity of the decision-maker—for example, Supreme Court versus arbitration panel—is important, the inquiry should go further. Judges are not just influenced by sources cited in the briefs before them.<sup>187</sup> They are also

183. Margolis, *supra* note 161, at 914 (“Traditional legal authority is produced by lawyers, primarily judges and legal academics, for use by other lawyers, judges, and legal academics”).

184. See *ABA Profile of the Legal Profession*, American Bar Association (2019) <https://perma.cc/WP4K-FTC8>; see generally MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

185. See Crenshaw, *supra* note 3, at 2; see also Boles, *supra* note 78, at 221 (“Most law students are taught from an invisible and assumed perspective that is largely white, male, heterosexual, economically advantaged, and able-bodied. This assumed perspective forms an invisible pedagogical norm.”); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 314 (2000) (“Not only is legal doctrine developed to obfuscate the importance of the racial context to entire areas of law, but silence is maintained in particular disputes. Legal actors—judges, lawyers, scholars, deans, and professors—are socialized to maintain a decorum that protects this silencing.”).

186. See Chase, *supra* note 154, at 58 (arguing that “contrived stance of objectivity” validates the cultural perspective of most white students “while the perspectives of rights, fairness, justice, and equality of many African-American students and professors are seen as less worthy of serious consideration.”); see also Archer, *supra* note 7 (arguing many law students view the world through a post-racial lens and this lens dominates social and legal culture); Angela Onwauchi-Willig, Dean, Boston University School of Law, Welcome Remarks at the Boston University School of Law Symposium: Racial Bias, Disparities and Oppression in the 1L Curriculum: A Critical Approach to the Canonical First Year Law School Subject Democracy (Feb. 28, 2020) (on file with author) (“For far too long, what it has meant to teach students to think like a lawyer has meant that we expect some students to ignore the realities of their lives, their families’ lives, and the lives of those in their communities—to ignore what is readily visible to them—while reinforcing the privilege that other students have in keeping those realities invisible.”).

187. Bennardo, *supra* note 22, at 47 (noting that these extralegal issues influencing decision-making include, but are not limited to, “prejudice based on certain characteristics of

influenced by culture and their own experiences.<sup>188</sup> As Professor Linda Edwards notes, “there exists no neutral moment—no moment when a judge’s perception is unaffected by one cultural frame or another . . . .”<sup>189</sup> Instead, judges rely on a near “limitless batch” of information to inform their decisions.<sup>190</sup>

This “batch” of information encompasses binding authorities as well as a host of other legal sources.<sup>191</sup> Optional legal authorities that law professors could introduce in their first year courses include legislative history, agency interpretations, treatises, dictionaries, empirical studies, and “voices briefs.”<sup>192</sup> Such sources help deepen a future lawyer’s understanding of the mutually constitutive relationship between law and culture. Non-legal sources also play an increasingly important role in both enacted law and judicial decisions.<sup>193</sup> As Professor Ellie Margolis explains, a non-legal source is “not explicitly ‘about the law’ and not directed at a legal audience but . . . is nonetheless used as authority in support of legal analysis.”<sup>194</sup> Students should be aware that lawyers and judges do not adhere to specific rules regarding non-legal sources, and they should be taught to vet those sources with a critical eye.<sup>195</sup>

Finally, students should also understand canons of interpretation and explore their import beyond a brief introduction in Legal Writing and

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the parties or the parties’ attorneys, the financial resources of the parties, the publicity surrounding a case, public opinion, social trends, and on and on”).

188. See Edwards, *supra* note 47, at 58-59 (“There is no such thing as a hermetically sealed judicial environment.”).

189. *Id.* at 61.

190. See *id.* at 53.

191. Griffin, *supra* note 177, at 54; Margolis, *supra* note 161, at 913-19 (describing traditional legal authority, which is generally broken into binding (mandatory) authority and persuasive authority).

192. Edwards, *supra* note 47, at 34. Edwards defines the term “voices briefs” as “stories drawn from the lives of individuals who are strangers to the case.” This subset of amicus briefs is a relatively new. Edwards explains, “[t]o date, voices briefs have been used almost entirely in abortion rights and marriage equality cases. These cases share two important, overlapping characteristics: (1) the outcome will have a direct personal impact on the intimate lives of those affected; and (2) the storytellers’ experience is likely outside of the Justices’ experience.” *Id.* at 39.

193. Margolis, *supra* note 161, at 920 (noting the quantity and variety of non-legal sources cited in legal decisions has increased dramatically).

194. *Id.* at 919 (arguing as use of non-legal sources becomes more accepted, these sources “increasingly take on the mantle of authority”). For example, Justice Sotomayor relied on law review articles, scholarly books, and writing by authors such as W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates to support her dissent in *Utah v. Strieff*, 136 S. Ct. 2056, 2064-72 (2016). See also Crawford et al., *supra* note 62, at 186-89 (discussing Justice Sotomayor’s dissent as an example of a legal opinion reflecting feminist theory and methods).

195. See Griffin, *supra* note 177, at 85 (noting when it comes to non-legal sources “the only guard against bias seems to be the adversarial design of the judicial system”).

