

DUQUESNE LAW REVIEW



DRAFTING STATUTES AND RULES: PEDAGOGY, PRACTICE, AND POLITICS

FOREWORD

FIFTH COLONIAL FRONTIER LEGAL WRITING CONFERENCE
DRAFTING STATUTES AND RULES: PEDAGOGY, PRACTICE, AND POLITICS

Jan M. Levine

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TEACHING THE ART AND CRAFT OF DRAFTING PUBLIC LAW:
STATUTES, RULES, AND MORE

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EXPERIENTIAL LEARNING AND ASSESSMENT
IN THE ERA OF DONALD TRUMP

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Rebecca L. Traylor

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Drafting Statutes and Rules: Pedagogy, Practice, and Politics

Foreword

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Foreword

Fifth Colonial Frontier Legal Writing Conference: Drafting Statutes and Rules: Pedagogy, Practice, and Politics

*Jan M. Levine**

On December 3, 2016, the Duquesne University School of Law hosted the first national conference on drafting statutes and rules, as our fifth biennial conference on legal writing pedagogy, resulting in this issue of the *Duquesne Law Review*.¹ The conference theme and agenda was developed by the faculty of the Legal Research and Writing Program² and was supported by our law school administration and our generous alumni,³ with additional assistance from LexisNexis and Wolters Kluwer Legal Education.

* Professor of Law and Director, Legal Research & Writing Program at Duquesne University School of Law. I would like to thank Robert Clark, my research assistant, for his help with this Foreword.

1. Special thanks to the editorial board and members of the *Duquesne Law Review*, especially the Editor-in-Chief, Abigail Reigle, and the Executive Editor, Elizabeth Mylin, for agreeing to publish the proceedings of this conference and for their assistance with the conference registration.

2. I and the other full-time Legal Research and Writing Program faculty members, Professor Julia Glencer, Professor Ann Schiavone, and Professor Tara Willke, thank our program's administrative assistant, Carrie Samarin, for her invaluable assistance with the conference.

3. We thank our Dean, Judge Maureen Lally-Green, for her support of the Legal Research and Writing Program, and for her welcome to the conference attendees. Our alumni have generously supported the Legal Research and Writing Program, resulting in two quasi-endowed accounts enabling our writing program to host the Colonial Frontier Conferences and run other programs. In particular, we owe much to the anonymous donor whose generous gift resulted in the creation of the Bridget and Alfred Peláez Legal Writing Center, named in honor of the late Professor Al Peláez and his late wife. Professor Peláez retired in 2015 and died shortly before the December 2016 conference, and we dedicated the Fifth Colonial Frontier Conference in his memory; the *Duquesne Law Review* has dedicated this issue in his memory.

The theme of this conference was “Statutes and Rules: Pedagogy, Practice, and Politics.”⁴ Thirteen presenters offered nine presentations,⁵ and this issue of the *Duquesne Law Review* contains five articles resulting from the conference.

The morning plenary session was offered by Professor Richard Neumann (Hofstra University School of Law) and Professor J. Lyn Entrikin (University of Arkansas Little–Rock School of Law), on “Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More.”⁶ That session was followed by sessions by Professor Lisa Rich (Texas A&M University School of Law), “One-Pagers, Testimony, and Rulemaking Comments, Oh My! Teaching Public Policy Drafting Techniques in a Law School Setting;”⁷ Professor Olivia Farrar (Howard University School of Law) “From Self-Determination to Self-Regulation: Teaching Legal Drafting Through Negotiating and Writing Class Rules;” and Professor Dakota S. Rudesill (The Ohio State University, Michael E. Moritz College of Law), “Legislative Drafting Exercises: Design Decisions and Experiential Experiments.”⁸

The afternoon plenary session was offered by former Pennsylvania Governor Tom Corbett (Distinguished Lecturer, Duquesne University School of Law) and Pennsylvania Senate Minority Leader Jay Costa, moderated by Professor John Rago (Duquesne University School of Law), on “From Chaos to Creation: A Look Behind the Curtain on the Flow of Policy-Making Powers Between Pennsylvania’s Executive and Legislative Leaders.”⁹ That session was followed by presentations by Professor Jamie Abrams (University of Louisville, Brandeis School of Law), “Teaching Legislation in the

4. *School of Law hosts 5th Legal Writing Conference*, DUQUESNE UNIV. SCH. OF LAW (Dec. 1, 2016), <http://law.duq.edu/news/school-law-hosts-5th-legal-writing-conference> (describing the theme and details of the conference).

5. PowerPoint presentations and conference handouts from all sessions are available on the conference website at <http://law.duq.edu/academics/legal-research-writing-program/2016-legal-writing-conference>.

6. *Drafting Statutes and Rules: Pedagogy, Practice, and Politics: The Fifth Colonial Frontier Writing Conference*, DUQUESNE UNIV. SCH. OF LAW (Oct. 10, 2016), [http://law.duq.edu/sites/default/files/documents/LRW/Fifth%20Colonial%20Frontier%20Conference%20-%20Agenda%20\(Draft,%20Oct.%202010\).pdf](http://law.duq.edu/sites/default/files/documents/LRW/Fifth%20Colonial%20Frontier%20Conference%20-%20Agenda%20(Draft,%20Oct.%202010).pdf) (providing the agenda for the Fifth Colonial Frontier Conference). See J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9 (2017).

7. See Lisa Rich, *Teaching Public Policy Drafting in Law School: One Professor’s Approach*, 55 DUQ. L. REV. 151 (2017).

8. DUQUESNE UNIV. SCH. OF LAW, *supra* note 6.

9. *Id.*

Era of Trump;”¹⁰ Adjunct Professor Jeffery Parrish (Belmont University College of Law), “The Government Relations Clinic;” Adjunct Professor Rex Frazier (University of the Pacific, McGeorge School of Law), “The Capital Lawyering Concentration & Courses;”¹¹ Professor Heidi Brown (Brooklyn Law School), “Misprision of a Felony? Using State and Federal ‘Failure to Report a Felony’ Statutes to Illustrate Language Choices in Legislation;” and Professor Ann Schiavone (Duquesne University School of Law), “Writing the Law: Promoting Community Engagement and Social Justice Through Statutory and Rule Drafting.”¹²

I did not offer a presentation at the conference, although I have been teaching an advanced course addressing legislative and rule drafting since 1992.¹³ This Foreword gives me the opportunity, however, to explain why I think such a course is important, and why this type of legal writing should no longer be so wrongfully neglected by law schools.

When I began my law practice career, I was a public interest attorney working in the areas of health law, disability law, juvenile law, and elder law. I then went into government service in Massachusetts, first at an agency dealing with child care facility licensure in the areas of foster care, day care, residential services, and adoption, as well as special education and inter-agency coordination of services to children. I was then counsel to the state child protective services agency.¹⁴ Apart from notable class action litigation at the

10. See Jamie R. Abrams, *Experiential Learning and Assessment in the Era of Donald Trump*, 55 DUQ. L. REV. 75 (2017).

11. See Rex D. Frazier, *Capital Lawyering & Legislative Clinic*, 55 DUQ. L. REV. 191 (2017).

12. DUQUESNE UNIV. SCH. OF LAW, *supra* note 6. See Ann L. Schiavone, *Writing the Law: Developing the “Lawyer Citizen” Identity Through Legislative, Statutory, and Rule Drafting Courses*, 55 DUQ. L. REV. 119 (2017).

13. See *Course Descriptions: Current Curriculum—Elective Courses*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/sites/default/files/documents/Registrar/Course%20Descriptions/Current%20Curriculum%20-%20ELECTIVES%202016-2017.pdf> (last updated Nov. 30, 2016) (describing my Advanced Legal Writing: Drafting course at Duquesne University School of Law). I have offered conference presentations about my course several times. See Jan M. Levine & Ann Schiavone, Presentation, We’re Not in Memo and Brief Land Any More: “Statutes and Rules and Regs! Oh My!,” Capital Area Legal Writing Conference, Univ. of Md. Sch. of Law (March 11, 2016); Ted Becker, Jan M. Levine & Sara Rankin, Panel Presentation and Discussion, Teaching Drafting Through Collaborations, Bringing Outside in: Social Justice Collaborations in the Legal Writing Curriculum, Univ. of N.H. Sch. of Law (June 29, 2014); Jan M. Levine, Invited Panelist, Our Place on the Continuum: Re-envisioning the Way We Prepare Law Students for Practice, “Practice Meets Pedagogy” Conference, St. John’s Univ. Sch. of L. (Dec. 2008); Ken Kirwin, Jan M. Levine & Deborah Schmedeman, Presentation, Writing Outside the Usual Box: Expository Writing Options in LRW Courses, Association of Legal Writing Directors Conference (2005).

14. See Jan M. Levine, *J.D.: Director of Legal Research and Writing and Professor of Law*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/faculty/jan-levine> (last visited Jan. 18, 2017) (providing further information on my legal experience and past employment).

start of the development of the law in those fields, virtually all of those areas of the law were controlled by, and based upon, federal, state, and local statutes and regulations.¹⁵ And it is axiomatic that in the modern legal environment virtually every practice area and context is controlled by statutes, rules, and regulations.¹⁶

So when I had the opportunity to teach an advanced legal writing course, I made legislation (and correspondence) the focus of the course.¹⁷ One of the many ironies of legal education is that students are exposed, almost exclusively, to case law.¹⁸ If statutes or rules remain in the edited cases they read and from which the professors teach, the only attention given to those primary materials is on poorly-written or ambiguous statutes and regulations, court rules, and Restatements of the Law, as they are criticized and parsed by the appellate courts, but almost never on the techniques of drafting that can teach how difficult it is to write good statutes and rules.¹⁹ You will be reading about courses that are offering students the opportunity to learn those critical skills.²⁰ Instead of doing a post-

15. See, e.g., 42 U.S.C. §§ 1–18501 (2017) (providing the “Public Health and Welfare” code which governs much of the health law practice area); 42 U.S.C. §§ 12101–12213 (2017) (providing the primary laws governing disability law, including the Americans with Disabilities Act of 1990); Paul Premack, *Elder Law Practice: An Overview*, 45 S.D. L. REV. 461, 466–68 (2000) (discussing the statutes, regulations, and rules that control the practice of elder law).

16. See RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, *LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH* 14 (Wolters Kluwer, forthcoming 2018) (noting that legislation is the most common form of public law, which governs all of the public generally); Entrikin & Neumann, *supra* note 6, at 12–17; Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) (“Statutory law has replaced common law as the most important source of law and legal tool in America.”).

17. See DUQUESNE UNIV. SCH. OF LAW, *supra* note 13 (describing the Advanced Legal Writing: Drafting course assignments, which include drafting legislation and “various types of correspondence”).

18. Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 241 (2011) (noting that the case method is the primary teaching strategy in most law courses).

19. See NEUMANN & ENTRIKIN, *supra* note 16, at 2–3 (discussing the lack of legal education focused on drafting and the difficulty of practicing good drafting skills); ASS’N OF LEGAL WRITING DIRS.: LEGAL WRITING INST., *REPORT OF THE ANNUAL LEGAL WRITING SURVEY*, 11, 13 (2015) (reporting that only 9 of the 194 law schools surveyed have required writing courses that provide education on drafting legislation and 54 offer an advanced writing course on drafting legislation).

20. See NEUMANN & ENTRIKIN, *supra* note 16, at 3 (noting the increase in law school courses focused on legal drafting); ASS’N OF LEGAL WRITING DIRS.: LEGAL WRITING INST., *supra* note 19, at 30 (2014) (reporting that thirty-one percent of law schools report a student demand for courses on drafting legislation that exceeds the availability of such courses).

mortem on a dead body, we ask students to create new life, by writing a new law, or curing the existing law, and to change the world by writing the rules under which our society operates.²¹

There are other benefits that come from offering such courses.²² Although in some courses students are given a very narrow or totally circumscribed area of the law in which to write, other courses leave the topic up to the individual student.²³ In my course, I ask students to find something in the real world that bothers them, that they know about, and which they want to fix. In my course and many others, students can write legislation that actually becomes law, by working with legislators, government agencies, and interest groups, from communities beyond the law school's walls, who share the same interests and goals.²⁴ This gives students the opportunity to write about something that holds meaning for them, and having that chance results in work product that far exceeds in depth and quality what the students have done in the past, and what they thought they could do.²⁵

Sometimes these projects are about what we usually think of as legislative drafting, such as statutes about public financing of athletic stadiums, criminal code reform, or permitting use of medical marijuana.²⁶ But at other times these same drafting lessons can be applied to such varied contexts as reforming soccer league rules, addressing concussion policies and procedures used by the NFL, or a law school's course registration system.²⁷ All of the projects I've mentioned have been recently completed by my students or are currently in the drafting phase by some of the students who attended

21. See NEUMANN & ENTRIKIN, *supra* note 16, at 3–5 (discussing the various types of legal rules that govern many aspects of our lives).

22. See, e.g., AM. BAR ASS'N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 181–82 (Eric B. Easton ed., 2d ed. 2006) (noting that upper-level writing courses can provide valuable legal drafting training to students that gives them a substantial advantage in the job market).

23. See generally Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119 (2004) (describing the variety of advanced legal writing and drafting courses, which can include an integrated or survey-style of coverage).

24. See DUQUESNE UNIV. SCH. OF LAW, *supra* note 13 (describing my drafting course, which allows students to pick their own topic of legislation and has led to actual legislation based on some students' drafting assignments); *Legislative Drafting Course Student Projects*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/academics/legal-research-writing-program/legislative-drafting/student-projects> (last visited Jan. 24, 2017) (describing several student-chosen drafting topics that relate to potential future legislation).

25. Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342, 348 (1996) (explaining the importance of writing courses allowing students to choose their own topic based on their own interests).

26. See NEUMANN & ENTRIKIN, *supra* note 16, at 12–13 (discussing the variety of public laws that may be drafted and enacted by public authorities that issue legal rules).

27. See *id.* at 11–12 (discussing the private rules that control contracts and other agreements that are voluntarily adopted by private parties to govern their interactions).

the conference; some past projects can be found on the Duquesne Law website, recognized as examples of outstanding faculty-supervised student writing.²⁸

The other benefits are long-term in nature. The requirement to fully research problems calling out for legislative solutions results in students broadening their commitment to law reform, to progressive legislation, to social justice, and to honesty in their professional work.²⁹ For example, I had one die-hard conservative Federalist Society student begin a project on welfare reform. He came to me one day, sheepishly, and announced that once he actually had to read deeply in the area, he realized that his assumptions were flawed, that he was naïve in his understanding of the economic and psychological issues in the project, and that past proposals for reform that he had once held in contempt were actually well-conceived, effective, and worth exploring as solutions to his problem. Another student, my own research assistant, wanted to draft a “right to work” statute for Pennsylvania, only to conclude, after doing her typically impeccable research, that it was unfair for dues-paying union members to have non-dues-paying workers be “free riders” and benefit from union contracts. She also learned that wages went down in right-to-work states, and discovered the corporate funding for the legislative activities of the American Legislative Exchange Council. She decided to change her project to one requiring disclosure of union expenditures.³⁰ One wishes that some of our legislators and their staff could have such epiphanies. And one wonders that if law schools took more responsibility for training law students in statutory and rule drafting it could lead to a higher level of performance in professional drafting and lead to wiser and more honest shaping of law on the local, state, and national levels.³¹

28. *Outstanding Student Papers*, DUQUESNE UNIV. SCH. OF LAW, <http://law.du.edu/student-life/outstanding-student-papers> (last visited Jan. 19, 2017) (listing outstanding student papers recognized by Duquesne University School of Law, including several that were completed in advanced writing courses).

29. See Schiavone, *supra* note 12, at 140–144 (arguing that statutory courses help to develop students’ focus on social justice and law reform).

30. See Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. TIMES, June 12, 2015, https://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html?_r=0.

31. See Schiavone, *supra* note 12, at 140–144 (urging law schools to take advantage of the opportunity to educate students in critiquing the law and working to change the law to reflect important social values); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 42 (1995) (explaining the importance of teaching students how to integrate their values, including justice and morality, with the law, rather than focusing merely on the rule of law itself).

All of the conference attendees took home ideas about how we can do a better job crafting legislation and rules and how to better teach the next generation of drafters. We hope that this issue of the *Duquesne Law Review* shares many of those ideas with a broader audience.

Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More

*J. Lyn Entrikin**
*Richard K. Neumann Jr.***

“[T]here are rich rewards in legislative drafting and the biggest one is the deep satisfaction that comes from wrestling with man-sized problems whose satisfactory solutions are a necessary phase of the art of government and a buttress of the public good.”

—Reed Dickerson¹

ABSTRACT

For centuries, lawyers have been notorious for long-winded writing filled with legalese, hyper-technical expression, and convoluted sentence structure. Legal writing in memos and briefs has been characterized as wordy, unclear, pompous, and just plain dull. Legal drafting, defined as the specialized skill of creating legal rules, is even more fraught with problems. In particular, no standardized, consistently used methodology exists in the United States for drafting federal and state statutes, agency regulations, and court rules.

In 1954, the late Professor Reed Dickerson observed, “It would be hard to exaggerate the importance of knowing how to prepare an adequate legal instrument. This is particularly true of statutes.”² Professor Dickerson called on law schools to do more to help future lawyers develop essential skills for legislative drafting as well as other kinds of “legal craftsmanship.”³ Over the last fifty years, American law schools have devoted much greater attention to objective and

* Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. Professor Entrikin acknowledges the scholarship grant provided by William H. Bowen School of Law.

** Maurice A. Deane School of Law, Hofstra University.

1. Reed Dickerson, *How to Write a Law*, 31 NOTRE DAME L. REV. 14, 27 (1955). Given the post-war times, we can perhaps forgive the author’s reference to “man-sized” problems rather than simply “challenging” problems.