Constitutional Law courses.<sup>196</sup> These “never-binding” sources inform judicial decision-making, which in turn alters the legal landscape in which people and entities operate.<sup>197</sup> For example, law professors would do well to include empirical data to show how courts use canons in various ways, and engage students in thinking about how canons impact specific cases and also affect the development of the law more generally.<sup>198</sup>

In order to evaluate the weight of authority in context, students also need to go beyond the edited appellate decisions that make up the bulk of first-year casebooks. While many casebooks include selected materials that help students contextualize the legal concepts they are learning, these heavily curated and neatly packaged sources do not replicate or prepare students to solve problems or create value in complex human environments.<sup>199</sup> Indeed, “[a]ppellate opinions hide, rather than display, how ‘facts’ are constructed and how more than one narrative can be consistent with ‘raw data.’”<sup>200</sup> The transformative legal analysis framework requires adding depth by uncovering narrative and including backstories. Adding to law’s narrative helps students to contextualize the law.<sup>201</sup> As lawyers, today’s law students will confront messy stories, not pristine legal doctrine. Their law school courses should prepare them for this

196. *Id.* at 73 (“[C]anons of interpretation, a long-accepted part of statutory interpretation, have no particular place on the hierarchy of authority but are used for their status.”); see also Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism’s Rhetoric Problem*, 116 MICH. L. REV. 1485, 1510-11 (2017) (discussing *State v. Demesme* as an example of the “cocktail party” canon of construction, where “plain meaning” is derived from personal experience).

197. Griffin, *supra* note 177, at 73-77 (discussing various types of optional authority and concluding these texts are routinely relied on for their authoritative weight and cited in judicial decisions).

198. See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (evaluating 632 cases 1969-2003 to see how the Supreme Court uses canons in workplace jurisprudence).

199. See Rakoff & Minow, *supra* note 2, at 604 (suggesting an alternative); Capulong, *supra* note 23, at 39-40 (noting that the client encounters in appellate decisions function as legal categories).

200. Rakoff & Minow, *supra* note 2; see also SULLIVAN ET AL., *supra* note 3, at 187 (observing that the case dialogue method deliberately ignores the “rich complexity of actual situations that involve full dimensional people”). In the area of contract law, Professor Deborah Zalesne has argued that judges often omit identifying characteristics of the parties. She notes that “[d]etails sure to have influenced the judge’s legal reasoning and analysis—such as the relationship between the parties, or the age, race, gender, or class of one or both of the parties—are conspicuously missing, leaving readers to hypothesize or fill in the gaps.” Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUMBIA J. RACE & L. 25, 29 (2013).

201. See Graham & McJohn, *supra* note 50, at 258 (noting “narrative plays a fundamental role in legal reasoning, in such areas as memory, moral decision-making, reasoning by analogy, explanation, and even the organization of the vast amounts of information that lawyers contend with.”); see also Peter Brooks, *Narrative Transactions - Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

work.

One way to add backstories and thereby fill in the law's narrative is to introduce students to documents underlying trial court and appellate decisions.<sup>202</sup> Docket entries, such as exhibits and transcripts, reveal competing stories and illuminate how law is shaped by non-legal sources. For example, students can compare facts from competing briefs and other supplemental material to identify which facts were included in an opinion. Where a case results in judges or justices issuing concurring or dissenting opinions, students can parse and wrestle with the implications of those drafting decisions.<sup>203</sup>

Professors teaching required first-year courses can also supplement their traditional casebooks with selections from the Feminist Judgments series.<sup>204</sup> These "shadow decisions" rely on precedents in effect at the time of the original opinion and use only established facts from the case record, yet reach a different conclusion from the original decision.<sup>205</sup> Using "shadow judgments" in combination with Supreme Court decisions "concretely demonstrate[s] that

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202. See Rakoff & Minow, *supra* note 2 (noting appellate "opinions state 'the facts.' Even when encountered with contrasting statements by a dissent, these factual statements do little to equip students to navigate overlapping and diverging witness accounts, gaps in forensic material, disputes over significance levels in statistical studies, or the influence of a narrative frame").

203. For example, the case history from *Bell v. Itawamba County School Board* demonstrates how complex narratives, legal frameworks, and cognitive biases affect legal decisions. In that case, 17-year old Taylor Bell sued his school, the principal, and others in the Northern District of Mississippi for suspending him and placing him in an alternative educational facility for writing and publishing on Facebook and YouTube a rap that alleged sexual misconduct by faculty at his public school and used explicit and violent imagery. *Bell v. Itawamba County Sch. Bd.*, 859 F. Supp. 2d 834, 836-37 (N.D. Miss. 2012). Documents filed by Bell in support of summary judgment reveal that after an initial disciplinary hearing the school board's Disciplinary Committee found there wasn't conclusive evidence that Taylor's rap could be construed as a threat. See Plaintiff's Motion for Summary Judgment, *Bell*, 1:11-cv-00056, Ex. 8. After the district court granted summary judgment in favor of the defendants, holding that Bell's off-campus speech was not protected by the First Amendment because it caused a material school disruption that was reasonably foreseeable, the Fifth Circuit reversed. *Bell v. Itawamba County Sch. Bd.*, 774 F.3d 280, 304 (5th Cir. 2014). The majority concluded that "the summary-judgment evidence and materials establish that Bell composed and recorded his rap song completely off campus; that he used his home computer to post it on the Internet during non-school hours; and that the School Board did not demonstrate that Bell's song caused a substantial disruption of school work or discipline, or that school officials reasonably could have forecasted such a disruption." *Id.* at 282. Compelled by the then-recent school shooting at Sandy Hook and the near-universal use of social media, the dissenting opinion concluded that the First Amendment did not protect Bell's off-campus speech because "an objectively reasonable person would interpret the rap recording as a true threat" and because Bell's speech could be regulated under the *Tinker* substantial disruption test. *Id.* at 315, 322-24 (Barksdale, J., dissenting). After rehearing en banc, the Fifth Circuit affirmed the district court's decision in an opinion written by Judge Barksdale. *Bell v. Itawamba County Sch. Bd.*, 799 F.3d 379, 380 (5th Cir. 2015) (en banc).

204. Crawford et al., *supra* note 62, at 180.

205. *Id.* at 181.

the development of the law or the outcome of a lawsuit is not inevitable or predetermined, whether one is talking about constitutional interpretation or statutory analysis.”<sup>206</sup>

Finally, students should become attuned to missing facts, voices, and stories and understand the impact that procedural rules have on them. For example, while first-year students generally take Civil Procedure, they may memorize the operative rules without understanding why they exist or how they order the chapters in a litigation story.<sup>207</sup> Yet these rules, like those in Evidence and Criminal Procedure, govern which facts are deemed important and which are suppressed. They not only impact the development of the law, but they also determine how and whether certain stories are told.<sup>208</sup> As a result, these rules affect the “legal imagination.”<sup>209</sup> Professors Todd Rakoff and Martha Minow describe the legal imagination as “the ability to generate the multiple characterizations, multiple versions, multiple pathways and multiple solutions, to which [law students] could apply their well-honed analytic skills.”<sup>210</sup>

Rather than focusing solely on procedural rules or appellate decisions, students should also be taught how to select, evaluate, and explore law’s sources and the narratives that impact them. Students can engage more fully with transformational legal analysis by going beyond law’s immediate sources to consider its social and cultural contexts. This will help students become archaeologists of the lawyering process, more adept at determining what the law is, and at articulating visions of what the law could and even should be.<sup>211</sup> The Subpart below suggests how to approach this work.

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206. *Id.* at 180.

207. See RUTHANNE ROBBINS ET AL., *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 39 (2019) (using the phrase “chapters in a litigation story” to explain the lifecycle of a case).

208. See Ralph, *supra* note 65, at 584-85 (describing the process by which law determines which stories are told); see also Bennett Capers, *Evidence without Rules*, 94 NOTRE DAME L. REV. 867, 867 (2018) (discussing the effect of un-governed “other evidence”—like race, attire, and presence of family members in attendance at trial—on case outcomes); Barbara A. Babcock, Toni M. Massaro & Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, in Coleman, Malveaux, Porter & Pedro, *A CRITICAL GUIDE TO CIVIL PROCEDURE* (forthcoming 2021) (on file with author) (calling on scholars to reconceptualize how procedure is taught and practiced by focusing on how procedure both works for and fails ordinary people).

209. Rakoff & Minow, *supra* note 2, at 602.

210. *Id.*

211. *Id.* at 607. Rakoff and Minow caution that without introducing students to the messy, open-ended problems people face beginning in the first year—to challenge them in this way—“students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder.” *Id.*

## 2. Excavating law's socio-cultural context

Transformative legal analysis situates law's socio-cultural contexts in the center of legal pedagogy. It asks law students to analyze the law and the legal system from a variety of perspectives and to consider what these perspectives add to their analysis. Doing so prepares law students to engage in self-reflective law practice and conscious professional identity development. Currently, the type of legal analysis that is taught in most first-year law courses stops at legal text. As the previous Subpart notes, first-year students are taught to decipher what the law says—to find a legal rule—often by extracting legal principles from a handful of sources.<sup>212</sup> But competent lawyering requires more. As a result, transformative legal analysis asks the law student and future lawyer to look into the human environment in which law operates and to evaluate law and its effects from the perspective of the people who it regulates, defines, and impacts.

Like the work involved with investigating law's sources, excavating law's social and cultural contexts requires a primary understanding of the core concepts from social and cognitive science that impact how people come to understand and make sense of information. Class discussions of how humans make subconscious and conscious assumptions will help to destigmatize critical conversations about law, legal reasoning, and legal systems.<sup>213</sup> When law students and lawyers are able to identify and unpack assumptions, they deepen their critical thinking and analysis. The list of potential differences (and similarities) that can complicate and impair lawyering is infinite.<sup>214</sup> Because people experience information differently, two individuals can look at the same information and apply different metaphors.

In addition to assigned readings and class discussions, professors can introduce simple exercises throughout the first year to help students understand that their brains use schemas and mapping rules for everything. For example, asking students to define terms like home, mammal, and garbage will trigger different images and associations.<sup>215</sup> Inviting students to experience the

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212. Margolis, *supra* note 161, at 913 (“In their legal research and writing classes, law students are taught how to find and use authority to analyze issues and form legal arguments.”). For sample texts explaining how to find a legal rule see David Romantz & Kathleen Elliot Vinson, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (2009); Christine Coughlin et al., *A LAWYER WRITES* (2018).

213. See e.g., Anderson et al., *supra* note 73, at 391-96 (providing clinic seminar exercises to explore how sameness and difference affect individual relationships and the legal system).

214. Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564, 566 (2014) (noting, at a minimum, there are differences in age, development, educational level, gender, language, national origin, religion, sexual orientation, disability, neighborhood and family structure).

215. HSBC's “Local Knowledge” marketing campaign provides numerous visuals professors can use to jumpstart the conversation. A simple Google image search results in

diversity of associations within a classroom and then think about how such results might impact the lawyer/client and even lawyer/supervisor relationship will enable them to understand that culture and cognition shape how people encounter and understand information. This reality is as true for the law student as it is for the judge or the client, or the juror, or the witness, or the parties to a contract. Associational exercises can quickly expose this mental process and lay the foundation for more careful, nuanced, and creative legal analysis.