2. Reed Dickerson, *Legislative Drafting: A Challenge to the Legal Profession*, 40 A.B.A. J. 635, 635 (1954).

3. *Id.* at 636.

persuasive writing, and many have added drafting courses. But few offer legislative and rule-drafting courses, and even fewer require students to learn how to draft legal rules. And the legal profession has yet to adopt a systematic method for drafting legal rules that can be easily understood by others.

This article reflects our efforts to help fill that void by demonstrating a straightforward, uniform approach to drafting legal rules of all kinds, including statutes, agency rules, and private contracts. By proposing a more unified approach to legal drafting, we hope to emulate Professor Reed Dickerson's tireless efforts to promote legal drafting as an essential component of every lawyer's professional education.

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I. INTRODUCTION AND OVERVIEW

Some of us who teach legal drafting courses consider Professor Reed Dickerson something of a national hero for his leadership in improving the art and craft of drafting—particularly legislative drafting.⁴ Before publishing the first of his many groundbreaking works in 1954,⁵ Dickerson served “in the trenches” for several years as a real-life legal drafter.⁶ That was certainly a most unusual career path for someone who had just earned a post-graduate law degree from Columbia Law School.⁷

4. E.g., Thomas F. Blackwell, *Finally Adding Method to Madness: Applying Principles of Object-Oriented Analysis and Design to Legislative Drafting*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 227, 235 (2000) (crediting Reed Dickerson as the progenitor of much United States scholarship on legislative drafting and the “science and art of legal drafting”); Joseph Kimble, *Wrong—Again—About Plain Language*, 92 MICH. B.J. 44, 46 (July 2013) (referring to Professor Dickerson as “the father of modern-day legal drafting”).

5. REED DICKERSON, *LEGISLATIVE DRAFTING* (1954).

6. Thomas B. McAfee, *Reed Dickerson’s Originalism—What it Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U. L.J. 617, 618 (1992) (“[Reed Dickerson] had at once the intensely practical mind of a craftsman who had toiled with real problems of drafting and interpretation as well as the mind of the theorist who was interested in the nature of his craft.”). After graduating from Harvard Law School in 1934, Dickerson practiced law in Chicago and Boston. In 1939, he earned an LL.M. from Columbia Law School on a fellowship. During World War II he worked as an attorney for the Office of Price Administration and the House Office of Legislative Counsel. He later led the Codification Section of the Defense Department’s Office of General Counsel. Frank E. Horack Jr., Book Review, *Legislative Drafting*, 103 U. PA. L. REV. 291, 292 (1954); see also John Gastineau, *In Memoriam: F. Reed Dickerson 1909–1991*, 67 IND. L.J. xii (1991). As a practicing attorney, Dickerson earned great respect for his work assisting the Pentagon in its massive effort to codify military law. *Id.*

7. After the war, Dickerson returned to Columbia, earning his J.S.D. in 1950. Brian Mattis, *Reed Dickerson’s Contribution to SIU’s School of Law*, 16 S. ILL. U. L.J. 585, 585–86

Addressing the Legislation Institute at Notre Dame University in 1955, Reed Dickerson acknowledged what unfortunately remains true to this day: “[T]he art of legal drafting in general, and of legislative drafting in particular, is only crudely developed.”⁸ But the dismal state of legislative drafting in the middle of the twentieth century was not for lack of concern and attention by the practicing bar.

Long before 1954, the American Bar Association (ABA) had recognized the special challenges of legislative drafting. In 1884, a practicing lawyer delivered a white paper at the Association’s annual meeting decrying the regrettable state of the legislative process, even after an era of state constitutional reform to constrain private legislation, logrolling, and undue influence by special interests.⁹ Simon Sterne, a New York lawyer, specifically criticized the lack of scholarly attention to legislative drafting in the United States:

The little attention that is paid to the language of legislation is somewhat indicated by the fact that there is not a single American work upon Legislative Expression . . . I venture to say that few of you remember the little treatise on [*Legislative Expression*], reprinted from the English work of [Sir George] Coode, which never yet found a venturesome American editor to apply it to our needs.¹⁰

The day after Sterne presented his paper, Judge C.C. Bonney, then the ABA Vice-President, delivered an eloquent response, echoing Sterne’s calls for reform.¹¹ But while emphasizing the unique problems and challenges associated with drafting statutes, Judge Bonney also acknowledged the high calling of the legislative drafter.

(1992). He began publishing articles about legal drafting as early as 1952. See Reed Dickerson, *The Codification of Military Law*, 38 A.B.A. J. 1037 (1952).

8. Reed Dickerson, *supra* note 1, at 14; see Horack Jr., *supra* note 6, at 291 (“[F]ew law graduates in modern times have been prepared to draft legislation or any other legal document.”). The problem of bad legal drafting has a long and colorful history. But especially in the United States, the remedy has been nearly as long in coming.

9. Simon Sterne, *The Prevention of Defective and Slipshod Legislation*, 7 ANN. REP. A.B.A. 275, 275 (1884).

10. *Id.* at 292 (referring to GEORGE COODE, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW (1845), possibly the earliest exposition of a conceptual approach to drafting legal rules of all kinds). The Coode text originally appeared in 1843 in the Appendix to the Report to Parliament of the Poor Law Commissioners on Local Taxation. The reprinted version in pamphlet form is available at <https://ia802700.us.archive.org/32/items/onlegislativeex00coodgoog/onlegislativeex00coodgoog.pdf>.

11. C.C. Bonney, *Mr. Bonney’s Remarks on Slipshod Legislation*, 7 ANN. REP. A.B.A. 54 (1884).

Statute-making is not only strictly professional work, it is the very highest order of such work. The text book of [*Story on Equity Pleadings*] tells us that the drawing of a well constructed bill in equity requires great accomplishments, and the endowments which belong only to highly gifted minds, and yet that is a summer-day pastime compared with the difficult task of framing a wise and well constructed bill for enactment into a law by the legislature.¹²

But it was not until the second decade of the twentieth century that the ABA appointed a Standing Committee on Legislative Drafting in an effort to follow England's lead in "raising legislative drafting to a recognized branch of legal science."¹³ In 1921 the Committee's "final" report offered a number of recommendations,¹⁴ but the Committee continued its efforts for more than five decades to improve legislative drafting.¹⁵ Professor Dickerson chaired the committee and served as a member for many years, and he continued as a "special advisor" to the committee for several years more.¹⁶

By 1986, things were not much better. Then in his mid-seventies and a long-time faculty member of the Indiana University School of Law, Professor Dickerson observed that despite advances in social sciences and computer technology, "lawyers have adjusted inadequately to the world of nonjudicial law making: the world of statutes, administrative rule making, and private ordering through consensual arrangements."¹⁷ Nor, unfortunately, has the art and

12. *Id.* at 57.

13. *Final Report of the Special Committee on Legislative Drafting*, 44 ANN. REP. A.B.A. 410, 410 (1921); see also *id.* at 413 (underscoring the value of recognizing "the status of legislative drafting as a branch of legal science").

14. *Id.* at app. C (outlining content for development of a legislative drafting manual).

15. The Committee was renamed the Standing Committee on Legal Drafting in 1975. See *Proposed Amendments to the Constitution and Bylaws of the American Bar Association*, 61 A.B.A. J. 749, 751 (1975). The Committee was discontinued in 1981, just one year after Professor Dickerson retired. See *Proposed Amendments to the Constitution and Bylaws of the American Bar Association*, 67 A.B.A. J. 788, 788 (1981); see also Frank P. Grad, *To Reed Dickerson: A Tribute to the Master*, 55 IND. L.J. 426, 427 (1980) (expressing disbelief about Dickerson's retirement). Professor Grad quipped about Dickerson's participation in the Committee over the years: "All of us who served on the Committee always knew that Reed Dickerson really ran the show, and that the designated chairmen who came and went were just there to meet the technical requirements of the American Bar Association." *Id.*

16. Reed Dickerson, *Professionalizing Legislative Drafting: A Realistic Goal?*, 60 A.B.A. J. 562, 562 (1974). Any scholar of legislative drafting in the United States today stands on the shoulders of Professor Reed Dickerson. See Patrick J. Kelley, *Advice from the Consummate Draftsman: Reed Dickerson on Statutory Interpretation*, 16 S. ILL. U. L.J. 591, 591 (1992) ("No one has had more influence on the practice and teaching of legal drafting than Reed Dickerson.").

17. Blackwell, *supra* note 4, at 235 (quoting REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 1.3, at 6 (2d ed. 1986)); see also Reed Dickerson, *Toward a Legal Dialectic*, 61 IND. L.J. 315, 316 (1986).

craft of legislative drafting evolved much since the mid-1980s. As recently as 2013, Professors Abbe R. Gluck and Lisa Schultz Bressman accurately observed that the field of legislative drafting is “still in its relative infancy.”¹⁸

Why should that be so? For the rest of his life,¹⁹ Professor Dickerson led a number of widely acclaimed reform efforts to improve the art and craft of legal drafting. As early as 1954, long before joining the faculty at Indiana University School of Law, he recognized that the legal academy was a big part of the problem. He urged law schools to teach students

to develop those general skills which form such an important part not only of legislative drafting but of many other kinds of legal craftsmanship. Unfortunately, [law schools’] justifiable preoccupation with the disciplines of analysis have led them to neglect the disciplines of synthesis, the skills involved in weaving complicated materials into an intelligible whole.²⁰

Regrettably, law schools were slow to respond to his call.²¹ But Dickerson would not give up.

In the early 1970s, Dickerson led an effort to professionalize the art of legislative drafting,²² in part by encouraging law schools to do more.²³ In 1975, he hosted a conference of international experts on the teaching of legal drafting at Indiana University School of Law.²⁴ For many years Dickerson was actively involved in the ABA’s Standing Committee on Legislative Drafting, later renamed the

18. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 911 (2013).

19. Professor Dickerson died in 1991 at the age of 81. *F. Reed Dickerson Dies, Law Professor Emeritus*, INDIANAPOLIS STAR 37, June 9, 1991, at 37.

20. Dickerson, *supra* note 2, at 636–37 (footnotes omitted).

21. Dickerson, *supra* note 16, at 562. Dickerson begrudged the fact that “the law schools have largely abandoned any significant effort to develop the drafting skill or, indeed, to develop anything more than the shallowest understanding of what drafting is all about.” *Id.* In 1986, he must have become impatient with the legal academy’s snail-like pace because he made the point more vociferously: “The main culprit in this inadequate readjustment to the increasing importance of nonjudicial lawmaking has been legal education’s self-perpetuating preoccupation with litigation and case law.” Dickerson, *supra* note 17, at 316.

22. PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE (Am. Bar Ass’n, Reed Dickerson ed., 1973).

23. Reed Dickerson, *Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report*, 31 J. LEGAL ED. 30 (1981) (critiquing BERNARD LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS (Am. Bar Found. 1977)).

24. INTERNATIONAL SEMINAR AND WORKSHOP ON THE TEACHING OF LEGAL DRAFTING (F. Reed Dickerson ed., 1977) [hereinafter INTERNATIONAL SEMINAR] (edited transcript of conference proceedings). The Conference was co-sponsored by the ABA Standing Committee on Legal Drafting and Indiana University School of Law.

Standing Committee on Legal Drafting.²⁵ The Committee's more generic new name reflected the recognition by professional drafters that "the conceptual, structural, and compositional problems of drafting [are] essentially the same for all legal instruments," despite their many differences.²⁶

We agree with that premise. This article offers the first few chapters of a forthcoming textbook²⁷ that will take a contemporary approach to drafting based on the common building blocks of all legal rules. We focus not only on statutes, constitutions, agency regulations, and court rules, but also on consumer contracts, sales agreements, leases, corporate bylaws, and jury instructions. All of these legal instruments are collections of legal rules that share the same basic components and structure. The book's premise is that law students who learn to effectively draft contracts and other legal instruments for private business transactions gain the same skills and analytical ability they need to competently draft legislation, administrative regulations, and other public laws. In other words, the essential lawyering skill of drafting is readily transferable among all kinds of legal instruments. Our book demonstrates how.

Professor Dickerson's many textbooks for teaching legal drafting are no longer in print.²⁸ Over the last decade, excellent teaching materials have become available for teaching contract drafting and other transactional skills courses, as well as survey courses that teach upper-level students to prepare a broad range of legal documents. But in the last thirty years, few law textbooks have been published in the United States that comprehensively address legislative drafting, which may explain in part why so few law schools offer such a course.

Relatively few law schools offered contract drafting courses before 2007, when Tina Stark published the first edition of her path-finding textbook and teaching materials.²⁹ Over the last decade,

25. Dickerson, *supra* note 23, at 30.

26. *Id.*

27. RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, *LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH* (Wolters Kluwer, forthcoming 2018).

28. While several good textbooks have been published on legal drafting, few that are currently in print and suitable for teaching U.S. law students recognize the conceptual features that all legal rules have in common. For one notable exception, see THOMAS R. HAGGARD & GEORGE W. KUNEY, *LEGAL DRAFTING: PROCESS, TECHNIQUES, AND EXERCISES* (2d ed. 2007). *But cf.* J.K. AITKEN & PETER BUTT, *PIESSE: THE ELEMENTS OF DRAFTING* (10th ed. 2004) (Australia); PETER BUTT & RICHARD CASTLE, *MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE* (2001) (Australia, England, and Wales); WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* (5th ed. 2010) (United Kingdom).

29. TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007). Stark's excellent textbook has been widely adopted because it offers a rich set of

many law schools have added elective courses in transactional drafting as a greater variety of excellent teaching materials have become available to professors. An ABA survey of curriculum developments and trends among accredited law schools revealed that legal drafting and upper-level writing course offerings increased substantially between 2002 and 2010, more than any other category surveyed.³⁰ The results reflect that the publication of innovative teaching materials promotes improvement in law school curricula and legal education generally.

The increased offerings in transactional drafting courses are an encouraging sign. But legislative and regulatory drafting courses remain scarce. And legislative drafting is a uniquely challenging variation on legal drafting. As Professor Dickerson long ago observed, “legal drafting is the most difficult thing a lawyer is called upon to do,” and “legislative drafting is the most difficult form of legal drafting.”³¹

Part II of this article sets out our perspective on legal drafting. It describes what we mean by legal drafting, distinguishes private law from public law, and defines the basic building blocks of all legal rules. Part III describes the differences in how private and public laws originate. Part IV explains why legal drafting is an essential lawyering skill. Part V provides step-by-step instructions on how to build a legal rule.

By proposing a more unified approach to drafting legal rules, we hope to emulate Professor Dickerson’s tireless efforts to promote legal drafting as an essential component of every lawyer’s professional education. We welcome your suggestions and feedback.

II. DRAFTING IS RULE CREATION

A. *Drafting Is Different from Legal Writing*

Law is made up of rules together with the ideas that surround them, such as the policy or goals that rules are intended to accomplish. Rules govern behavior. Drafting is creating and expressing legal rules. All drafted documents that govern people—including

teaching resources for teaching contract drafting, even for academics who lack in-depth experience in business or contract law. See also TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2d ed. 2013). In fact, Stark’s book inspired us to broaden her approach beyond the relatively narrow scope of deal transactions.

30. AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, Executive Summary 16 (Catherine L. Carpenter ed., 2012) (“Transactional Drafting courses and upper division Legal Writing courses experienced the greatest growth in offerings.”).

31. Dickerson, *supra* note 1, at 15.

statutes, contracts, administrative regulations, court rules, bylaws, local ordinances, injunctions—are collections of rules.

A public rule governs everyone within its scope. A legislature, for example, enacts a statute requiring every person who drives on a public road or street to get a driver's license. When enacting a statute, the legislature chooses goals. Legislative drafters, typically staff attorneys, find the words to express rules that will accomplish those goals.

A private rule governs a limited number of persons or entities. A contract, for example, governs only the parties to that contract. A contract is a set of rules that the parties have agreed will govern them for purposes of their transaction. By agreeing to the contract, the parties have created the equivalent of their own private statute. The parties' lawyers translate that mutual agreement into rules expressed in words.

Statutory rules and contract rules are similar but not identical in structure. If you know how to draft a statute, you know most of the skills needed to draft a contract. The reverse is also true. If you know how to draft a contract, you are close to knowing how to draft a statute.

Legal *drafting* differs from legal *writing*. Legal drafting is rule creation. Legal writing is rule explanation. Here are some examples of the documents in each category:

Legal Writing

office memoranda
 motion memoranda
 appellate briefs
 judicial opinions
 client letters
 demand letters
 other analytical or
 persuasive documents

Legal Drafting

contracts
 statutes
 local ordinances
 administrative regulations
 court rules
 organizational bylaws
 other governing documents

Legal writing explains legal rules that the writer did not create. An office memo, for example, explains how a court would interpret a governing document such as a statute or contract. An appellate brief persuades a court to interpret the statute or contract favorably to the writer's client. Legal writing does not craft the rules that appear in the statute or contract. Instead, legal writing explains how these rules govern.

Legal drafting creates legal rules. A statute or contract is drafted. The legal drafter constructs the rules, while other lawyers might later write memos or briefs to explain those rules.

Drafting is difficult to learn because most law students have never created a rule. Legal education has traditionally focused on legal writing rather than legal drafting, even though drafting is an essential skill for all lawyers. Indeed, “[l]egal drafting is a form of preventive medicine.”³²

B. What Is a Rule?

Speaking generally, a “rule” is an idea or concept. While rules may be expressed in various ways in different disciplines, legal rules are almost always expressed in words. More specifically, a legal rule is a linguistic expression defining terms, directing conduct, granting authority, or explaining how to do something. A rule may take the form of a contract term, a corporate bylaw, a statute, a regulation, a jury instruction, a judicial order, or an appellate court’s mandate to a trial court or administrative tribunal.

When lawyers write, they generally think about communicating information to someone else in written form. But a legal rule, as this article uses that term, is neither predictive nor persuasive. Rather, a rule is a directive that tells the audience what to do and how to do it. Or a rule may tell those it governs what *not* to do, or what might happen if a rule is violated.

We use the term legal drafting to mean the specialized skill of creating legal rules. While many lawyers use the term in its broadest sense to describe legal writing generally, including rhetoric and narrative, we use the term in the narrower sense defined by *Black’s Law Dictionary*: “The practice, technique, or skill involved in preparing legal documents—such as statutes, rules, regulations, contracts, and wills—that set forth the rights, duties, liabilities, and entitlements of persons and legal entities.”³³

Rules take many forms and have many functions. For example, legal rules establish agencies or other organizations, authorize action, define terms, create obligations or duties, prohibit conduct, guide decisions, or impose sanctions. In contracts, rules establish and govern voluntary relationships between or among parties. In statutes, rules often represent compromises between competing public policies that result in regulating conduct or imposing affirm-

32. Mattis, *supra* note 7, at 587.

33. BLACK’S LAW DICTIONARY 508 (Bryan A. Garner ed., 7th ed. 1999).

ative duties. Statutes obligate taxpayers, appropriate public revenues, regulate commerce, impose consequences, or prohibit certain behavior. A government agency's administrative regulations, if issued according to specified procedures, govern conduct by entities within the scope of the agency's regulatory jurisdiction. In turn, the agency's jurisdiction is defined by the organic statute that establishes the agency and delimits its authority. Courts issue rules that govern civil litigation, criminal procedure, admission of evidence, and court records. Wills and trusts are specialized rules that govern the distribution, investment, and management of testators' or settlors' property. For a will or trust to give proper effect to a testator or settlor's intent, the document must be drafted, verified, and witnessed according to statutory formalities.

The client or drafter's goals determine a rule's function. To solve a client's problem, an effective lawyer must understand how to identify the client's goals, and how to properly structure a rule that most effectively accomplishes what the client wants. Sometimes rules appear to grant discretion but in fact impose an obligation. Rules that appear to be merely declarations may actually function to prohibit certain kinds of conduct. A lawyer must be able to identify not only the structure of a rule, but also what it does and how it operates. Rules can be structured in different ways to accomplish a variety of functions, depending upon the client's needs and the specific circumstances.

Knowing how to draft a rule well requires a deep understanding of the power and meaning of words. Drafting rules effectively requires precise thinking, careful word choice, impeccable judgment, and analytical accuracy.

C. Legal Drafting: A Specialized Skill

Rule drafting is a specialized skill, distinct from general legal writing skills. While the differences in the function and operation of various kinds of legal rules are significant, the drafting techniques for all legal rules are surprisingly similar. And those drafting techniques differ in important ways from the techniques lawyers use in objective and persuasive legal writing.

The traditional law school curriculum included few if any courses in drafting. But in the last two decades, drafting courses have taken an increasingly important place in most law school curricula. A recent survey of law schools undertaken by the American Bar Association demonstrates that between 2002 and 2010, legal drafting courses grew in number more than any other category of law school

course.³⁴ Students and alumni alike value courses that teach fundamental skills, including drafting, that most practicing lawyers use on a daily basis.

D. Rule Sources and Categories

Rules are everywhere. Parents issue rules to govern a household. They set curfews and bedtimes, and they impose rules on where and when teenagers in the family can drive the family car. Road signs give rules of the road to protect the safety of travelers and pedestrians. Recipes list the ingredients and give the sequential instructions for preparing food. Board games come with rules that players read and follow when playing the game and keeping score. Model car and airplane kits come with instructions that explain how to build scale models. Knitting and sewing patterns are composed of rules the reader follows to reach the desired outcome.

Everyone learns to live with rules. But where do all those rules come from? We all live with many rules that nobody thinks of as legal rules. But the rules that govern daily living have the same function and underlying structure as legal rules. The drafting principles we explain in this article can be applied to analyze any kind of rule.

Legal rules may be divided into two major categories based on their origin, effect, and audience: public rules and private rules. Public rules are the products of governmental entities, and they generally reflect important public policies. Private rules, on the other hand, are the product of negotiations and agreements among private parties. Some private rules operate more like public rules than others. For example, a non-profit corporation's bylaws govern a private organization's internal operations, much like state statutes govern every corporation that conducts business in that state.

While the differences between public and private legal rules are significant, the drafting techniques for each category are surprisingly similar. Because both categories have much in common structurally, this article explains the general drafting skills that apply to both categories and their many variations.

34. AM. BAR ASS'N, *supra* note 30, at 16. In 1992, only 31 law schools taught courses in contract or transactional drafting. By 2010, that number had nearly quadrupled to 122. AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 78 & fig.64 (Catherine L. Carpenter ed., 2012).

1. *Public Rules*

Public rules are enacted or issued by public entities. They include state and federal constitutions, statutes, local ordinances, administrative regulations, court rules, and similar rules. Public rules, by their very nature, must be enacted or adopted by authorized public bodies or entities. Most public rules operate both generally and prospectively.

Public rules are necessarily general in scope and application. While public rules sometimes represent ideas or concerns that originate in particular circumstances, often they reflect broad public policy preferences or goals. For example, if a state values its agricultural heritage and seeks to preserve the traditional way of life of small family farmers, the state legislature may enact a tax preference to reduce the property tax burden on small family-owned farms. Another state whose economy depends heavily on manufacturing and commerce might do something similar to encourage businesses to build manufacturing plants in the state and to create new jobs.

Lawmakers can never anticipate every possible future circumstance to which a statute or ordinance may apply. Once enacted, public rules are almost always forward-looking—they apply prospectively to future circumstances rather than retroactively. And those governed by a public rule may or may not be consciously aware of the rule that governs their conduct; yet the law generally presumes that everyone is on constructive notice of the law.³⁵

In one sense, public rules also include common law judicial rulings. A court is a public entity that has jurisdiction or power to adopt common law rules, as long as they are consistent with relevant constitutional and statutory provisions. But judge-made common law rules are formulated to resolve disputes involving the litigating parties' particular facts and circumstances. At least in the sense we define the terms, United States courts do not draft rules that govern conduct prospectively. Instead, judicial decisions resolve disputes in particular facts and circumstances, and common law rules evolve over time as a result of the process used by lawyers and judges to synthesize rules from a pattern of judicial holdings in factually analogous cases.

While lawyers regularly debate the meaning and applicability of common law rules, judicial precedents are the result of inductive

35. *Parker v. Levy*, 417 U.S. 733, 751 (1974) (referring to “the ancient doctrine that everyone is presumed to know the law”).

reasoning about the law as it evolves from litigating disputes involving particular parties and specific facts. But legal drafting is a deliberative process lawyers use to create generally applicable rules by identifying current problems, anticipating future problems, and resolving those problems without resorting to litigation. The specific individuals to whom a public rule will apply in the future are unknowable at the time the rule is drafted. Once circumstances occur that trigger its application, deductive reasoning best describes how the rule will operate.

2. *Private Rules*

Contracts, corporate and association bylaws, wills, and trusts are all governing documents based on private rules.

A contract is the equivalent of a private statute that governs the parties to the contract. It requires a party to do certain things and empowers that party to do other things. Two contract parties can agree to private rules to govern their transaction, and they gain that authority through a meeting of the minds, combined with a trade that the law calls mutual consideration. A contract generally governs only the parties, although some contracts confer rights on third-party beneficiaries. A contract cannot impose requirements on anyone who is not a party to the contract.

Corporate and association bylaws govern an organization's internal operations. A corporation or association is controlled by three collections of rules. One is public law: federal and state statutes and regulations that govern all corporations, together with common law rules that govern everyone, including legal entities. The second is the corporation's own bylaws that govern its internal operations. The third is the transaction-specific contracts that result from negotiations between the corporation and other parties.

A will is a set of rules that govern the conduct of an estate's executor or administrator as well as the distribution of the estate's assets. A trust is a set of rules that govern the conduct of the trustee for the benefit of the named beneficiaries. The rules of a will or trust are created unilaterally by the person whose property will enter the estate or trust. That person has authority to adopt those rules because anyone can dispose of her property in any way she pleases. But for the rules to be enforceable, the will or trust must follow statutory formalities and other legal requirements.

E. Defining Rule Types

A comprehensive, rule-based approach to drafting legal rules requires that we first define the basic building blocks for all rules, whether public or private.

1. Duties and Rights

Duty. A duty requires someone to do something or to refrain from doing it. Lawyers and judges sometimes use the terms obligation or mandate to describe a duty. The following phrases each impose a duty on the actor to do X:

Actor is required to do X.
Actor is obligated to do X.
Actor is mandated to do X.

Duties are often expressed by using modal verbs³⁶ of command, such as *shall* or *must*, combined with another verb specifying an action. In this article, we refer to modal verbs as operative terms.

A duty can be stated in the affirmative (someone *shall* or *must* do something) or in the negative (someone *shall not* or *must not* do something). A negative duty has the same effect as a prohibition.

A duty is completely expressed only if a reader knows exactly who has the duty and exactly what that person must do or must not do. To impose a duty properly, the legal rule must identify the actor who has the duty, as well as the action required. We can write a duty using a basic formula:

Duty = Actor + Operative Term + Action
(of command)

Right. If a duty is for someone else's benefit, that person often (but not always) has a right to have the duty performed.

In a contract, every duty has a corresponding right because contract parties mutually agree on rules for each other's benefit. For example, in a lease for an apartment, a tenant has a duty to pay rent to the landlord no later than the first of the month. And the

36. Modal auxiliary verbs, also known as "helping" verbs, join with basic verbs "to add specific shades of meaning" that indicate mood or tense. *Altizer v. Commonwealth*, 757 S.E.2d 565, 568 (Va. Ct. App. 2014) (citing MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 452 (2010)).

landlord has a right to receive the money by that date each month. In return, the landlord has a duty to keep the hallways safe and to maintain kitchen appliances in good working order. And the tenant has a right to safe hallways and a functioning stove and refrigerator to prepare and store food.

In contrast to contract duties, not all statutory duties create corresponding rights. For example, statutes generally require homeowners to pay property taxes every year to help finance public schools. The homeowner has a duty to pay property taxes, even if no school-age children live in the household. But the homeowner's duty to pay taxes does not give her a correlative right to attend public school. Nor does it give schoolchildren a right to the homeowner's tax payments. To give another example, a criminal statute might prohibit a pedestrian from crossing a street against a red light. But that negative duty does not give a driver the right to proceed into the intersection without taking precautions to avoid hitting someone who happens to step into the crosswalk against the red light.

In general, the best way to draft a rule creating a right is to impose a duty on someone else. A rule that simply creates a right for someone cannot be enforced unless the rule has identified an actor who must do something for the person the drafter intends to benefit. The rule need not express the right nor identify a specific beneficiary as long as the rule properly imposes the duty on an appropriate actor.

2. *Discretionary Authority*

Authority is the power to act, but without the duty to act. Discretion is the power to decide whether to act or not. The combined term *discretionary authority* is the power to decide whether or not to do something, but without an obligation either way. Discretionary authority is sometimes expressed as permission. The operative term *may* grants the actor discretionary authority.

A drafter can grant discretionary authority using the following formula:

**Discretionary Authority = Actor + Operative Term + Action
(of authority)**

To illustrate, suppose you drive 63 miles per hour on a highway with a posted speed limit of 55. A police car comes up behind you, lights flashing. You pull over and stop at the roadside. A police

officer walks up to your car window, and you anxiously await the consequences. If police officers generally have a duty to issue a speeding ticket to any driver who exceeds the posted speed limit, this officer has a duty to give you a ticket.

But if the officer has discretionary authority, she has the power to give you a ticket but also the power not to do it. She has the power to elect what to do and then act on her decision either way. You might receive a ticket, or you might not. The officer might say, “We’re real tough on speeders in this county. This time, I’m giving you a warning rather than a ticket. But don’t do it again.” If she says that, you will be relieved by the way she exercised her discretionary authority. But that does not give you any right to avoid being ticketed; the discretion rests with the officer alone.

Discretionary authority is not the same as a legal right in the sense that we use that term. Authority is power to do something or not; it conveys neither a right nor a duty to anyone. In contrast, a right is the counterpart of a duty. Drafting a rule that creates a right necessarily means that someone else must have a duty to give effect to the right. Giving someone discretionary authority does give anyone a right—not even the person who has the discretionary authority.

3. *Declarations*

A declaration is a sentence declaring that something is true. Declarations can take several forms. One example is a definition—a rule that explains the meaning of a legal term. Another is a rule specifying the minimum or maximum prison term a judge must impose on someone who has been convicted of a crime. While the definition of a declaration appears straightforward, a declaration in the form of a legal rule can have a powerful effect when used in conjunction with other rule structures. For example, statutes that define crimes are declarations, and they are usually accompanied by other statutes, also declarations, that specify penalties for those convicted of certain crimes.

California is a state because Congress declared it to be one by statute in 1850:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the State of California shall be one, and is hereby **declared** to be*

one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.³⁷

Every other state, except for the original thirteen, was created the same way.

To create a declaration that defines a legal term, the proper operative term is *means*. For other declarations, use *is* or *are*, or some other form of the verb “to be.” For example, “New Year’s Day and the birthday of Martin Luther King, Jr. *are* national holidays.” “Fracking in this state *is* a misdemeanor.”

A declaration can be written using the following formula:

Declaration = Subject + Operative Term + Predicate Noun
(“*means*” or a form
of the verb “*to be*”)

4. *Tests, Conditions, and Exceptions*

Tests and conditions are two names for the same concept: a contingency—or group of contingencies—that must be true or must occur to activate a rule.

Many tests and conditions are expressed as clauses beginning with the word *if*. The following terms all mean the same thing: *provided that*, *conditioned on*, *conditional on*, and *subject to* a test or condition (or group of conditions). In a contract, contingencies are called conditions; they are not called tests, even though the two words mean essentially the same thing. In other fields of law, both words are used to describe the same concept. If the test or condition is not met, the rule does not operate. Another way of saying the same thing is that the test or condition is a prerequisite for the rule to apply.

An exception operates as a reverse condition: It deactivates the rule. If the facts satisfy an exception, the rule does not apply. Many exceptions are expressed by adding a clause beginning with *unless* or *except* to the general rule.

A rule may be subject to a test or condition *and* an exception. If the test or condition is satisfied, the rule is activated. But if the exception is satisfied, the rule is deactivated.

37. An Act for the Admission of the State of California into the Union, Pub. L. No. 31–50, 9 Stat. 452, § 1 (1850) (second emphasis added).

Let's go back to the example on pages 25 and 26 and the police officer who stopped you for speeding. Suppose she says, "I can give you a warning because you exceeded the speed limit by less than 15 miles per hour. If you had been driving 70 miles an hour where the posted limit is 55, I'd have to give you a ticket because yesterday we got a departmental policy directive saying that."

The departmental policy imposed a duty on the officer to issue a ticket, but only if a specific condition is met: *If* a driver exceeds the speed limit by 15 miles per hour or more (condition), the officer *must* issue a speeding ticket (duty). The same departmental policy allows the officer to skip giving a ticket, but only if another condition is met: *If* a driver exceeds the speed limit by less than 15 miles per hour (condition), the officer *may* issue a speeding ticket (discretionary authority—the power but not the obligation to act).

A test or condition can be rewritten to become an exception to a rule. For example, a departmental directive might generally *require* a police officer to issue a speeding ticket (duty) when a driver exceeds the speed limit (condition), *unless* the driver exceeded the posted speed limit by less than 15 miles per hour (exception).

At first, it might seem that conditions and exceptions have the same effect, but the distinction between them is important in legal drafting. For example, assume a statute authorizes a civil claim for injunctive relief if a plaintiff's facts satisfy a list of elements. Each element would be a *condition* for securing the injunction. If one of the elements is not satisfied, the statute authorizing the court to grant an injunction never operates, so the plaintiff cannot obtain the desired injunction. That means a defendant could challenge the plaintiff's entire claim simply by arguing that one of the elements cannot be satisfied. Each element acts as a condition for stating a claim for injunctive relief.

But now consider the statute of limitations for the civil claim. The plaintiff does not have to demonstrate that her claim was filed within the statute of limitations to state a claim for injunctive relief. All she must do is allege facts to support each element—each *condition*—for stating the claim. The statute of limitations has the same effect as an *exception* to the statutory rule. The exception deactivates the statutory rule giving the plaintiff a claim for injunctive relief. In this example, the statute of limitations is an affirmative defense because the defendant must assert and prove each element of the exception.

As a general rule, a condition in a rule must be satisfied by the party who wants the rule to operate. An exception must be satisfied by the party who wants to defeat the rule's operation.

5. *Distinguishing Duties from Conditions*

Duties and conditions are easy to confuse because both appear to require action. The difference between the two can be determined by the consequences of not complying.

Consequences of breaching a duty. A person who has a duty but fails to comply can expect something bad to happen as a direct result. The bad consequences differ from one duty to another.

Recall a first-year law student's courses in torts and contracts. Tort law imposes a common law duty to behave with reasonable care. Someone who breaches that duty may owe damages in negligence to anyone who was proximately injured by the breach of duty. Or suppose you sign a contract that gives you a duty to do X by a certain date. If you do not, you will owe damages to the other party for breach of contract.

Even before law school, you understood the consequences of breaching a duty. Suppose you earn taxable income. You have a duty to pay the federal income tax no later than April 15 of the following year. If you breach that duty, you will owe interest and penalties to the Internal Revenue Service.