While cognitive and narrative theory are often included in Legal Writing courses when discussing persuasive advocacy, their role in making and interpreting law is equally important. As a result, concepts from these disciplines such as schema, master narrative, and ethos/pathos/logos should be included in Legal Writing courses at every stage of legal problem solving, which includes critical reading, rule synthesis, legal analysis, and overall prediction. Additionally, other first-year professors can build and strengthen the foundation laid by Legal Writing professors by pulling these concepts into their courses, which helps students to scaffold and deploy the knowledge they are acquiring. For example, Contracts professors can help students understand that a contract represents an artifact of a transactional lifecycle.<sup>216</sup> The contract came from somewhere. Its lifecycle began as the subjective desires of each party and those desires at some point became an agreement—there was a meeting of the minds. These subjective desires, the contract itself, and the law that will determine the result of any later dispute all rely on communicating with language across various cultures and contexts.<sup>217</sup> Understanding the master narratives and schemas in a contract’s transactional lifecycle helps to reveal the subjective nature of legal analysis and unpack power dynamics, both among contracting parties and in relation to the development of contract law more generally.

Next, courses should include the human environment. While some traditional first-year podium courses may incorporate how cultural context and individual cognition impact the stories that get told and the legal decisions that result, often the people, entities, and institutions that law affects—the sphere of

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images ranging from three different “footballs” (football/USA; soccer/UEA; rugby/Australia) to the same small rug with the terms: “décor,” “souvenir,” and “place of prayer.” See also Jeffrey Pilcher, *HSBC ‘Different Points of Value,’* FIN. BRAND (July 6, 2009), <https://perma.cc/5DDU-ZZYN> (describing campaign and including image samples).

216. See Lipshaw, *supra* note 170 (arguing for teaching students contract law by exploring metaphor, prototypical frames, and the lifecycle journey of a contract).

217. See Zalesne, *supra* note 200, at 35 (noting that “[f]actors such as ethnicity and national origin can play a major role in contract formation and interpretation. The unique experiences and vocabularies of different communities can affect individual business practices and therefore can affect the subjective intent of parties entering into a contract”); see also Chase, *supra* note 154, at 39-40 (arguing that “[t]he effect of the historical treatment of African-Americans as property and as the subject of contracts undoubtedly has affected the white perception and attitudes towards African-Americans and contracts”).

reception—remain curiously absent.<sup>218</sup> Casebooks filled with summaries and excerpted decisions can gloss over the main characters and disguise the life of the law. Even in first-year “lawyering” or “skills” courses, the fact patterns are often carefully curated, stripped of the discursive interplay between law and the people and spaces it regulates.<sup>219</sup> When considering context—and especially when finding, evaluating, and using facts—students should understand that they already have categories or schema for the material they are encountering and have also likely developed a perspective. This is not good or bad, it simply is. As Professor Linda Edwards notes, “[t]he question is not *whether* we see the situation through a lens, but *which* lens focuses our view. The danger is, of course, that we are often oblivious to our own unconscious frames.”<sup>220</sup>

Interweaving discourse and critical legal theory into teaching legal analysis in the first-year curriculum is one way to encourage law students to *read* both the law and the facts in context.<sup>221</sup> This skill is particularly important because creating, interpreting, and applying the law occurs in a space of translation between author and audience. When students understand law as discourse—as a way of explaining, regulating, and understanding social events and ideas—they can evaluate how courts and legislatures construct an argument, or “encode,” as they interact with law and culture.<sup>222</sup> At the same time, they can consider how people and institutions perceive the law, or “decode.”<sup>223</sup>

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218. See Rakoff & Minow, *supra* note 2, at 602 (noting that students “most crucially lack . . . the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills”). For a discussion of how to place legal doctrine in context in a first-year Contracts class see Lipshaw, *supra* note 170.

219. See Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441, 454-58 (2006) (describing the “canned” legal hypothetical as “a highly simplified environment, free of many of the complications of practice” where the “‘question’ for the students is defined by the pre-determined ‘answer’” and there are a “limited number of pathways for the students to follow”); Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1733-39 (1993) (discussing how various law school classes rely on a one-dimensional, constructed client to avoid the ambiguities and complexities of “real” clients); see also L. Danielle Tully, *Collaborative Case Development for the First-Year Legal Writing Problem*, 31 THE SECOND DRAFT 3, 3 (2018) (explaining a method for engaging first-year students in developing their simulated case file).

220. Edwards, *supra* note 47, at 61.

221. For an example of applying critical cultural theory to policing and depolicing see Cooper, *supra* note 63.

222. Cooper, *supra* note 64, at 858-61 (describing encoding of discourse as the “construction of an argument” and suggesting when we analyze encoding we “break[] apart the structure of the discourse to see why its building blocks were combined in a certain way”).

223. See *id.* at 861-64 (describing decoding a discourse and explaining that an audience can read discourse consistent with the dominant position (in the way its author intended) or in an oppositional position (in a way its author never intended)).