Consequences of not satisfying a condition. When a condition applies to a duty, discretionary authority, or a declaration, nothing bad happens as a direct result if the condition is not satisfied. The failure to satisfy the condition simply means the rule is not activated. For example, take a look at this city ordinance:

To obtain a parade permit, an applicant must pay a \$300 fee to the city clerk.

If you want to hold a parade, you might assume from reading the ordinance that you are obligated to pay the fee. You may feel obligated to pay and worry what might happen if you don't. But this rule does not give you a duty to pay. Paying the application fee is simply a *condition* for obtaining a parade permit. If you fail to pay the fee, the city will not give you a parade permit, but you would not be in trouble like you would if you decide not to pay your taxes. The city clerk will not sue you or attach your assets. You just will not get the parade permit you want.

The fundamental difference is this: You owe taxes to the Internal Revenue Service because you have a *duty* to pay them, and if you do not, bad things will happen. But you do not "owe" anything to the city clerk for the parade permit you want. In fact, most likely

the city clerk has a duty to issue you the parade permit, conditioned on your payment of the fee.

Another ordinance might contain a sentence like this one:

The city clerk shall issue every permit, license, public record, or other document to which a person is entitled.

Reading both ordinances together, the city clerk is legally required (duty) to issue you a parade permit, as long as you pay the \$300 application fee (condition). When you pay the fee, that conduct activates the city clerk's duty. If the clerk does not perform that duty after you pay the fee, you can sue for a court order requiring the clerk to issue the permit to you.

To distinguish a duty from a condition or test, consider the consequences if the actor does not comply. Failing to perform a *duty* leads to a bad outcome because the duty can be enforced or its violation sanctioned. But failing to perform a *condition* just means the rule that is subject to the condition never takes effect.

F. Four Things You Can Do in a Statute

A statute can do any of the following:

1. Impose a duty or a prohibition on someone
2. Give someone discretionary authority
3. Make something true with a declaration
4. Attach a test, condition, or exception to a duty, discretionary authority, or declaration

When asked to draft a statute, the drafter will translate everything legislators want to accomplish into one or more of these four kinds of rules. Each is a tool for accomplishing legislative goals. They make up the drafter's legislative toolkit.

Each type of rule is represented in statutes. For example, if you want to drive on a public street, a statute requires you to obey the speed limit (duty). A public street is defined as a government-owned passageway for vehicles that is open to the public (declaration). You are permitted to park your car on a public street (discretionary authority). But on certain public streets, parking is limited to drivers who pay in advance at a meter (condition).

Each rule type is also represented in the common law. Every case you read in law school involves some combination of duties, discretionary authority, declarations, and conditions or tests. Any single

case might not include them all, but every case involves at least one rule type, and often more.

Statutes are drafted, but the common law is not. Common law is the sum of all the relevant cases, written by judges acting in different years and sometimes different centuries. On the other hand, a statute is a single document drafted by one or more people working together in one effort, and ultimately enacted by a legislature. The statute might be amended later, but each amendment would be a single drafting effort.

In the process of drafting a statute, legislators explain what they hope to accomplish, and the drafter uses a combination of duties, discretionary authority, declarations, and tests or conditions to create a document—the statute—that does what they want. A statute drafter solves all legislative problems with these four tools and no others. The limited number of available rule types can make statute drafting seem deceptively easy because the drafter must master only four tools. But that actually makes statute drafting more difficult because learning how to apply each one effectively is both strategically and analytically challenging.

A drafter must use the four tools wisely and express them perfectly. Otherwise the statute can misfire. For example, if the statute imposes a statutory duty when it should have imposed a condition on discretionary authority, fewer people will probably comply with what the legislature wanted them to do. Or if the statute expresses a rule ambiguously, litigation is likely between those who think the statute's words mean one thing and others who think the same words mean something else. After the legislature has enacted the statute, courts will ignore a drafter who tries to tell them what the legislature meant.

Legislative drafting is not limited to Congress and state legislatures. Every county, city, town, and other local government with the power to enact local ordinances has lawyers on staff or on retainer to draft them. And administrative agencies at all levels of government adopt rules and regulations to carry out the authority that statutes confer on them.

G. Six Things You Can Do in a Contract

Think of a contract as something like a private statute. By reaching an agreement—a meeting of the minds, often through offer and acceptance—the parties create rules to govern themselves. A legislature can enact rules governing everybody because a constitution

gives it that power and because voters elected legislators. Similarly, contract parties have the power to create rules governing their own transaction because they mutually agreed to make them.

When drafting a contract, the drafter can do the same four things a statute drafter can do. A contract can impose duties (or prohibitions) on the parties. It can give them discretionary authority. It can make things true by declaring them. And it can limit any of these others with conditions, the term commonly used for tests that appear in contracts.

But a contract can also do two other things. One party to a contract can represent a fact. And a party can warrant a fact. Every transaction is a mixture of both opportunity and risk. Contract parties use representations and warranties along with other tools to manage risk in various ways. The details about how contract parties manage risk are beyond the scope of this article. But representations and warranties often appear in contracts, a feature that distinguishes contracts from statutes.³⁸

III. WHERE RULES ORIGINATE — PRIVATE LAW AND PUBLIC LAW

A. *Private Rules*

As we explained earlier, private rules include contracts, leases, covenants, bylaws, conveyances, wills, and trusts. Unlike public rules, private rules are the product of voluntary relationships or transactions. Most private rules take the form of contracts—consensual agreements between private parties.

Private rules take many more specialized forms as well. A lease, for example, is a contract through which a property owner agrees to grant a tenant a possessory interest in real property for a specific term, limited to certain purposes, in exchange for periodic rent payments. A restrictive covenant is a condition in a deed or other conveyance that restricts the use of real property,³⁹ and in some instances runs with the land to bind future purchasers.⁴⁰ A different kind of covenant refers to an employee's agreement not to compete

38. Statutes sometimes include legislative findings, which might appear similar to representations. However, legislative findings are simply declarations that help explain the legislature's policy reasons for enacting the statute. They are not representations in the contract sense that we mean here.

39. *Greenfield v. Wurmlinger*, 349 P.3d 1182, 1187 (Idaho 2015) (holding that covenants restricting uses of land are enforceable but narrowly construed).

40. *E.g.*, *Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 665 (Tex. App. 2005) (setting out conditions under which a covenant runs with the land).

with her employer for a certain period of time after terminating the employment relationship.⁴¹

Bylaws are rules adopted by private corporations, associations, and other organizations to govern their operations. Conveyances are instruments that operate to transfer interests in real estate or mineral interests, such as oil and gas leases. Trust agreements transfer assets from the property owner, known as the settlor, to a third party trustee, who holds and manages the assets as a fiduciary for the benefit of specified beneficiaries, subject to conditions imposed by the settlor in the trust agreement. And a will is a set of rules prepared by an individual, known as a testator, giving directions to a personal representative to govern the distribution of the testator's assets upon death.

Different kinds of specialized agreements between private individuals have one thing in common: All are composed of legal rules that create duties, rights, discretionary authority, declarations, conditions, and exceptions. In most cases, these agreements are put into written form, often by a lawyer. Drafting skills apply in much the same way to all these instruments because all are fundamentally made up of legal rules.

B. Public Rules Generally

As explained earlier, public law includes constitutions, statutes, codes, ordinances, administrative rules and regulations, executive orders, and court rules. They typically reflect broad public policies and priorities that result from executive, legislative, or judicial compromise.

1. Public Laws of General Operation

Public rules are enacted, issued, or adopted by public bodies or entities with authority to issue legal rules. They include electors, legislatures, judicial officers, state governors, and administrative agencies. In that respect, public rules differ from private law, which is negotiated by individuals or organizations to govern impending transactions or current and ongoing relationships.

Most often, public rules operate generally; they reflect broad public policy goals or preferences, which often compete with other policies. For example, a state may enact a statute imposing limits on how law enforcement officers conduct strip searches, balancing public safety interests against the privacy rights of the accused.

41. *E.g.*, *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879, 882 (Wis. 2015).

2. *Public Laws of Narrow Application*

Most statutes apply generally, but not all do. Although no longer common today, state legislatures historically enacted “private” or “special” laws as well as public laws.⁴² A “private law” in this sense is legislation that benefits particular individuals rather than the public generally. The term “special law” refers to both private and local statutes that apply to certain localities rather than the entire state.⁴³

In fact, until the second half of the nineteenth century, state legislatures enacted relatively few laws of general application.⁴⁴ For example, a legislative body in those days might pass a private bill granting a divorce, or a bill issuing a charter to an individual or company to operate a ferry on a particular navigable river. Even today, Congress and many state legislatures enact private laws that grant specific benefits or privileges to private persons.⁴⁵ A private law may be enacted to legislatively resolve an individual’s claim against the government, or to grant a citizen of a foreign country relief from a deportation order issued by a federal administrative agency.

A combination of factors in the late nineteenth century led many states to amend their constitutions to prohibit or strictly limit state legislatures from enacting special or private laws. These factors included an increasing proliferation of special laws, constituent pressures, and concerns about political favoritism.⁴⁶ But these constitutional restrictions do not apply nationwide. The U.S. Constitution and about twenty state constitutions impose no restrictions whatsoever on special legislation.⁴⁷

For drafting purposes, even private and special laws as described here are subcategories of what we broadly define as “public rules.” The source of special statutes, like all other public rules, is a public entity with constitutional or statutory authority to enact or issue law, even though the special laws themselves are typically narrow

42. Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004).

43. *Id.*

44. *Id.*

45. Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 43 n.19 (2014) (citing Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–3, 119 Stat. 15 (2005)). While private statutes are published in the *Statutes at Large*, they are not codified in the *U.S. Code*. See *Researching Federal Statutes*, LAW LIBRARY OF CONG., <http://www.loc.gov/law/help/statutes.php> (last visited April 26, 2017).

46. See generally Schutz, *supra* note 45, at 44–48 (summarizing history of special-legislation provisions).

47. *Id.* at 41, 48 & nn.37–38.

in scope and application. Once enacted, private and special laws, as well as other public laws, are subject to constitutional challenge under the Equal Protection Clause.

3. *Prospective v. Retroactive Application*

Most, but not all, public rules operate prospectively to future circumstances and events within their scope, unless a different intent is clearly expressed in the rule itself. As a general rule, courts presume that statutes operate prospectively, unless the legislature clearly expresses its intent that a particular statute apply retroactively.⁴⁸ But sometimes a court will apply a law retroactively even without a clear statement from the legislature, if the law affects only procedure and does not implicate any vested substantive rights.⁴⁹

The lesson for public law drafters is to always clearly express the client's intent about whether the proposed legislation will apply prospectively or retroactively. Default rules on retroactive application vary from state to state and from time to time. But in close cases, courts will first consult the language of the public law itself to determine whether the legislative body clearly expressed an intent on the issue. The best course of action for the drafter is to always include a provision that spells out exactly whether, and to what extent, the law applies retroactively.

C. *Constitutions*

The U.S. Constitution is the supreme law of the land. All other public laws, whether federal, state, or local, must be consistent with the U.S. Constitution. The Supremacy Clause guarantees that in case of a conflict, federal law preempts contrary state or local law.⁵⁰

For most lawyers, especially those who draft public law at the state level, state constitutions are more important than the federal constitution in the drafter's day-to-day work. State constitutions include many procedural and format requirements for state statutes, and a state legislative drafter must be aware of those restrictions and draft accordingly. State constitutions are also

48. See, e.g., *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001); *Bailey v. Spangler*, 771 S.E.2d 684, 687 (Va. 2015) ("Absent an express manifestation of intent by the legislature, this Court will not infer the intent that a statute is to be applied retroactively.")

49. E.g., *GreenPoint Mortg. Funding, Inc. v. Poniewozik*, 23 N.E.3d 525, 531 (Ill. App. Ct. 2014).

50. U.S. CONST. art. VI, cl. 2.

amended much more often than the federal constitution,⁵¹ and those amendments are drafted by lawyers, generally legislative staff. In an initiative or referendum state—in which voters, in general elections, can legislate and amend their own constitution—some amendments are drafted by private lawyers who represent individual clients or advocacy groups. In recent years, for example, advocacy groups have proposed state constitutional amendments to allow for the sale and purchase of marijuana for regulated medical uses.⁵²

The United States, unlike many other nations, has a strong tradition of judicial review of legislation. The separation of powers doctrine, including the power of the court to review statutes for consistency with the Constitution, is steeped in judicial tradition in the United States.⁵³ The drafter must always keep in mind that anything in a bill draft that might be interpreted as inconsistent with the state or federal constitution puts the client at risk of litigation. The legislative body itself may debate whether a proposed enactment is constitutional or not. But most legislators are not lawyers, and they are not necessarily persuaded by constitutional arguments.⁵⁴ Upon enactment, if a statute can be reasonably challenged on constitutional grounds, its opponents are likely to institute litigation.

As a public arena, the legislative process is designed to invite controversy, which is an inherent aspect of deliberating on questions of public policy. But for public law drafters, the ever-present risk of

51. For example, the most recent amendment to the U.S. Constitution was the 27th Amendment ratified in 1992. Relatively speaking, state constitutions are amended much more frequently. While separately numbered amendments to the United States Constitution are appended at the end, most state constitutions are amended by interlineation in much the same way as codified statutes.

52. In 2016, for example, advocacy groups sponsored a state constitutional amendment to legalize the medical use of marijuana in Arkansas consistent with state statutes and regulations, while recognizing that use of the drug remains illegal under federal law. A majority of the voters approved the initiative amendment in the November 2016 general election. Arkansas Medical Marijuana Amendment of 2016, ARK. CONST. amend. XCVIII; *see also* COLO. CONST. art. XVIII, § 14 (authorizing adults to possess or transfer limited quantities of marijuana for medical use), *invalidated in part by* People v. Crouse, 388 P.3d 39 (Colo. 2017) (4–3 opinion) (striking down § 14(2)(e) as preempted by federal Controlled Substances Act).

53. *E.g.*, Marbury v. Madison, 5 U.S. 137 (1803).

54. One of the co-authors worked for several years as a member of a state legislature's nonpartisan professional staff. If anyone raised constitutional arguments about a pending bill, some legislators were fond of saying, "A law isn't unconstitutional until some court says it is." Courts generally agree. A longstanding canon of statutory interpretation gives challenged statutes a strong presumption of constitutionality. *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641, 696 (1984) ("There is a presumption in favor of the constitutionality of an Act of Congress.").

constitutional challenge by opponents is an occupational hazard that generally does not apply to drafters of private law.⁵⁵

Because federal and state constitutions are amended much less frequently than statutes, most lawyers are not likely to draft many constitutional amendments in their legal careers. However, understanding how to effectively draft legal rules will help any lawyer interpret constitutional provisions and understand how they limit the reach of other drafted rules.

Most importantly, a drafter must be thoroughly familiar with constitutional constraints on the format and substance of all public rules. Every state constitution includes provisions that govern the work of the legislative drafter. Usually they appear in the article that governs the legislative process.

D. Legislation: Statutes, Codes, Ordinances, and Appropriation Acts

Legislation at the federal, state, or local level is the most common form of public law. A statute's life begins as a bill prepared by a drafter for introduction and consideration by the legislative body. The form of a bill differs, sometimes substantially, from the form of an enacted statute. A bill's format, organization, and substantive contents are governed by the constitutional and statutory requirements of the jurisdiction in which the bill originates.

1. Statutes

Upon enactment, a bill generally becomes a public law. Laws enacted by a legislative body go by different names and may take several forms. At the federal level, an enacted bill is known as a slip law, which is assigned a unique number. Enacted legislation is transmitted to the Archivist of the United States, who is required by law to preserve the originals.⁵⁶ Both public laws and private or special laws are numbered in the order enacted, beginning with the congressional session number. The laws Congress enacts in each congressional session are compiled in chronological order and published in the *Statutes at Large*. At the state level, a similar process

55. Of course, a contract or other private rule cannot contradict applicable public law, including statutes and constitutional provisions. However, if the parties to the agreement want the relationship to continue, neither one is likely to challenge a mutual agreement as contrary to law.

56. 1 U.S.C. § 106a (2012).

is used to number, compile, and publish laws enacted at each legislative session. These uncodified state statutes are generally known as session laws.

For more than a century, the *Statutes at Large* was the only source available for a lawyer to research federal statutes. No codified version existed as we know it today.⁵⁷ To find current statutory law, a lawyer had to search every volume to determine whether a statute enacted years ago had been amended or repealed at some later date. Because the *Statutes at Large* published laws in chronological order, they were not organized or searchable according to subject matter. Indexing was generally inadequate. Therefore, neither the *Statutes at Large* nor any other published version of enacted laws was a satisfactory source for finding current statutes on any specific subject matter.

In the country's early years, researching federal statutes in the *Statutes at Large* was not especially onerous because Congress enacted so few statutes of general application.⁵⁸ As the nation grew in size and complexity, the federal government took on more complex functions, which underscored the need for improved access to current federal law. The lack of codification and systematic organization of statutory law profoundly influenced not only the process of legislative drafting, but also the way courts interpreted enacted law.⁵⁹ The courts approached early legislation as "situational edicts"⁶⁰ overlaying a common law canvas, and traditional canons of statutory interpretation treated them accordingly.⁶¹

2. Codes

Beginning in the early 1800s, the codification movement advocated for a compilation of enacted laws by subject matter to make them more accessible. In 1874, Congress published the *Revised Statutes at Large*, consolidating and replacing all prior enactments. While that publication represented an important step toward codification,⁶² it was not organized by subject matter. By the late 1800s, several states had embarked on their own efforts to codify state statutes.⁶³

57. Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1140–41 (2014).

58. See *supra* notes 44–46 and accompanying text.

59. Stevenson, *supra* note 57, at 1141.

60. *Id.* at 1141–42.

61. See, e.g., *Dougllass v. Lewis*, 131 U.S. 75, 85 (1889) (“[S]tatutes, if in derogation of the common law, . . . should be construed strictly.”).