Understanding how socio-cultural context impacts encoding and decoding provides students with critical perspective on how their clients interpret, use, and exist within legal frameworks. Sometimes law has a profound regulating effect on behavior. Other times, like with the laws that regulate speed limit on roadways, culture has more influence than the formal rule.<sup>224</sup>

Including backstories and counter-narratives, like those mentioned in the previous Subpart, also injects a dose of context into the first-year curriculum. It helps students understand that facts in a decision do not necessarily tell the entire story. At the same time, these facts are essential to the case's narrative, and that narrative is situational.<sup>225</sup> For example, in her article *Law as Culture*, Professor Mezey recounts an example first proposed by philosopher Gilbert Ryle and then employed by Clifford Geertz to explain the import of culture to interpretation. She asks: What is the difference between an unintended twitch of the eye and a wink?<sup>226</sup> In order to understand whether an eye movement is voluntary or involuntary, an observer must do more than read the mere physiological description of the movement itself. Rather, to make sense of the movement the observer must also understand "the social codes that give it meaning as a twitch, a wink, a fake-wink, a parody of a wink, a rehearsal of a wink, etc."<sup>227</sup> As Professor Robert Cover argued: "[j]ust as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm."<sup>228</sup> He explained, "[t]here is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case, an act signifies something new and powerful when we understand the act is in reference to a norm."<sup>229</sup> Moving beyond description to interpretation, the observer must understand, or read, the social and cultural contexts.<sup>230</sup> This "reading" is core to transformative legal analysis.

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224. See Mezey, *supra* note 29, at 52-53. Describing analysis conducted by legal scholars on speed limits, Mezey argues "the de facto 'legal' speed limit[] is the limit set by the conventions of drivers—conventions which vary depending on the stretch of road, the time of day, the prevailing conditions, or the habits of a particular city or geographic region." *Id.* at 52. Additionally, she states, "[t]he color of one's car, or more important still, the color of one's skin, will change the legally enforced speed limit and traffic laws generally." *Id.* at 53.

225. See Ralph, *supra* note 65, at 577 (discussing events recounted in *Walker v. City of Birmingham* and *Shuttlesworth v. City of Birmingham* and noting the Supreme Court created two distinct narratives of the same event for different purposes).

226. Mezey, *supra* note 29, at 60.

227. *Id.*

228. ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 99 (1995).

229. *Id.* at 99-100.

230. See Montoya, *supra* note 185, at 274-77 (exploring silence as a communicative device and situating its meaning within culture).

Exploring backstories and counter-narratives also situates law within history and supports culturally responsive lawyering because it demonstrates the dynamic nature of legal norms. Some examples illustrate this point. When studying the law of discrimination, students should understand that it developed in tandem with the scientific theory that “individuals were aware of their biases and prejudices, and accordingly that discrimination was manifested in overt, express ways.”<sup>231</sup> Subsequent developments in the fields of psychology and cognitive science complicate the law’s landscape and provide new avenues for both understanding and critiquing legislation, case law, and regulations governing discrimination. When learning about restrictive covenants in Property, students should understand the socio-historic context that supported their widespread use and its lasting consequences on housing and education. Students could be introduced to recent work by Professor Richard Rothstein, which deftly demonstrates how the enduring legacy of racial segregation is intentionally created, supported, and sustained by local, state, and national law.<sup>232</sup> Similarly, in Constitutional Law, students should understand that the recognition of marriage equality and an individual right to bear arms under the Second Amendment reflect not only legal changes, but also profound social transformations that resulted from the complex mutually constitutive relationship between law and culture.<sup>233</sup> The law’s history is ripe with stories to demonstrate this critical point: socio-cultural context matters.

Including both theory and the socio-cultural context does not water down or detract from teaching core legal concepts. Rather, including them throughout the curriculum—not simply in specialized elective courses—helps students to develop nimble problem-solving skills and prepares them to meet the multidimensional demands of competent law practice.<sup>234</sup> This foundation supports the third tenet of culturally responsive lawyering.

### C. Employing Inter-Cultural Sensibility

When legal education and law practice situate culture at the heart of legal inquiry, employing transformative legal analysis in the provision of culturally sensible legal services embodies culturally responsive lawyering.

The cultural sensibility framework proposed by Professors Curcio, Ward, and Dogra focuses on students’ understanding that “culture is a complex

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231. Bassett, *supra* note 50, at 1574.

232. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

233. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (discussing marriage equality and right to bear arms).

234. See Jeffrey M. Lipshaw, *What’s Going On: The Psychoanalysis Metaphor for Educating Lawyer-Counselors Essay*, 45 *CONN. L. REV.* 1355, 1355 (2013) (arguing lawyers need to be interdisciplinary theorists to understand “what’s going on”).

compilation of numerous influences and emphasizes developing students' understanding of how culture, in turn, influences interactions or knowledge."<sup>235</sup> Importantly, the cultural sensibility framework acknowledges that cultural experiences impact the interpretation, application, and communication of facts and law.<sup>236</sup> At its core, cultural sensibility promotes curiosity, humility, and open-mindedness.<sup>237</sup> It "emphasizes self-reflection and treats each person as an expert on his or her own cultural experience(s)."<sup>238</sup> Additionally, cultural sensibility acknowledges that cultural experiences and understanding vary over a person's lifetime.<sup>239</sup> As a result, culturally responsive lawyering, much like a lawyer's duty of competence, requires an ongoing commitment to self-reflection, inquiry, and growth.

Currently, most law students who encounter curriculum on cultural sensibility do so in the second or third year of law school when they participate in a legal clinic. While a well-designed and supervised clinic experience is invaluable for developing competent lawyering skills, imagine the potential for student growth if the entire legal education supported a student's first client representation. In such a scenario, the student would be applying concepts and skills honed over two years of large lecture, small seminar, and simulation-based courses. Alongside the core concepts and skills associated with transformative legal analysis, students should be exposed to and begin to cultivate the professional values, attitudes, and skills undergirding inter-cultural sensibility from the first day of law school.