62. Stevenson, *supra* note 57, at 1139–40.

63. See, e.g., Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547, 560 (1894) (observing that about one fourth of the states had

Publication of the *United States Code*, as we know it today, was not approved by Congress until the mid-1920s.⁶⁴ Even now, the best evidence of federal statutory law is not necessarily the *United States Code*. Congress has enacted only about half the Code's fifty-four current titles as "positive law," which replaces and supersedes all previous enactments compiled in each title. But the rest—fully half of all codified federal statutes—have *not* been enacted as positive law. The best evidence of statutes organized and published in those titles remains the original and amended versions of the statutes that appear chronologically in the *Statutes at Large*.⁶⁵

The difference is critical when a drafter is preparing a bill to amend federal statutes. If the bill would amend a statute in a title that has been enacted as positive law, the bill would simply refer to the codified version of existing law and amend it further. But if a bill would amend a statute published in a title not yet enacted as positive law, the drafter must refer to the original enactment by its public law number, as well as each subsequent public law that has amended the original enactment.

Over time, congressional staff continues to compile and propose titles for enactment as positive law, but the process is not likely to be completed for many years to come.⁶⁶

3. Ordinances

State statutes must conform to the state and federal constitutions, and they may be preempted by federal law. Similarly, local governments in most states have the power under state law to enact local laws governing local affairs. States vary greatly with respect to the scope of authority granted to local governments. All states grant at least some power to local authorities to enact local legislation, as long as it is not contrary to generally applicable state law. Some states grant home rule authority to local governments, which allows certain localities to adopt their own local charters that set out the basic organization and administration of local government.

Given the wide variation among states regarding the power conferred on local governments, it is difficult to generalize about the

become "code States" by "embod[ying] a substantial part of the common law in the form of legislation"). See generally R. FLOYD CLARKE, *THE SCIENCE OF LAW AND LAWMAKING* 33–43 & 263–340 (1898) (surveying state codification efforts in the late nineteenth century and summarizing arguments for and against).

64. Stevenson, *supra* note 57, at 1140.

65. 1 U.S.C. § 112 (2012).

66. See *Positive Law Codification in the United States Code*, U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE LAW REVISION COUNSEL, http://uscode.house.gov/codification/positive_law_codification.pdf (last visited Feb. 12, 2017).

lawmaking authority of United States municipalities.⁶⁷ In general, however, a municipality or other local government unit has only the authority the state constitution or state statutes confer on it.

In most states, municipalities are authorized to act by adopting ordinances and resolutions. Only ordinances have the force and effect of law. Resolutions are used primarily to make policy statements, or to direct administrative or ministerial functions. Few formalities are required for resolutions, and they are typically temporary in nature.

Local ordinances are analogous to state and federal statutes. They differ from resolutions in several respects, which vary from state to state. In general, an ordinance is required for municipal action that involves persons or property, and that imposes a penalty for a violation. State laws sometimes require municipalities to take certain actions by local ordinance. And an ordinance is necessary to repeal or amend any other ordinance.

An ordinance's form and content are dictated by state law. In home rule states, local charters may add required formalities for enacting ordinances. Every ordinance is typically assigned a unique number reflecting the chronological order of its enactment. Some municipalities codify their ordinances, but others do not. In general, an ordinance cannot take effect immediately unless the legislative body declares an emergency. And every ordinance must comply with certain publication requirements, which also vary from state to state.

4. *Appropriation Acts*

Appropriation acts are essential to government operations because they are the legislative vehicles for financing public services. Tax legislation is enacted to raise revenue for the government on an ongoing basis, but separate legislative action is required to specifically appropriate funding to provide for public schools, police protection, welfare programs, and other essential public services.

Constitutional provisions dictate the format and content of appropriation acts, just as they do for substantive legislation. Often

67. Complicating matters further, the very definition of "municipality" varies from state to state, and sometimes even within a state. *See, e.g.,* *Jericho Water Dist. v. One Call Users Council, Inc.*, 887 N.E.2d 1142, 1144 (N.Y. 2008) ("Municipality" is an ambiguous word."). In general, the term applies to units of local government. *E.g.,* *Bell v. Kan. City, Kan. Hous. Auth.*, 992 P.2d 1233, 1235 (Kan. 1999) ("The present [statutory] definition of 'municipality' . . . encompasses all political subunits with the power to create indebtedness and make payments independent of the parent unit."). *See generally* 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 2:8, at 176–82 (3d ed. 2010) (defining "municipal corporation").

they also provide special procedures for enacting appropriation bills into law. In some jurisdictions, for example, appropriation bills must be introduced in the House of Representatives.⁶⁸ Some state constitutions require a super-majority vote of both chambers to enact appropriations.⁶⁹ Legislative drafters must be aware of these unique requirements for appropriations because no new program, however meritorious, can succeed without suitable operational and financial support.

Most state constitutions restrict the number of subjects in any one bill to help prevent legislative “logrolling.”⁷⁰ For that reason, appropriations typically do not appear in the same enactment that establishes a new government program. While the U.S. Constitution does not restrict bills to one subject, other House and Senate procedural rules have the practical effect of requiring separate bills to appropriate federal money. Standing congressional committees must “reauthorize” federal programs from time to time, and those authorization bills generally include multi-year limits on the funding amounts authorized for each federal program. Other committees are then responsible for considering separate bills each year to appropriate specific amounts of money to finance each agency’s programs.

At both the state and federal levels, appropriation bills have a limited life span and do not become part of the permanent law. For that reason, unlike public laws, they are not codified. They generally appropriate money for specified government programs for one fiscal year. Some state appropriation bills may appropriate funding for more than one year, especially when the state legislature meets only once every other year.

Legislatures have adopted a variety of sometimes innovative techniques for drafting appropriation bills to restrict the use of government funding for specific purposes, or to otherwise limit the discretion of government agencies.⁷¹ For example, “riders” attached to

68. *E.g.*, MASS. CONST. pt. 2, ch. 1, § 3, art. VII.

69. *E.g.*, ARK. CONST. art. 5, § 31 (requiring a two-thirds majority vote in each chamber to appropriate money).

70. “Logrolling” occurs when several legislators combine unrelated proposals in a single bill. The bill gains sufficient political support as a whole based on the combined votes of the legislators who support each component proposal in the bill. Logrolling is perceived as an evil practice because it often allows a group of provisions to pass that would fail if each stood alone. *E.g.*, *Kan. One-Call Sys., Inc. v. State*, 274 P.3d 625, 631 (Kan. 2012).

71. To illustrate, one rider prohibited the Department of Interior from spending funds to issue rules that would have placed a specific bird species (the “sage-grouse”) on the endangered species list. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking*, *Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1805 & n.78 (2015) (citing Press Release, The U.S. House of Representatives Comm. on Appropriations, Rogers: Omnibus

appropriations bills sometimes bar agencies from spending appropriated funds to carry out programs that are otherwise authorized by substantive law. As a general rule, a legislature may impose conditions and restrictions on appropriations, but it cannot enact or amend substantive law in a general appropriation bill, even temporarily.⁷² But if Congress renews funding restrictions or conditions in an appropriation bill year after year, those provisions can have the same practical effect on government services as permanent legislation.⁷³

Everyone is familiar with the long-standing custom of Saturday mail delivery, which offers a perfect illustration of the technique. Since 1987, Congress has used appropriation bills to mandate that U.S. Post Offices deliver mail on Saturdays. Every year Congress has included a “proviso” (a kind of condition) in each U.S. Postal Service appropriation bill requiring that “6-day delivery and rural delivery of mail shall continue at not less than the 1983 level.”⁷⁴ In 2013, the Postal Service proposed to save funds by eliminating Saturday mail delivery. But Congress stymied the plan once again by adding a proviso to the 2013 Continuing Appropriations Resolution.⁷⁵ The effect was to create a recurring annual exception to the discretionary authority granted by substantive law, which empowers the Postal Service to deliver mail “as it finds appropriate to its functions and in the public interest.”⁷⁶

Appropriations are an essential legislative tool for getting things done, preventing things from getting done, and controlling how things are done and how much they cost. An experienced legislative drafter once observed, “The real guts of much legislative effort are the control and careful manipulation of the state purse. No class of

Package Responsibly Funds the Federal Government, Avoids a Shutdown, Makes Good Government Policy Changes (Dec. 9, 2014) (<https://perma.cc/SAG5-TQ8Y>).

72. Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT’L REV. L. & ECON. 191, 192 (1992) (arguing to restrict “widespread” congressional practice of amending substantive statutes through appropriations); see S.D. Educ. Ass’n/NEA *ex rel.* Roberts v. Barnett, 582 N.W.2d 386, 392 (S.D. 1998); see also State *ex rel.* Stephan v. Carlin, 630 P.2d 709, 710 (Kan. 1981).

73. See Gluck et al., *supra* note 71, at 1832–33 & n.242. Another appropriations rider, renewed every year since 1996, has restricted the use of federal funds for stem-cell research. *Id.*

74. U.S. GOV’T ACCOUNTABILITY OFFICE, B-324481 2 (Mar. 21, 2013), <http://www.gao.gov/assets/660/653188.pdf>.

75. See *id.*

76. 39 U.S.C. § 403(a) (2012).

bills is subject to greater need of careful analysis of constitutional limits.”⁷⁷

5. *Agency Rules and Regulations*

A rich source of legal rules in the United States consists of administrative regulations issued by numerous federal and state agencies. For regulations to be enforceable, the agency must have express statutory authorization to issue substantive regulations to implement a government program or regulatory framework. If issued according to proper procedure, agency rules and regulations have the force and effect of law.

The federal procedure for issuing agency rules and regulations is outlined in the federal Administrative Procedure Act,⁷⁸ which also provides generally for judicial review of agency regulations.⁷⁹ The federal courts are generally quite deferential to agencies when a litigant challenges regulations for exceeding statutory authority or for inconsistency with authorizing statutes.⁸⁰ On the other hand, state courts vary with respect to the deference they give state agency regulations when challenged for exceeding statutory authority.⁸¹

New or amended federal agency regulations are initially published in the *Federal Register* and later codified in the *Code of Federal Regulations*. Similar notice and publication requirements apply to state regulations. In content and form, a regulation is indistinguishable from a statute. Regulations are an essential component of primary legal authority, and every practicing lawyer must be familiar with them and how they relate to other sources of law.

77. Fred J. Carman, National Conference of State Legislatures, remarks made at legislative drafting workshop: Bill Drafting Research, (Nov. 10–11, 1977) *reprinted in* REED DICKERSON, MATERIALS ON LEGAL DRAFTING 122, 124 (1981).

78. 5 U.S.C. §§ 553, 561–570 (2012).

79. 5 U.S.C. §§ 701–706 (2012).

80. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001).

81. *Compare, e.g.*, *Denning v. Kan. Pub. Emps. Ret. Sys.*, 180 P.3d 564, 568 (Kan. 2008) (“An agency’s interpretation of a statute is not conclusive; final construction of a statute always rests within the courts.”) *with, e.g.*, *United Ins. Co. of Am. v. Md. Ins. Admin.*, 144 A.3d 1230, 1249 (Md. 2016) (“[W]e accord great deference to the factual findings and legal conclusions of an administrative agency that are ‘premised upon an interpretation of the statutes that the agency administers and the regulations promulgated for that purpose.’” (citation omitted)).

6. *Executive Orders*

Executive orders are issued by the President or a state governor. They have been used to implement a variety of executive policy decisions with relatively little judicial oversight. During times of legislative gridlock, they can be used by executive officials to implement controversial policy decisions without legislative endorsement. While executive orders have sometimes drawn political controversy, they have been issued throughout U.S. history.

In general, courts give executive orders the effect of law to the same extent as administrative rules and regulations. In some cases, specific statutes authorize the issuance of executive orders, and those orders have the force and effect of a statute.⁸² On the other hand, a court will not enforce an executive order that conflicts with the chief executive's constitutional power or any statute.⁸³ On rare occasions, courts have vacated presidential executive orders for exercising power inconsistent with the authority granted by the Constitution.⁸⁴

The Federal Register Act requires publication of all presidential executive orders, except those that have no general applicability and legal effect.⁸⁵ Gubernatorial executive orders are sometimes published and sometimes not. Practices vary from state to state.⁸⁶

82. See, e.g., *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (citing 40 U.S.C. § 486(a) (recodified at 40 U.S.C. § 421(a)), authorizing the President to adopt policies and directives for procuring government property and services); *United States v. R.I. Dep't of Corr.*, 81 F. Supp. 3d 182, 187 (D.R.I. 2015) (citing Reorganization Act, 5 U.S.C. § 906, which permits the President to reorganize government agencies, subject to congressional veto); *id.* at 188 (citing cases for the principle that an executive order authorized by a specific statute has the effect of a statute enacted by Congress).

83. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) (“[N]either the Supreme Court nor our court has ever held that courts lack the authority to review executive action [including Executive Orders on matters of immigration and national security] for compliance with the Constitution.”).

84. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (invalidating President Truman's executive order authorizing Secretary of Commerce to assume control over national steel industry).

85. 44 U.S.C. § 1505(a)(1) (2012). Orders beginning with Executive Order 7316 issued March 13, 1936, are published in 3 C.F.R. and online on the National Archives website. See *Federal Register: Executive Orders Disposition Tables Index*, THE U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/executive-orders/disposition.html> (last visited Apr. 27, 2017).

86. See, e.g., Robert A. Zarnoch, *Gubernatorial Executive Orders: Legislative or Executive Power?*, 44 MD. B.J. 48, 53 (May/June 2011).

7. Court Rules

Court rules are another form of legislation.⁸⁷ Courts routinely draft and adopt rules to govern their proceedings. Rules of evidence, criminal and civil procedure, and appellate practice are all forms of judicial legislation. In addition, each state supreme court has adopted a code of professional conduct that governs every lawyer licensed to practice in that state.

Every law student learns about court rules. They are drafted and amended in much the same way as statutes, administrative rules, and executive orders.

At the federal level, new court rules, and amendments to existing court rules, are annually proposed to and debated by the Judicial Conference of the United States.⁸⁸ Among other duties, the Conference is required to study the general rules of practice and procedure used in the federal courts and recommend changes and additions it considers appropriate.⁸⁹ In carrying out its duties, the Conference makes recommendations to the Supreme Court, which may accept, modify, or reject any recommendation.⁹⁰ The Conference also has the duty to review other court rules authorized by the Rules Enabling Act,⁹¹ and it may amend any court rule found inconsistent with federal law.⁹²

In addition to the duties prescribed for the Judicial Conference, the Rules Enabling Act authorizes the Supreme Court and all other federal courts to prescribe rules for conducting business. Any rules proposed under this discretionary authority must be consistent with federal statutes and with Supreme Court rules governing practice and procedure in the federal district courts.⁹³ Those procedural rules may not “abridge, enlarge or modify any substantive right.”⁹⁴

The Rules Enabling Act requires the Judicial Conference to prescribe and publish procedures governing its consideration of proposed court rules, and the process has many parallels to those used by the legislative and executive branches to propose and deliberate

87. See Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 916 (1976). “[T]he [courts’] rulemaking power is more legislative than advisory and falls within that twilight area created by practical necessity where activities of the separate branches merge.” *Id.*

88. 28 U.S.C. § 331, ¶ 5 (2012).

89. *Id.*

90. *Id.*

91. 28 U.S.C. §§ 2071–77 (2012).

92. 28 U.S.C. § 331, ¶ 6.

93. 28 U.S.C. §§ 2071, 2072(a).

94. *Id.* § 2072(b).

on statutes and administrative rules.⁹⁵ The Conference has established various committees to handle its work.⁹⁶

Before May 1 of each year, the Supreme Court is required to submit to Congress any new or amended rules that have been proposed under the Rules Enabling Act. Unless Congress enacts a law to the contrary, the rules automatically take effect on the following December 1.

Each state has adopted its own procedures for proposing and amending court rules. In many states, rules of evidence and court practice are enacted by the state legislature and codified along with other state statutes. Other court rules, especially those governing practice in state trial courts, may be separately published by the state supreme court and amended from time to time by administrative order.

IV. DRAFTING: AN ESSENTIAL LAWYERING SKILL

“[D]rafting is the most important phase of the average lawyer’s work.”

—J.G. Thomas⁹⁷

A. *Drafting and Professionalism*

For a practicing lawyer, drafting is an essential professional skill. Reed Dickerson, internationally renowned for his leadership in professionalizing legal drafting, underscored its importance to the practicing bar:

[L]egal drafting, . . . is probably the single most important intellectual skill now being used by lawyers, even those who never allow themselves to be seen in the company of a statute. Far more professional hours are spent in the kind of legal planning or other preventive lawyering that culminates in developing definitive instruments such as contracts, wills, leases, mortgages, and corporate agreements than are spent in litigation.⁹⁸

The legal profession and its clients are increasingly demanding practice-ready law school graduates. And today’s law students are more and more aware of the importance of learning professional

95. 28 U.S.C. § 2073(a)(1).

96. *Id.* § 2073(a)(2).

97. J.G. Thomas, *Problems in Drafting Legal Instruments*, 39 ILL. B.J. 51, 57 (Sept. 1950), quoted in DICKERSON, *supra* note 77, at 3–4.

98. Dickerson, *supra* note 16, at 562–63.

skills as part of their academic legal education. Knowing how to draft legal rules clearly and effectively is central to a lawyer's role as a professional.

B. Client Goals

The primary obligation of a professional drafter—whether drafting a contract, statute, or other legal instrument—is to carry out the client's goals.

How does a drafter ascertain and effectuate the client's goals? The first step is to identify the client. The second step is to ask questions to clarify the client's overall objectives. The third step is to research the legal background and context, including any existing legal relationships that need to be considered. The fourth step is brainstorming alternatives to accomplish the client's goals, as well as anticipating possible roadblocks and how to overcome them. The fifth and final step is consulting with the client to fine-tune the strategy for accomplishing the client's goals.

The drafting process is highly interactive. Only rarely can a drafter do the job effectively without several meetings with the client to clarify goals. Drafting is also recursive in nature: Competent legal drafting requires multiple drafts, edits, amendments, and revisions.

1. Identify the Client

One of a legal drafter's greatest challenges is ascertaining exactly who the client is for a specific drafting project.

In drafting private documents, the client could be one of the parties to a contract, who are both motivated to work out the terms of a deal so they can engage in a productive business relationship for an indefinite time. Or the client may be a property owner who wants to structure a sales transaction to allow for repossession in the event of default by the buyer. Or the client may be an organization—for example, a homeowners' association or non-profit corporation—with conflicting institutional goals. The objectives of the organization as a whole may not coincide with the goals of any individual member or officer of the organization. Is the drafter's client the association, or its individual members? A lawyer who serves as general counsel for a corporation may think of her client as the corporation itself. But what about the shareholders who own fractional interests in the corporation?

A lawyer who drafts statutes may be tasked with carrying out the goals of an advocacy group—to lobby for legislation that advances

the organization's objectives. Or the client may be an administrative agency whose mission is to carry out one or more government programs created by statute, subject to detailed regulations adopted by the agency. Or a drafter may be asked to prepare a bill for introduction by an individual legislator who has political motives that may or may not be disclosed to the drafter. Often government agencies or corporations retain outside counsel to represent the organization with specialized projects. Even associates in private law firms may find themselves representing institutional clients.

Before a lawyer can effectively draft any document to serve a client's goals, the drafter must determine just who the client is. The person who explains the client's goals to the drafter may or may not be in the best position to communicate the goals and objectives of the *real* client. That is particularly true when the client is an organization or institution.

2. Ask Questions to Clarify the Client's Objectives

At the initial meeting, the client generally does not have a crystal-clear idea what she wants to accomplish. Maybe she just agreed to purchase a used car from a distant relative and has asked the drafter to draw up the bill of sale. She may not realize that she needs a contract to protect her against certain risks inherent in the transaction. Or a city commissioner may request a draft ordinance permitting a nonprofit religious organization to erect a Christmas display in the town square. The commissioner may not recognize the constitutional issues involved.

Most every client will rely on the drafter to ask the right questions to clarify the client's objectives. Most clients will not be lawyers and will not understand the legal context that must be considered in drafting a document to carry out the client's goals. Before embarking on the next step, a drafter should ask plenty of questions to fully understand the client's true objectives, not just what the client says she wants the drafter to do.

3. Research the Legal Background and Subject-Matter Context

Every legal instrument or document has a legal context that a competent drafter must thoroughly understand before beginning the drafting process. And if the drafter knows little about the subject matter, one aspect of doing an effective job is to learn enough factual context to draft the document competently.

Parties to a private contract are free to tailor the agreement to carry out their mutual goals. But they cannot agree to terms contrary to the law of the jurisdiction that will govern any contract disputes. For example, a provision for binding arbitration to resolve any contract dispute may not be enforceable under state law if a party has a change of heart. Parties to a private agreement may have a prior business relationship that may need to be considered in drafting the agreement. Does one party have a history of renegeing on prior deals—or failing to perform in a timely manner? The parties' prior relationship may prompt suggestions by the drafter about how best to allocate the business risk between the parties.

A lawyer who drafts public rules has even more context to consider. Any statute, regulation, or court rule takes its place within a larger and more complex legal framework. For example, an agency regulation has no effect unless consistent with the scope of authority the legislature granted by statute to the agency. And the legislative grant of authority to issue agency regulations has no legal effect if it exceeds the legislature's constitutional power to delegate lawmaking authority to the executive branch. A statute enacted without reference to other related statutes may lead to litigation if its substance is inconsistent with those laws. A state statute enacted to bar judicial enforcement of mandatory arbitration agreements in consumer contracts may be unenforceable if preempted by the Federal Arbitration Act. And if one section of a statute is successfully challenged on constitutional grounds, the drafter must determine whether the client wants to preserve the rest of the statute without the unconstitutional clause.

Of course, a legislator has the option of sponsoring legislation that may be challenged on constitutional or other legal grounds. However, the drafter has the responsibility to identify any potential legal issues raised by the bill draft, to discuss them with the requesting legislator, and to document those concerns for the record.⁹⁹

Thorough research is essential before embarking on any drafting assignment. The drafter must fully understand the nature of the parties' relationship and the business context before drafting a private agreement. For both contracts and public laws, the drafting process begins with researching the existing legal context. In the public arena, the drafter's research may even reveal that a legal framework already exists relevant to the client's objective, but for

99. See HELEN XANTHAKI, DRAFTING LEGISLATION: ART AND TECHNOLOGY OF RULES FOR REGULATION 50–51 (2014); Robert Stutz, *The Legislature's Lawyers: Their Place and Their Challenges in the Bill-Drafting Process*, 37 MONT. LAW. 7, 9 (Oct. 2011).

some reason the current law is not working effectively. For example, perhaps a statute grants an agency discretionary authority to regulate an industry, but the legislature has not provided the agency with adequate financial resources or personnel to exercise that authority.

Whether drafting private or public law, the drafter must always take existing law into account, including relevant case law interpreting current statutes and regulations.

4. *Brainstorm Alternatives*

As the drafter researches the larger legal context and the parties' prior relationship, if any, the drafter should develop alternative strategies the client might not have considered, always keeping the client's overarching goals in mind.

In the example above, the drafter might suggest amending the statute that grants the agency discretionary authority to regulate the industry so that the statute will impose a duty to regulate. If the statutory amendment is successful, the agency will be in a better position to request adequate budget resources to carry out the regulatory program.

If asked to draft legislation for a new government program, the drafter might consider adding a "sunset provision" that would terminate the program after a set time unless the legislature amends the statute to extend the program or make it permanent. Or the drafter might consider establishing a pilot program in an appropriation bill, allowing the legislature to consider the merits of the program after one year before debating permanent substantive legislation.

In a private agreement, the drafter might suggest alternative wording or enforcement provisions that will protect the client if the other party attempts to avoid its contract obligations. If the agreement is designed to operate for the indefinite future, the drafter might suggest an initial term of short duration, subject to renewal if both parties agree, or renegotiation of the contract terms if they do not.

Any legal document is highly unlikely to be executed or enacted in a form identical to the drafter's final version. Contracts and statutes alike are always subject to negotiation and amendment before they become final. The drafter's efforts to brainstorm alternatives will provide the client with helpful information to facilitate the ne-

gotiation process that is inevitable in reaching an agreeable compromise with other parties and, for public laws, multiple constituencies.

5. *Consult with the Client to Fine-Tune Strategy*

Subject to any time constraints, the drafter should always discuss the results of the preliminary research and alternative strategies with the client before devoting too much time to drafting. If the drafter's research into a legislative proposal has disclosed legal or constitutional barriers, the client may decide to drop the matter or change course entirely. In researching a private agreement, the drafter may discover that a different jurisdiction's law would be more favorable to the client, or that the courts have interpreted a specific contract provision in a manner contrary to the client's objectives.

If the drafter has kept the client's overall goals in mind while doing the necessary background research, she should be well prepared to suggest other alternatives for the client to consider. The drafter's job is not to make the decision for the client, but to competently research alternatives and the pros and cons of each. A drafter will serve the client well by laying out workable strategies as well as their probable consequences so that the client can make an informed decision about which alternative to pursue.

Only after following each of these five steps will a drafter be adequately prepared to competently draft the document to achieve the client's goals.

C. *Multiple Audiences*

Identifying the audience for a drafted document might seem obvious. In the first instance, the audience for the draft is the client. But every legal document has multiple audiences, and that is especially true for statutes, ordinances, regulations, court rules, and other public documents. The audiences for every document are diverse and may include members of the public, consumers, in-house corporate counsel, judges, juries, and even law students.

For a private legal document, the parties to the transaction comprise the primary audience. Others who rely on the document, such as employees, accountants, beneficiaries, or subcontractors, make up the secondary audience. Still others constitute the "unexpected"

audience—those who might use the document in ways not anticipated by the drafter.¹⁰⁰ For example, an attorney may use the document as precedent for drafting another contract. Or if a party to a lease agreement later dies, the personal representative may use the document to establish a value on a leasehold interest for purposes of dividing the estate among the heirs.

Public law has an even broader and more diverse set of audiences. For example, an enactment's proponent might be an individual constituent who has a problem with a neighbor's fence, or a special interest group that represents hundreds of stakeholders. By its very nature, a public law's audience is as broad as its scope. Lawyers, judges, regulators, law enforcement personnel, and many others are prospective audiences for public law. Even those who never actually hear or read about the statute or regulation will be treated as if they have. Law enforcement officers, prosecutors, and courts presume that everyone is on constructive notice of the law.¹⁰¹ Thus, as a practical matter, an "unexpected" audience may not exist for public law. Instead, the audience is everyone.

Generally, the drafter can anticipate the nature of the primary and secondary audiences and how they may rely on the drafted document. Sometimes those interests conflict, but clear drafting meets all possible audiences' needs, anticipated or not, for rules that are easily understood.

D. Unforeseen Consequences

For private law, the drafter's primary goal is to translate the client's objectives into legal language that is clear, concise, and comprehensive enough to resolve any issue that the drafter can reasonably anticipate during the life of the parties' relationship. Some agreements have a short life, such as real estate sales contracts. While the relationship governed by a sales contract may have a short duration, the contract terms will continue to govern any disagreements about the bargain, especially if something goes wrong with the subject matter of the transaction. Other private rules govern ongoing business relationships, and for that reason the drafter may have a greater challenge anticipating potential disputes over the life of the agreement and drafting accordingly.

100. Karen Sneddon & David Hricik, *Three General Principles of Good Drafting*, 16 GA. B.J. 62, 63 (Oct. 2011).

101. See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("The familiar maxim 'ignorance of the law is no excuse' typically holds true.").

The parties to a contract are generally free to mutually agree to its terms. But a court will refuse to enforce contract provisions that are contrary to law or public policy. Classic examples include restrictive covenants in deeds that discriminate on the basis of race or religion, as well as non-compete clauses in employment agreements. Even one unenforceable clause in an otherwise enforceable contract poses a risk that the entire contract will be invalidated. Or a court might refuse to enforce the unlawful term and enforce the rest of an otherwise valid agreement, but only if the deficient term is not an essential part of the agreement.¹⁰² If a client requests provisions in a private agreement that are unenforceable, the drafter has a responsibility to advise the client about the risks and suggest appropriate alternatives.

In contrast to private rules, most public laws have an indefinite life. It is nearly impossible for the client or the drafter to anticipate every possible issue that may come up during the life of a public law. But the drafter has the professional responsibility to include provisions in the bill that will address those issues, to the extent reasonably possible.

Without careful research, planning, and revision, unintended consequences may defeat the client's objectives for even the most carefully drafted law. The greatest risk of an unintended consequence is that a court might invalidate the statute or rule as a whole. If the drafter has failed to identify and resolve possible constitutional challenges or federal preemption arguments, the entire statutory scheme may fail.¹⁰³ Or the court may sever an unconstitutional provision from the rest of an enactment and effectively amend the statute by enforcing the rest. Perfectly precise wording and immaculate organization will not save the legislation from substantive failure on constitutional or preemption grounds.

Similarly, the drafter must be familiar with the process for enacting the statute or issuing the rule, as explained earlier. Constitutional and statutory requirements for the form of a bill and the process for its enactment must be followed faithfully, or the legislation may never take effect in the first instance. When drafting proposed legislation, a full understanding of the jurisdiction's procedural and format requirements is essential. Some requirements are constitutional, but others are found in statutes. At the local level,

102. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 47–48 (1995).

103. State laws and local ordinances may be preempted not only by federal statutes, but also by federal regulations. See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

the form and process for adopting ordinances may be governed by a charter ordinance or by state statutes.

Proposed legislation or other public rules are frequently revised (before introduction) and amended during the deliberation process (after introduction). Every revision or amendment raises the risk that other aspects of the proposed rule will be inconsistent with the amendment, which in turn may raise contextual ambiguities that complicate how the law is interpreted or implemented.

The most common kind of unintended consequence for any drafted rule or instrument is litigation to resolve a dispute about its meaning or intended effect. While litigation may not ultimately change the meaning or application of drafted language, it always causes uncertainty, confusion, delay, and expense to the contract's parties and to everyone within the scope of a challenged public law. For the drafter, the most important measure of effectiveness is whether the parties governed by a drafted rule can resolve disputes by consulting the document's language, without resorting to litigation.

E. Career Advantages of Drafting Skills

An often-cited 1993 survey of practicing lawyers in both urban and rural areas identified legal drafting as one of the top five most highly valued professional skills in the practice of law.¹⁰⁴ Yet only sixteen percent of the respondents reported that they had learned legal drafting skills in law school.¹⁰⁵ Nearly eighty percent believed that law schools paid insufficient attention to teaching legal drafting skills.¹⁰⁶ The authors concluded,

Legal drafting is "legal." It can be taught in law school. But it has not been successfully incorporated into academic scholarship. We cannot point to a recognized legal theory or science [of legal drafting] that academics can invest in to promote their careers. The result is that, unlike negotiation and probably ADR, drafting has made very little progress in legal academia

104. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 477 tbl.3, 478 (1993).

105. *Id.* at 479 tbl.4.

106. *Id.* at 496 tbl.15, 501. The disparity had not substantially changed since a similar survey was conducted in the 1970s.

despite the admitted gap between what is taught and what the graduates ought to know.¹⁰⁷

More recent surveys have underscored the value of legal drafting skills in the practice of law.¹⁰⁸ In today's job market, a graduating law student who knows how to effectively draft legal rules has a distinct advantage.

F. Transferability

Many drafting skills are transferable across contexts. For example, a student who learns how to create duties in a contract is also learning the fundamentals of creating duties in a statute. The core skills are transferable, although the student must also learn skills uniquely relevant to specific kinds of legal rules and documents.

Although a few drafting concepts, such as representations and warranties, are unique to contracting, most parts of a contract are the equivalent of private legislation created by the parties to govern their transaction. In a contract, the parties make their own legally enforceable rules that, with few exceptions, trump the law's generally applicable rules.

Contract drafting and interpretation are everyday work for a large proportion of practicing lawyers. Even litigators engage in contract drafting. Most litigation ends in negotiated settlement agreements, which are contracts. They are drafted that way, and courts interpret them that way.¹⁰⁹ Litigators regularly interpret court rules and draft jury instructions, which are structured and interpreted in the same way as other legal rules. Other lawyers draft wills and trusts, both private instruments that incorporate rules to carry out the client's wishes for distributing assets.

Drafting and interpretation skills are especially transferable among public law documents. Statutes are legal documents that are collections of interrelated rules. A statute begins as a bill, which a legislative drafter writes. Every legislature employs lawyers who draft bills and amendments for introduction and debate. Many other lawyers work in state or federal administrative agencies,

107. *Id.* at 506. The authors identified "substantial gaps in what the recent graduates think could be taught in law school in the practical areas, including especially oral and written communication, and legal drafting." *Id.* at 508.

108. *See, e.g.*, Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 SCRIBES J. LEGAL WRITING 93, 104 (2012) ("no other skill vital to all lawyers is so much ignored in legal education").

109. *E.g.*, *Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195, 205 (2d Cir. 2016) (explaining that settlement agreements, like consent decrees, are construed as contracts).

county or city law departments, law firms representing local government clients, or law firms that draft legislation for clients to propose for enactment. Lawyers are often asked to consider legislative and administrative solutions to client problems. And to learn legislative and regulatory drafting is to learn more deeply how to interpret legislation and regulations, which all lawyers must understand.

Private organizations govern themselves and others through collections of legal rules drafted similarly to public legislation and regulations. Examples are bylaws for corporations, nonprofit organizations, homeowner associations, and industry associations, as well as private regulatory standards, including the ABA accreditation standards that govern law schools.

The heart of drafting is creating rules inside a legal document. Creating a rule involves both substantive decisions about which rule or rules will best accomplish the client's goals, and expressive choices about the most effective words to accomplish those results. Drafting also includes related provisions that are not rules per se, but are essential to a workable drafted document.

G. Why Lawyers Draft Badly

“Traditional legal language will be a long time dying.”

—Peter Butts¹¹⁰

For centuries, lawyers have been notorious for bad writing. Lawyers have an unfortunate reputation for long-windedness, legalese, hyper-technical expression, and convoluted sentence structure. A noted legal language scholar once characterized legal writing as wordy, unclear, pompous, and just plain dull.¹¹¹

Over the last fifty years, law schools have devoted much greater attention to objective and persuasive writing, and many law schools have added drafting courses. But the legal profession has yet to adopt a systematic method for drafting legal rules that can be easily understood by others.

One reason for lawyers' bad reputation for clear writing is that legal pleading predates literacy and the age of the written word.

110. PETER BUTTS, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE 3 (3d ed. 2013).

111. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 24–29 (1963).

From its beginning, legal pleading was steeped in an oral tradition.¹¹² As late as 1640, most English citizens were illiterate.¹¹³ Written pleadings were unknown in common law courts until the early 15th century, and they were not used routinely until the 16th century. Before then, pleadings written in Latin were more commonly used in chancery courts because of the influence of the educated clergy.