As discussed previously, clinical scholars have developed both theoretical and practical models for teaching cultural sensibility in their clinics and a full summary is beyond the scope of this article.<sup>240</sup> Some of the models and exercises for teaching cultural sensibility are easily adapted to other courses outside the clinical experience. For example, consistent with the proposed learning outcomes above, Legal Writing, first-year podium, Professional Responsibility, and other non-clinical experiential courses should include professional identity development as a core learning outcome. In courses outside of the clinical setting, professional identity development should include engaging students in developing self-awareness through frequent self-assessment and reflections. This could include asking students to think about

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235. Curcio et al., *supra* note 128, at 189.

236. *Id.* at 191-92; *see also* Chopp, *supra* note 34, at 370.

237. Curcio et al., *supra* note 128, at 189.

238. Chopp, *supra* note 34, at 367.

239. *See* Curcio et al., *supra* note 128, at 188 (noting that cultural sensibility "account[s] for the fact that cultural experiences vary over our lifetimes and . . . encourage[s] students to continuously [] examine whether their own worldviews or beliefs might need to shift").

240. For an extensive list of learning outcomes supporting the cultural sensibility framework, *see id.*

how their own identity and experiences impact their reaction to and understanding of the material they are encountering.<sup>241</sup> In a Legal Writing course, this may include asking students to read *The Five Habits* and walk through some of the exercises.<sup>242</sup> While addressed to clinical professors looking to support students in building cross-cultural competence, the exercises in this seminal text could be adapted to any law school classroom. For example, students in first-year Legal Writing courses often represent a fictional client and engage in a client interviewing simulation.<sup>243</sup> In preparation for the simulation, students can be asked to complete an exercise based on “Habit 1: Degree of Separation and Connection.”<sup>244</sup> Here, students can identify the similarities and differences between themselves and their clients. They can then brainstorm how these similarities and differences might impact the lawyer/client relationship—from issue-spotting and fact gathering to client communication and legal drafting.

Certainly, there are limits to such an exercise in simulated “client” settings. As Professors Capulong and Shallek have each noted, simulated clients can never adequately capture human complexity.<sup>245</sup> Acknowledging these limitations, law professors should be transparent with students about what they can and should learn from casebooks, simulated exercises, and actual-client representation. For example, unpacking assumptions around sameness is particularly important for first-year law students who are developing their issue-spotting and problem-solving skills in both podium and Legal Writing courses.<sup>246</sup> As Professor Alexis Anderson notes, “assumptions attributed to sameness can complicate lawyering . . . . [U]ntested assumptions, whatever their source, can impair lawyering judgments.”<sup>247</sup> One strategy that professors can employ in any type of course is to challenge students to make the familiar strange. Using this sociological concept, students should move beyond

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241. Weng, *supra* note 73, at 386; Zawisza, *supra* note 33, at 232 (asking students to reflect on an assumption of theirs that “proved to be untrue”); Anderson et al., *supra* note 73, at 386.

242. See Bryant, *supra* note 73; see also Bryant & Koh Peters, *supra* note 36.

243. See e.g., Peggy Cooper Davis & James Webb, *Learning from Dramatized Outcomes*, 38 WM. MITCHELL L. REV. 1146, 1151-52 (2019).

244. Bryant & Koh Peters, *supra* note 36, at 51. For suggestions on applying *The Five Habits* in large first-year required courses, see Mikah K. Thompson, *Toward a Pedagogy of Self-Awareness in the First-Year Law School Classroom*, CULTURAL COMPETENCE IN HIGHER EDUCATION (forthcoming), <https://perma.cc/QTR2-PQ92>.

245. See Capulong, *supra* note 23, at 41-42 (noting that “because it is impossible to simulate social circumstances fully and dynamically, simulated clients are bounded and are replete with individual, not social, detail”); Shallek, *supra* note 23, at 1733 (noting that simulated clients are stripped of extraneous features because they are created to serve pre-existing legal frameworks).

246. Anderson et al., *supra* note 73 (noting challenge of addressing sameness for clinical students).

247. *Id.* at 341.

“common-sense” conclusions that are grounded in their own social reality and attempt to describe, interpret, and evaluate events and people from different perspectives. When discussing a case—such as one relying on concepts like the “reasonable person” or “apparent authority”—students can be asked to consider whether identity, cultural background, or other considerations impact such determinations.<sup>248</sup> As part of this inquiry, taking a transformative legal analysis approach, students can investigate sources that explore the socio-cultural contexts in which these legal rules were developed.<sup>249</sup> This type of perspective-taking can be used when reading appellate decisions or when representing a fictional client. Exercises like this help students to experience law’s subjectivity. And practicing this skill throughout law school will help students to prepare to competently represent clients.<sup>250</sup>

When integrated throughout the law school curriculum, students will begin to understand that professional identity development is critical for both learning and practicing the law. They will come to understand that “a lawyer’s multicultural knowledge, intercultural communication skills, and cultural sensitivity are often the keys to avoiding misunderstanding and promoting effective problem solving.”<sup>251</sup> Finally, teaching students to consciously reflect on how perceptions of difference and sameness affect their lawyering practices will result in attorneys who are more agile and ethical in a pluralistic society and will inspire them to build a judicial system that is more just and equitable.

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248. For a simple, engaging addition to a discussion on “reasonable person,” include the podcast: “Mr. Graham and the Reasonable Man.” *Mr. Graham and the Reasonable Man*, MORE PERFECT (2017), <https://perma.cc/V3L3-R393>. For suggestions on discussing “implied consent” in Torts, see Thompson, *supra* note 244. Professor Osamudia James uses a brief classroom exercise in her Torts course to help her students understand how race shapes the construction of the reasonable person standard and to understand that engagement with core legal concepts is not neutral. She asks her students to close their eyes and picture the reasonable person. She asks: who is this person? What do they look like? Where do they live? How do they move around the world? Students then open their eyes and she asks a series of questions about who or what they conjured. Osamudia James, Professor, University of Miami Law School, Presentation at the Boston University School of Law Symposium: Racial Bias, Disparities and Oppression in the 1L Curriculum: A Critical Approach to the Canonical First Year Law School Subjects (Feb. 28, 2020) (remarks on file with author).

249. For example, professors could assign law review articles or book chapters to contextualize and ground the cases they read. *See, e.g.*, Ann McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012) (discussing the reasonable person standard in negligence law and Title VII); Lucy Jewel, *Does the Reasonable Man Have an Obsessive Compulsive Disorder?* 54 WAKE FOREST L. REV. 1049 (2019) (exploring the cultural and legal attributes of the reasonable man); Martha Chamallas, MEASURE OF INJURY, 119-53 (exploring how omission bias, normality bias, and fundamental attribution error negatively affects marginalized tort plaintiffs).

250. *See* Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L. J. 1, 24 (2011) (noting that moral imagination arises through “the effort to understand the perspectives of others”).

251. *See* Lynch, *supra* note 81, at 136.

## IV. CULTURALLY RESPONSIVE LAWYERING APPLIED

While a full exploration of Mr. Demesme's story is beyond the scope of this article, returning to the opening scene and sketching a possible pathway forward will help to ground the preceding pages. Did he ask for an attorney? Should anything he said after he made the statement be suppressed in his criminal trial? What do the answers to these questions say about what the law is? What, if anything, do they say about what the law should be? This Part illustrates how using the culturally responsive lawyering framework might impact Mr. Demesme's case and provides suggestions for its use in a law school course.

The court reporter transcribed Mr. Demesme's statement as follows:

*"If y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."*<sup>252</sup>

Like the eye movement—a twitch or wink—Mr. Demesme's statement to two police officers during a custodial interrogation might be understood in numerous ways. But where would you start? First, acknowledge that law and culture exist in a mutually constitutive relationship. For Mr. Demesme's story, this means that before he spoke those words, he existed in the world, his life and how he understood the world were influenced by his experiences, which is to say: he existed in culture(s). The rules being applied to Mr. Demesme, those that he allegedly broke and those governing his interactions with law enforcement, also existed within and were informed by culture. Finally, you the law student or lawyer, imbued with multiple identities and shaped by experience, will process all of the materials in this case through the cognitive architecture that has been building itself in your brain since you were born. Some of that architecture will process information consciously and you will be aware of its working. Much of that architecture will process information subconsciously. That's the starting point: law and stories come from somewhere and your perception of both is subjective.

Then what? Before situating the legal sources that might govern this case, heighten your self-awareness. Consider how your identity and experiences influence the choices you make in legal research, issue spotting, case analysis and client communication. What are your initial thoughts on the case? For some, you may think that Mr. Demesme asked for a lawyer, and that his request was clear. If you think this, why? What supports your conclusion? For others, you may think that Mr. Demesme didn't ask for a lawyer, or that he asked but then kept answering questions so he must not have really wanted one. If you think this, why? What supports your conclusion?

Next, as you investigate legal sources, consider the role that state and

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252. State v. Demesme, 228 So. 3d. 1206, 1206 (La. 2017).

federal law play in this scenario. The Supreme Court of Louisiana will apply its own substantive and procedural precedents along with the Supreme Court's Fifth Amendment protections. Here, Mr. Demesme petitioned the Louisiana Supreme Court for a supervisory writ to review the trial court's denial of his motion to suppress and the intermediate appellate court's subsequent writ denial. Can the Louisiana Supreme Court take the case? Should it? What rules will the court apply? What level of error must Mr. Demesme demonstrate? Which way do these scales tip? Which way should they?

When considering Mr. Demesme's Fifth Amendment argument, start with the text of the Fifth Amendment, and consider the Supreme Court decisions in *Miranda v. Arizona*, *Edwards v. Arizona*, and *Davis v. United States*. For context, understand the dilemma the Supreme Court faced in this series of cases. On the one hand, prior to *Miranda*, coercive custodial interrogation practices routinely resulted in questionable confessions.<sup>253</sup> Some of those custodial practices were so brutal and intimidating that they "effectively infringed on the Fifth Amendment's privilege against self-incrimination."<sup>254</sup> On the other hand, the government has an interest in interrogating criminal suspects. This history, steeped in both racism and subjugation, helps to ground the law's various purposes.

Think about how Supreme Court in *Davis* added to the Fifth Amendment story. There, it said that in order for an investigation to cease, the suspect must "at a minimum, [make] some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."<sup>255</sup> Statements that reference an attorney, but are "ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that they suspect *might* be invoking an attorney," do not require ceasing the interrogation.<sup>256</sup> The Supreme Court of Louisiana has interpreted *Davis* to mean that Louisiana courts should evaluate facts on a case-by-case basis to determine whether a suspect made the request with "sufficient clarity."<sup>257</sup> What "facts" matter in this case? How do you know they matter? Are there facts that might not matter but should? What does "sufficient clarity" sound like? What does it look like? When you read the Louisiana cases, question your hunches and the way that you justify the similarity or differences between their facts and those in Mr. Demesme's case.