A second reason for the notoriety of English legal language is its evolution over the centuries as an amalgam of Old English, Latin, and French. Both the common law of England and the language of the law have “countless collateral relatives as well as a polyglot parentage.”¹¹⁴ Vestiges of the multilingual heritage of legal English remain with us today in redundancies such as “will and testament,” “devise and bequeath,” and “goods and chattels,” representing Old English, French, and Latin influences on legal language carried over from centuries ago.¹¹⁵

In medieval times, court proceedings regularly used “law Latin” and “law French” in lieu of English, which obscured the meaning of legal proceedings to the lay public. In 1362, the Statute of Pleading ordered all oral pleas in the King’s courts to be “pleaded, shewed, defended, answered, debated, and judged in the English tongue,” but all court documents still had to be written in Latin.¹¹⁶ Ironically, the Statute of Pleading itself was written in French. Lawyers resisted the mandate, generally ignoring the statute by continuing to use French, Latin, or a combination in what were then primarily oral court proceedings.

Not until 1650 did Parliament enact a statute that required all court proceedings, including written pleadings, to be in English. This time the reformers meant business. Anyone who violated the Act was subject to a £20 fine, a very substantial amount even for barristers in the mid-17th century. The Act also required all court reports, statutes, and other law books to be translated into English.¹¹⁷

Unfortunately, the bad writing habits lawyers adopted during that era are still all too common among lawyers today. They have been handed down from generation to generation through precedent and ancient form books. The way lawyers often write has a

112. *Id.* at 41, 116, 138–39.

113. DAVID CRESSY, LITERACY AND THE SOCIAL ORDER: READING AND WRITING IN TUDOR AND STUART ENGLAND 75–76 (1980).

114. MELLINKOFF, *supra* note 111, at 35.

115. *Id.* at 58.

116. *Id.* at 111–12 (quoting Statute of Pleading, 36 Edw. III, Stat. I, c. 15 (1362)).

117. *Id.* at 126–27 (quoting II Acts and Ordinances of the Interregnum 455 (1650)).

long and fascinating history, but the historical causes stopped mattering long ago. The world has changed. Clear, succinct legal writing is the modern norm, and clients expect lawyers to draft rules they can readily understand.

H. Legal Drafting and Legal Education

Only in the last decade have large numbers of students learned drafting skills in law school. Before that, drafting courses were offered infrequently, if at all.¹¹⁸ Nearly all lawyers have taken at least one *legal writing* course as part of their legal education. But among lawyers who graduated from law school more than a decade ago, very few ever took a *drafting* course.

Good drafters have advantages in the job market. The overriding purpose of a well-drafted contract, statute, or legal instrument is to prevent litigation. A new lawyer's marketability is greatly enhanced by understanding how to draft clear, cogent, concise rules that advance clients' objectives. And one of those objectives, whether explicit or implicit, is to avoid the uncertainty, delay, and expense of litigation. That is a drafter's ultimate professional duty.

V. BUILDING A RULE

"It is too bad that no one has yet invented a calculus for drafting."

—Reed Dickerson¹¹⁹

Most rules are created and expressed in a single sentence. A rule sentence is built around the operative term that specifies the type of rule and what it does.

A. Building a Duty or Discretionary Authority

The following steps are the easiest way to draft a rule creating a duty or discretionary authority. In some situations, however, these will not produce the rule you need, and you will have to build it differently.

Step 1 — Make the sentence's subject (the actor) the party or person who has the duty or discretionary authority.

The seller . . .

118. Dickerson, *supra* note 23, at 31–33.

119. Dickerson, *supra* note 1, at 20.

Step 2 — Add the operative term. For a duty, the term is usually *shall* or *shall not*, although in some situations you will use a different operative term. For discretionary authority, the operative term is usually *may*.

. . . *shall* . . . [duty]

. . . *may* . . . [discretionary authority]

Step 3 — After the operative term, concisely describe the duty or discretionary authority.

. . . *tender the goods* . . .

Step 4 — If the duty or discretionary authority is subject to a condition or test, add a clause concisely describing the condition or test.

. . . *if the buyer pays the purchase price.*

. . . *if the buyer offers a price acceptable to the seller.*

If you include a test or condition precedent—one that activates the duty or discretionary authority—try to express the condition in a clause beginning with the word *if*, as shown above. If the test or condition is an exception—one that deactivates the duty or discretionary authority—express the exception in a clause beginning with *unless* or *except*.

Do not place a clause introduced with *if*, *unless*, or *except* in the middle of a rule sentence. If you do, it will interrupt the operative words that create the duty or discretionary authority. Think of a condition as qualifying or limiting a duty or discretionary authority. Decide whether to place the clause at the beginning or the end. In making that decision, consider the following:

A condition precedent—an *if* clause—logically precedes the words describing the nature of the duty or discretionary authority. It is a condition “precedent” because it must be satisfied *first* before the duty or discretionary authority is activated. If the condition is met, the rule operates. If not, the rule has no effect.

An exception—an *unless* or *except* clause—logically follows the words describing the nature of the duty or discretionary authority. The rule is already active and will stay active unless the exception is satisfied, which deactivates it.

A short and simple condition precedent can be placed at the beginning of the rule. A more complicated one should be at the end, as shown in the example above, because a reader will better understand the rule if it is written that way. But an exception, however simple, is hard to understand unless the reader already knows the general rule. Placing an exception at the beginning usually forces the reader to read the sentence twice—once to figure out the main part (the general rule) and again to understand the qualification (the exception). For that reason, place an exception at the end of the rule sentence, unless it is so short and simple that it seems odd to place it there.

Condition precedent: *If the buyer pays the purchase price,*
the seller shall deliver the goods.

Exception: The seller shall deliver the goods,
unless the buyer fails to pay the
purchase price.

Why would a drafter decide to express a qualification as an exception rather than a condition precedent? In the examples above, they both seem to mean the same thing. But conditions and exceptions operate differently. A drafter may choose one or the other as a matter of strategy, depending on the client's goals. As explained on page 27, the party who wants to *activate* a rule must satisfy a condition, while the party who wants to *deactivate* the rule must satisfy an exception. When the drafter decides whether to write a condition or an exception to qualify a rule, the drafter effectively allocates the burden of persuasion among the individuals or entities within the rule's scope.

Most conditions can be expressed clearly in the same sentence that creates the duty or discretionary authority. But sometimes several conditions apply that are so complicated that they cannot be clearly expressed in the same sentence that creates the rule itself. In that case, the conditions might be expressed in a second sentence, or in very complex situations, several additional clauses or sentences.

B. Building a Declaration

Like duties and discretionary authority, declarations are usually created using a single sentence. But a declaration is not built the

same way as a duty or discretionary authority. Someone (the subject or actor) *has* either a duty to act or discretionary authority to act—some kind of action is required or authorized. That is not so with a declaration, which is simply a statement of what *is*.

Step 1 — Make the statement using the appropriate operative term—a present-tense verb. For a definition, use *means*.

Step 2 — If the declaration is subject to a condition or test, add a clause concisely describing the condition or test.

If the declaration’s condition or test is expressed in a clause beginning with *if*, *unless*, or *except*, the same considerations apply as when qualifying a duty or discretionary authority. But in a declaration, the drafter has other options for including a condition or test. Consider the following rule:

A person who takes another’s property wrongfully is guilty of common law larceny.

<i>declaration</i>	A person . . . is guilty of common law larceny
<i>test</i>	who takes another’s property wrongfully

The same declaration could be expressed in an *if* clause, but not as artfully:

A person is guilty of common law larceny *if he takes another’s property wrongfully*.

Using a male pronoun in the rule may suggest gender bias to some readers. On the other hand, substituting *she* when referring to the perpetrator also seems odd in this context. And it would be awkward to simply repeat “the person” in order to avoid the pronoun issue.

C. Revising the Rule Sentence for Clarity

Once you have the basic rule structure in place to accomplish your client’s goal, consider how to revise the rule for readability, clarity, and conciseness. You’ve built the rule structure; now it’s time to add the finishing details.

1. *Get the Reader to the Subject and Verb as Soon as Possible.*

An English-language sentence makes no sense until the reader finds the verb, preferably placed as close as possible to the subject. The verb brings everything together and reveals the sentence's logic. And the verb doesn't make much sense to the reader unless the subject is nearby.

When you try to figure out a long and complicated sentence written by someone else, you may have the feeling you are wading through glue. When that happens, you are looking for the verb—either consciously or subconsciously. Whether you realize it or not, that complex sentence begins to make sense when you've found both the verb *and* the subject. When a rule you have drafted seems too dense to be easily readable, figure out a way to move the subject and the verb closer to each other, and closer to the beginning of the rule.

2. *Use the Active Voice (Unless You Have a Very Good Reason to Use the Passive).*

In a sentence using active voice, the subject *acts*. In a sentence using passive voice, the focus shifts to the verb and the direct object of the action, rather than the subject who acts:

active Smith *drove* the car.

passive The car *was driven* by Smith.

In the passive example, the subject of the sentence is the car, and something was passively done (by Smith) to the car. In the active example, the subject is Smith, and he did something *active* to the direct object—he drove the car.

Here is what passive voice looks like in a statute or contract:

Improvements to the licensed design made after the effective date of this section must be disclosed within 10 days of an improvement.¹²⁰

Improvements made by whom? And who has the duty to disclose, and to whom? It's all a mystery. The reader feels confused, just like you probably felt when you read the sentence. Passive-voice

120. ME. LEGISLATIVE COUNCIL, MAINE LEGISLATIVE DRAFTING MANUAL 77 (2009).

sentences are frustrating to understand because the reader cannot instantly comprehend who (the subject) is doing what (the verb) to whom or what (the direct object). When the direct object becomes the focus of the action rather than the subject who acts, the reader gets lost.

To solve the reader's frustration, rewrite the sentence in active voice, using *shall* to denote the duty—and an *if* clause to clearly express the condition precedent:

If [the actor] makes an improvement to the licensed design after the effective date of this section, [the actor] shall disclose the improvement within 10 days.

Now consider another example. These two sentences appear together in a statute:

Each physician shall file the required statement with the department. Copies of each statement shall be made available to any interested person.¹²¹

In the first sentence, the physician has a duty and knows exactly what to do. But in the second sentence, who has the duty to make the statement available—the physician or the department? Both the physician and the department have copies after the physician complies with the duty to file. But neither one knows whether its copy must be produced. If you are an interested person, do you ask the physician for a copy—or do you ask the department? If the statute doesn't make that clear, everyone will be confused. If you ask the physician, she will tell you to go ask the department for a copy. If you ask the department, its employees will send you to the physician. If both refuse, what do you do next?

Even when a passive-voice sentence does identify who has the duty, it seems lifeless compared to active voice:¹²²

Passive: The required monitoring frequency may be reduced *by the commissioner* to a minimum of one sample analyzed for total trihalomethanes per quarter.

Active: *The commissioner* may reduce the required monitoring frequency to a minimum of one

121. FLA. SENATE, MANUAL FOR DRAFTING LEGISLATION 11 (2009).

122. Both examples are from MAINE LEGISLATIVE DRAFTING MANUAL, *supra* note 120, at 77 (emphasis added).

sample analyzed for total trihalomethanes per quarter.

Sometimes, you have no choice but to use the passive voice. For example, here the passive verb is the only way to get the reader to the verb quickly:

The application may be made by the prosecuting attorney of the county in which the offense was committed, the parole board, or the chief executive officer of the facility or sheriff of the county from which the person escaped.¹²³

3. *Place Modifiers Close to the Words They Modify.*

Misplaced modifiers are a very common source of ambiguity in drafted rules. To prevent confusion, place a modifying word—especially an adverb—as close as possible to the term it modifies.

For example, the following sentences all mean different things just by moving the modifier *only* to a different location:

The police may arrest **only** the person named in the warrant.
[*They aren't authorized to arrest anyone else—just that person.*]

The police may **only** arrest the person named in the warrant.
[*They aren't authorized to deport him, or do anything else but arrest.*]

Only the police may arrest the person named in the warrant.
[*Civilians aren't authorized to arrest—the police alone have that power.*]

A drafter's work requires precise use of words to avoid confusion that leads to litigation. If you do not know how to identify a modifier in a rule sentence, learn how from a good grammar book.¹²⁴ Professional drafters must understand the rules of the English language because all readers rely on them to comprehend legal rules.

123. MINN. OFFICE OF THE REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL 278 (2013).

124. *E.g.*, DEBORAH E. BOUCHOUX, ASPEN HANDBOOK FOR LEGAL WRITERS: A PRACTICAL REFERENCE (4th ed. 2017); ANNE ENQUIST, LAUREL CURRIE OATES & JEREMY FRANCIS, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (5th ed. 2017); RUTH ANN MCKINNEY & KATIE ROSE GUEST PRYAL, CORE GRAMMAR FOR LAWYERS (2d ed. 2011); JOSEPH M. WILLIAMS & JOSEPH BIZUP, STYLE: LESSONS IN CLARITY AND GRACE (12th ed. 2016); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005).

Courts generally assume that a modifier applies to whatever words *follow* the modifier, unless nothing follows it. If nothing follows—because the modifier appears *after* the last item in a list—courts assume that the modifier applies *only* to the last item on the list—the one that immediately precedes the modifier, and nothing else on the list. This is best known as the “last antecedent rule.”¹²⁵

If you want a modifier to apply to everything in a list, you have two alternatives. First, you could place the modifier at the list’s beginning and use wording or punctuation to make it clear to the reader that the modifier applies to the whole list. Your second alternative is to place the modifier at the end of the list with some punctuation or wording that plainly separates the modifier from the list’s last item. You want a court to understand clearly that the modifier applies to everything in the list, not just the last item. Edit for absolute clarity because ambiguity associated with modifier placement is a significant reason for litigation.

D. Formatting Rule Sentences

Many rules express complicated concepts. Many can be structured as lists. For example, every rule with elements or factors includes a list.

If a duty requires doing several things, the duty itself is a list. If someone has discretionary authority to do several things, the available alternatives may be expressed using a list of options stated in the alternative. Sometimes a rule includes a list within another list.

Legal rules are probably the most intricately organized form of verbal expression. (Classical music might be more intricately organized, but it is not expressed verbally.) The drafter has several techniques to organize collections of rules to make them more understandable to the reader.

1. Enumeration and Tabulation

Enumerating means identifying or marking items in a list using numbers or letters to distinguish each listed item from the others. In contrast, *tabulation* means arranging a list on the page to make the internal organization obvious.

125. See, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003))).

<i>no enumeration or tabulation</i>	Common law burglary is breaking and entering the dwelling of another in the nighttime with intent to commit a felony therein.
<i>enumerated but not tabulated</i>	Common law burglary is (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony therein.
<i>enumerated and tabulated</i>	Common law burglary is (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony therein.

When enumerating, lawyers enclose the number or letter in parentheses. It's a legal convention. Don't just add a single parenthesis, period, or other punctuation mark before or after the number or letter.

<i>right</i>	(1)		
	(a)		
<i>wrong</i>	1)	(1	1.
	a)	(a	a.

Parallel Wording in Lists. The wording of every item in an enumerated or tabulated list must be grammatically consistent with the wording of every other item in the list. If some items are complete sentences and others are not, redraft the list so that each one is a complete sentence, or none of them are. If some items include both a noun and a verb and others include only a noun, redraft the list so that all items include both a noun and a verb, or all of them are nouns without verbs.

Consistency between Words That Introduce the List and Each Listed Item. The wording that introduces the list, sometimes known as the "stem," must make sense grammatically when

read with each item in the list independent of the others. For example, if words introducing the list end with a verb, every item in the list that follows must grammatically qualify as an object of that introductory verb. To test your rule draft for this all-too-common problem, read the stem words together with each enumerated item on the list, without reading anything else. This is the best way to spot problems with syntax and parallelism in a list.

right The following personal property is not subject to tax in this state: (1) farm vehicles, (2) livestock, (3) growing crops, (4) boats and boating equipment used to harvest fish for commercial sale, (5) aircraft used to spray pesticides on field crops; and (6) greenhouses used to grow flowers and vegetables for commercial sale.

wrong Personal property in this state is not subject to tax if used for any of the following purposes: (1) farm vehicles, (2) livestock, (3) unharvested crops, (4) harvesting fish for commercial sale, (5) aircraft that sprays pesticides on field crops; and (6) greenhouses only if used to grow flowers and vegetables to sell.

The first example shown above correctly introduces the enumerated list by first referring to the general category of tax-exempt personal property. Accordingly, every numbered item on the list begins with a noun describing a particular category of personal property, and some also include descriptive modifying phrases. Each of the six listed items can stand alone with the introductory words, independent of the other enumerated items. For example,

The following personal property is not subject to tax in this state:
... (4) *boats and boating equipment* used to harvest fish for commercial sale

The following personal property is not subject to tax in this state:
... (6) *greenhouses* used to grow flowers and vegetables for commercial sale

The second example introduces the enumerated list “of the following *purposes*.” These words suggest that the list refers to various worthy purposes that warrant a tax exemption for personal property when used for those purposes. But the enumerated list in the

second example includes a number of nouns and phrases that do not qualify as “purposes,” as revealed by the following illustrations:

Personal property . . . is not subject to tax if used *for any of the following purposes*: . . . (3) unharvested crops

Personal property . . . is not subject to tax if used *for any of the following purposes*: (6) greenhouses only if used to grow flowers and vegetables to sell.

Neither “unharvested crops” nor “greenhouses,” qualify as *purposes* for using personal property. Rather, crops and greenhouses are specific kinds of *personal property*. For the enumeration to make sense, every item on the list must be written as an example of a purpose, not a thing.

Here is one way to redraft the second example so that each listed item is grammatically consistent with the introductory word *purposes*:

Personal property in this state is not subject to tax if used for any of the following purposes: (1) ~~farm vehicles~~ farming, (2) raising livestock, (3) ~~unharvested~~ harvesting crops, (4) harvesting fish for commercial sale, (5) ~~aircraft that sprays~~ spraying pesticides on field crops; and (6) ~~greenhouses only if used to grow~~ ing flowers and vegetables to sell.