While investigating the sources of authority that impact the outcome in Mr. Demesme's case, consider the justices and judges who wrote key opinions. Consider the sources they cite and the types of arguments that might have

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253. Mezey, *supra* note 29, at 55.

254. *Id.*

255. *Davis v. United States*, 512 U.S. 452, 459 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

256. *Id.*

257. *State v. Payne*, 833 So. 2d 927, 938 (La. 2002).

influenced them at the time. Pay attention to whether they rely on a canon of construction to support their decisions. Do they rely on the same canon in similar cases? Would using a different canon render a different result? Consider also the facts in each case, consider what is present and what might be missing. Ask yourself whether those facts change your analysis. Also consider whether the cases you are relying on could have come out differently using the same facts and precedent and think about how this answer might influence your analysis.

Next, look beyond the law's source and consider the socio-cultural context—for the law and for Mr. Demesme. The stories you surface will reveal that law and culture had been busy creating meaning and constructing one another long before Mr. Demesme said: so why don't you get me a lawyer. The *Miranda* warning and the attendant rule from *Edwards* requiring that interrogations cease once a custodial suspect invokes the right to an attorney by requesting one, also became part of popular culture.<sup>258</sup> They “found [their] way not only into police stations, but into television stations, movies, children's games, as well as the popular imagination of Americans and foreigners alike.”<sup>259</sup> Consider how the rules' operation in the popular imagination, and perhaps even in Mr. Demesme's own experiences, might have influenced how he expressed himself in that interrogation room. Would Mr. Demesme's literacy level, education, mental health or other factors affect your thinking?

Then, consider what happens to your analysis if you change up the syntax, or even word choice?

What if Mr. Demesme said this:

*“If y'all (pause). This is how I feel. If y'all think I did it, I know that I didn't do it. So why don't you just give me a lawyer, dawg, cause this is not what's up.”*<sup>260</sup>

Or this?

*“If you? This is how I feel. If you think I did it, I know that I didn't do it. So why don't you give me a lawyer because you are wrong.”*

Or this?

*“Just give me a lawyer.”*<sup>261</sup>

Take a step back and consider how your initial hunch has changed. Are you more or less certain? Why? And, how do you feel about this certainty? How

258. Mezey, *supra* note 29, at 55; see also Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J. L. & ARTS 91, 95 (2005) (noting that many Americans' dominant perspective of the law and legal institutions comes from their representation in popular culture and this influences “collective expectations, societal myths and the national psyche”).

259. Mezey, *supra* note 29, at 55.

260. Cf. *Demesme*, 228 So. 3d. at 1206.

261. Petition at 9, *Demesme*. Mr. Demesme's attorney argued in his motion and in subsequent petitions that these were the operative words.

might this feeling affect your case planning, decision-making, and client representation? How might it change what you think the law should be?

The avenues to consider in Mr. Demesme's case are nearly limitless, and the paragraphs above only scratch the surface. But they also represent something powerful—something captured by the media storm Justice Crichton's concurrence sparked after he decided “[i]n [his] view, the defendant's ambiguous reference to a ‘lawyer dog’ does not constitute an invocation of counsel,”<sup>262</sup> a view which has no support in Louisiana or Supreme Court precedent.<sup>263</sup> Teaching future lawyers and judges about culture, cognition, and context matters.

#### CONCLUSION

*“For it is important that awake people be awake, or a breaking line may discourage them back to sleep; the signals we give—yes or no, or maybe—should be clear: the darkness around us is deep.”<sup>264</sup>*

Although social cognition and culture work have emerged in some legal corners, these concepts can no longer be buried in scholarship or largely siloed in “Law +” or in experiential courses. If law schools continue with this approach, they will send the message that these concepts and skills are peripheral to legal education and practice.

Certainly, the changes proposed here may seem daunting. Faculty members might feel that this framework is inconsistent with their teaching or course plan. As Part IV illustrates, the culturally responsive lawyering framework requires professors to dedicate syllabus space and class time to dynamic spheres of inquiry. There will be no simple answers. Law professors may feel ill-equipped to teach and assess students on cultural responsiveness, especially since few law professors were trained to be culturally sensible lawyers.<sup>265</sup> The danger is the perpetuation of “empty, abstract, and ill-educated efforts to meet a rather lofty and elusive goal.”<sup>266</sup> Law faculty are right to be cautious when adopting new trainings and curricula, especially in these critical areas where a decontextualized approach to teaching about culture risks reification.

But cognition and culture influence every aspect of human interaction. They inform how people perceive, evaluate, and communicate information. It is time for legal institutions and law professors to embrace their import for legal education. Even though the newest changes to the ABA Standards do not

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262. *Demesme*, 228 So. 3d. at 1207.

263. See Hebert, *supra* note 15, at 7-8.

264. WILLIAM STAFFORD, A Ritual to Read to Each Other, in *THE WAY IT IS: NEW AND SELECTED POEMS* 42 (1998).

265. See Boles, *supra* note 78, at 224.

266. *Id.*

explicitly require law schools to ensure their graduates demonstrate any competency with these concepts, law faculty should take this opportunity to rethink legal curricula—and to adopt new approaches that prepare law students to practice law ethically, promote justice, and improve the legal profession. Adopting the tenets of culturally responsive lawyering will help them do just that.