By editing each of the enumerated items to include a gerund, the structural problem is resolved. Each of the six enumerated items follows logically when read in conjunction with the introductory words referring to *purposes*, and the rule’s parallel structure is much more clear and understandable after one reading.

E. Drafting Techniques That Should Become Part of Your DNA

Drafting is the art of creating rules wisely and expressing them perfectly. A rule can go wrong in two ways: A rule can be unwise in substance or imperfect in expression. Unwise rules accomplish little and create problems. Even if a rule is wise in substance, it will fail if expressed imperfectly.

The following drafting tips should become second nature to you. They should dominate your thinking throughout the drafting process.

1. *Think Like a Lawyer — Don't Just Imitate Noises You Assume Lawyers Make.*

Imitating is creating only an appearance or an illusion of lawyering. Good legal drafting requires using your brain to construct rules that get results. Clients pay lawyers to think, not to imitate.

2. *Say Precisely What You Mean — and Say It So Clearly That Everyone Will Know Exactly What You Mean.*

A drafter's first duty is to communicate precisely and clearly. If words can reasonably be interpreted two different ways, the words are ambiguous and the drafter has failed.

Some lawyers might say, "I don't need to worry about the fine points. Courts will be able to figure out what I mean." That is bad lawyering because a client will not want to pay the high cost of going to court to figure out what a rule means. If you have ever been a party to a lawsuit, you know that lawyers' fees and other court costs can be bank-breaking, and the disruption, uncertainty, and anxiety can be overwhelming for your client. You have a duty to your client to draft so clearly and so precisely that nobody can disagree about the meaning.

Every disputed issue about meaning costs money. If reasonable people can disagree about what your drafted words mean, they will litigate the issue if they believe it is in their interests to do so. Don't make the reader guess. If you do, your client will be unhappy with you, and for good reason. Litigation should never be necessary to resolve a drafted rule's meaning.

Your drafted rules must be so clear that everyone will know what you mean. Most people will do what is required of them—but only if they know what it is. The reader who wants to do the right thing should be able to learn from your drafting exactly what to do. And the reader who wants to do something unless it is prohibited should be able to understand clearly whether it is prohibited or not. Do not frustrate good people by failing to tell them what they need to know.

3. *Predict — and Draft Accordingly.*

Casebooks are about the past. Drafting is about the future. What events will happen in the future? What will people do? How will market conditions and technology change? You are drafting now to govern events in the future. If you do not foresee the future, your drafting will govern badly.

If you are drafting a statute, how will people react ten years from now to your words? How will courts interpret them? How will people change their behavior?

If you are drafting a contract, what could go wrong? If your client is buying an asset, what can you do now to increase the odds that the asset will work properly next year? If your client is concerned that the other party might want to get out of the deal next month, how can you draft now to make that outcome less likely? If your client might want out of the deal, how can you draft now for that possibility in case your client needs an escape hatch?

4. *Never Include a Provision without Knowing Why.*

Never put something in a statute or contract just because you saw it in a different statute or contract, and it looked good there. First, the provision you include might have caused a problem in the statute or contract where you saw it, and you might not know that. Second, the provision might have worked wonderfully in the statute or contract where you saw it, but because your situation is different, adding it without thinking might cause trouble.

For every provision you include, ask yourself exactly what you want it to accomplish. And decide how the provision or sentence accomplishes your client's goal. Know exactly what you are including and why. If you can't answer these questions, leave it out.

5. *Never Use a Word or Phrase Unless You Know Exactly What It Means.*

Assume that you are drafting a contract. You represent the buyer, and the seller has a duty to deliver the goods by June 19. When drafting the seller's duty, you throw in the words "best efforts." You have heard and read those words many times. They sound good when you hear them and look good when you write them. What could be better than "best efforts"? How can you go wrong by including them?

Including these words in your client's contract creates the risk of disaster. They do not *require* the seller to deliver by June 19. They require only that the seller *try very hard* to do it. If the goods have not been delivered to your client by June 19 and the seller points to your "best efforts" clause as an excuse for failing to deliver on time, your client will be understandably unhappy with you.

The lesson is to be absolutely sure you understand every word you include in your drafted document and why you put it there. Don't include window dressing just because it looks lawyer-like. It's

unprofessional to include words without carefully considering what they mean and what specific purpose they accomplish for your client's best interests.

6. *Find and Close Loopholes.*

Assume your client wants to buy a factory that was built in 1981. The original owner sold the factory to the current owner in 1988.

You and your client are concerned about the possibility that toxic materials have contaminated the premises. You are not worried about steel barrels with warning labels on them. Your client has examined the place thoroughly, and none can be found. Instead, you are worried about chemicals that might have been used in the past and that might have seeped into the soil, where they would be invisible. Under federal law, the property owner must pay the cost of removing toxic materials, which can be incredibly expensive. In some situations, the expense can bankrupt the owner.

The contract of sale has been drafted, but the parties have not yet signed it. The contract contains this sentence:

The Seller represents and warrants that it has not used any materials in the Factory that the law requires a property owner to abate at the owner's expense.

Find the loophole. It does not matter which party's lawyer drafted the sentence. The seller's lawyer might have inserted the loophole deliberately. Or if you drafted the sentence, you might have included the loophole by accident. The only thing that matters is that the problem sentence is in the contract, which the parties have not yet signed.

You still have an opportunity to advise your client not to sign until you have renegotiated the contract and redrafted the sentence to remove the loophole. But first, you must find it. How would you redraft the sentence to protect your client from bearing the expense of removing toxic materials once the sale closes?

Identifying loopholes is an essential drafting skill. It applies to public rules as well as private contracts. The loophole in the hypothetical above is the phrase that limits the seller's representation and warranty to materials the *seller* has used "*that the law requires a property owner to abate at the owner's expense.*" Just what does the seller mean by this clause? Imagine the federal statute referenced above that imposes a duty on the property owner to abate toxic materials. If you represent the buyer, you will try to interpret

the statute broadly to impose that statutory duty on the seller, to make sure your client is not responsible for the mitigation expenses after the sale closes, including mitigation costs for toxic materials that the *original* owner used. But if you represent the seller, you will look for a way to interpret the statute narrowly to impose the statutory duty on the buyer and to protect your client from paying those costs.

When drafting any legal rule, anticipate how someone might try to interpret your wording to find a loophole. Then redraft the rule to close the loophole.

7. *Draft Consistently.*

Inconsistency creates confusion and risks ambiguity. Confusion annoys and frustrates readers. Ambiguity can turn into a disaster if people end up going to court to resolve the ambiguity. This drafting principle has two corollaries:

- **Use exactly the same words to refer to the same thing.** Use identical words when referring to the same object, action, or idea in the same collection of rules. Never vary the wording. If you do, a court can assume that your different words mean different things—even if that’s not what you intended.
- **Never use the same word or phrase to mean two or more different things.** The flip side of the rule applies equally: Don’t use the same word or phrase in a collection of rules to mean one thing in one part and something else in another part. A court could interpret the same wording to mean that both parts of the document refer to the same thing—even if you intended to refer to different things.

8. *Use “Shall” for One Purpose Only — to Create a Duty.*

Never use *shall* to do anything else except create a duty. *Shall* means “has a duty to.” In drafted documents, it has no other acceptable meaning.

The most common error in drafting rules is using *shall* inappropriately. You have already observed that mistake many times when reading badly drafted statutes and contracts, but you probably did not understand why “shall” was used incorrectly.

Do not be fooled by what you see in existing documents, especially older ones. Most legislative drafting manuals now forbid the use of *shall* except to create a duty.¹²⁶

VI. CONCLUSION

“[T]he principles that apply to the drafting of legislation are, for the most part, the principles that apply to the drafting of any definitive legal instrument.”

—Reed Dickerson¹²⁷

Among the earliest of Professor Dickerson’s many textbooks offering excellent resources for teaching legal drafting was *The Fundamentals of Legal Drafting*.¹²⁸ In a 1966 book review, the author accurately observed that “there is hardly a legal problem that does not involve the drafting or interpretation of some legal document, be it a contract, will, statute, regulation, conveyance, lease, trust, indenture, or related form of written expression.”¹²⁹

We agree, and that statement is all the more true half a century later. Today’s law students will be engaged in law practice involving a much more sophisticated web of legal rules, addressing everything from global business transactions and trade negotiations to cross-national statutes and international treaties. The modern practice of law demands much more of lawyers than preparing traditional office memos and court briefs.

We hope these first few chapters of our forthcoming textbook will encourage the legal academy to offer a greater variety of legal drafting courses that teach students the essential lawyering skill of drafting legal rules of all kinds—both public and private. With great admiration and respect for the pioneering work of Professor Dickerson spanning more than five decades, we think he might be pleased with our modest contribution.

126. *E.g.*, TEX. LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL § 7.30 (2017), <http://www.tlc.state.tx.us/docs/legref/draftingmanual.pdf>.

127. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* xiii (1965).

128. *Id.*

129. James B. Minor, Book Review, *The Fundamentals of Legal Drafting* by Reed Dickerson, 44 TEX. L. REV. 588, 590 (1966). James B. Minor was a practicing lawyer who specialized in legislative drafting. He worked for many years for Congress and various agencies of the federal government and later worked in private practice. *James Minor Dies; Lawyer for Agencies*, WASH. POST, June 12, 1992 at D5. He chaired the ABA Special Committee on Legal Drafting from 1974 to 1978. *Id.*; see INTERNATIONAL SEMINAR, *supra* note 24, at 1 (listing James B. Minor as Committee Chair in 1975).

Experiential Learning and Assessment in the Era of Donald Trump

Jamie R. Abrams*

ABSTRACT

Law teaching is turning a critical corner with the implementation of new ABA accreditation standards requiring greater skills development, experiential learning, and student assessment. Years of debate and discourse preceded the adoption of these ABA Standards, followed by a surge in programming, conferencing, and listserv activity to prepare to implement these standards effectively. Missing from the dialogue about effective implementation of standards has been thoughtful consideration of how implementing these requirements will intersect with the challenges, realities, opportunities, and complexities of political divisiveness and polarization so prevalent in society and university campuses today.

Law schools are notably implementing these pedagogical reforms in a time of great political division. From the divisive presidential election, to police-community relations, to a worldwide refugee crisis, political discourse is contentious, polarized, and fraught with both risk and opportunity. University campuses have particularly been the sites of difficult discussions about race, politics, gender, and the very role of academic communities in these conversations. Students and faculty alike seem less capable than ever to manage these complex dynamics, yet true experiential learning and assessment requires us to move into the “eye of the storm” for courses with politically grounded content like legislation, among many others in the law school curriculum. The stakes are high. Faculty must engage students in more active learning with real-time feedback designed around realistic and timely simulations. Yet, they must do this in a

* Jamie R. Abrams (LL.M., Columbia University School of Law, 2011; J.D., American University Washington College of Law, 2002; B.A., Indiana University–Bloomington) is an Associate Professor of Law at the University of Louisville Louis D. Brandeis School of Law. The author thanks participants in the Fifth Annual Colonial Frontier Legal Writing Conference (Duquesne University School of Law, 2016) and Luke Milligan for feedback. The author extends a special thanks to Abigail Lewis and Jennifer Reynolds for their invaluable editing and research support.

time of great divisiveness in law, society, and politics. In this modern reality, both faculty and students alike may not be comfortable, prepared, or equipped to navigate these challenges without savvy techniques and methods.

This article discusses how law faculty might successfully implement experiential learning and assessment techniques with these modern dynamics in mind. It highlights a critical opportunity to transform our students into thoughtful problem-solvers and savvy lawyers. It identifies three critical components to a modern experiential learning course addressing topics of political relevance: (1) student-driven content, instead of faculty-driven content; (2) consistent and holistic student engagement, instead of sporadic or sequential engagement; and (3) vertically and horizontally structured feedback.

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I. INTRODUCTION

Legal education is at a crossroads implementing new American Bar Association (ABA) accreditation standards that require greater emphasis on and, accountability for, experiential learning, skills instruction, and formative assessment.¹ These pedagogical reforms push professors to simulate realistic lawyering in the field while assessing students throughout.² These reforms are launching in the context of some of the most polarized political dynamics in the nation's history.³ They are being imposed on students and faculty who are perhaps less equipped than ever to manage division and debate in the classroom. Missing from the implementation of these pedagogical reforms is discussion of how these standards will be implemented in this modern context and how faculty can do so successfully.

In any course addressing pressing and divisive current political topics,⁴ like legislation, experiential learning and assessment present notable considerations and challenges for the professor designing and implementing the course. Legislatures are arguably the epicenter of modern political divisiveness.⁵ Legislatures are wading

1. See generally ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015 (AM. BAR. ASS'N 2014) [hereinafter ABA STANDARDS] (setting forth new standards requiring law schools to establish learning outcomes, curricular standards, simulation experiences, and assessment standards).

2. See *id.* Standard 304(a) requires schools to establish substantial opportunities for students to have experiences “similar to the experience of a lawyer advising or representing a client.” *Id.* at 17.

3. *Political Polarization in the American Public*, PEW RESEARCH CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (noting that Democrats and Republicans are more divisive now than any point in the past twenty years); see also DIANA E. HESS & PAULA MCAVOY, *THE POLITICAL CLASSROOM* 21 (2015) (concluding that the political parties have “purified along ideological lines” in the last thirty-five years). Hess and McAvoy conclude that this polarization has occurred as a result of changing political strategies. *Id.* at 21. While political scientists debate *why* this polarization increased so dramatically rapidly, they agree that it is a “‘dance’ between economic factors and the behavior of politicians.” Paula McAvoy & Diana Hess, *Classroom Deliberation in an Era of Political Polarization*, 53 CURRICULUM INQUIRY 14, 26 (2013).

4. DIANA E. HESS, *CONTROVERSY IN THE CLASSROOM* 5 (2009) (defining “controversial political issues” as “authentic questions about the kinds of public policies that should be adopted to address public problems”).

5. See Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 396–97 (2009) (explaining that Congress will struggle to “assert its institutional prerogatives” as long as Congress is dominated by “party polarization”); *Partisan polarization, in Congress and among public, is greater than ever*, PEW RESEARCH CTR. (July 17, 2013), <http://www.pewresearch.org/fact-tank/2013/07/17/partisan-polarization-in-congress-and-among-public-is-greater-than-ever/> (noting that “Congress reflects an America that has been growing further and further apart ideologically for decades”).

into difficult and polarizing political and social issues, such as efforts to defund Planned Parenthood,⁶ ban refugees,⁷ regulate transgender bathroom use,⁸ reform criminal justice,⁹ regulate labor,¹⁰ raise the minimum wage,¹¹ address immigration,¹² and more. In this context, the stakes and risks of experiential learning and assessment can seem high and volatile for law faculty, particularly untenured faculty.¹³ Diana Hess calls this the “challenges of teaching in the tip” whereby certain timely issues, such as same-sex marriage, are sitting on a tipping point teetering between becoming closed or remaining open as a matter of public policy debate.¹⁴ This dynamic presents a dilemma: forge ahead with casebooks and historical or theoretical discussions about the field in the abstract or pivot toward simulations on current relevant issues that simulate modern lawyering in the field, but that raise pedagogical risks.

This article first considers the timing of pedagogy reforms implemented in a time of significant political shifts. It then considers how these reforms map on to a course like legislation with its own history of pedagogical reform. It then identifies three ways to approach experiential learning in courses handling potentially divisive political topics to walk the delicate tightrope between navigating more engaged and relevant classrooms with students and faculty who may not yet be equipped for thoughtful, balanced dialogue. This model includes: (1) student-driven content, instead of

6. See Defund Planned Parenthood Act, H.R. 3134, 114th Cong. § 3(a) (2015) (attempt by United States House to prohibit funding to Planned Parenthood Federation of America, Inc. for one year unless it promises not to perform any abortion services).

7. See Refugee Program Integrity Restoration Act, H.R. 4731, 114th Cong. (2016) (attempt by United States House to sharply restrict the number of refugees admitted into the country).

8. See Public Facilities Privacy & Security Act, 2016–3 N.C. Sess. Laws 1 (North Carolina act banning transgender people from using restrooms that do not match their sex assigned at birth).

9. See Sentencing Reform and Corrections Act, S. 2123, 114th Cong. § 1 (2016) (attempt by United States Senate to address over-incarceration concerns through reexamining sentences for low-level drug offenders and providing judges with greater discretion for sentencing low-level drug offenders while still targeting violent criminals).

10. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016, H.R. 3020, 114th Cong. (2016) (attempt by United States House to modify funding of the Department of Labor and other departments).

11. See Raise the Wage Act, S. 1150, 114th Cong. § 2(a)(1) (2015) (attempt by United States Senate to increase the minimum wage to \$12 an hour over the course of four years).

12. See Border Security Technology Accountability Act, S. 1873, 114th Cong. (2015) (attempt by United States Senate to strengthen accountability for border security technology).

13. See, e.g., Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 11 (2003) (noting that some professors are “nervous” about teaching courses like legislation).

14. HESS, *supra* note 4, at 124–25 (2009).

faculty-driven content; (2) consistent and holistic student engagement, instead of sporadic or sequential engagement; and (3) vertically and horizontally structured and assessed feedback.

II. COLLIDING COMPLEXITIES: A UNIQUE CLASH OF PEDAGOGY REFORMS AND POLITICAL SHIFTS

This section positions the new ABA accreditation standards in the context of legal education reforms generally. It then considers how implementation is grounded in unique political and social contexts. This political context is further layered on complex modern university dynamics. As we move toward providing more ongoing feedback to students and simulating the realities of law practice, particularly in a field like legislation, how will these reforms create unaddressed challenges, obstacles, and opportunities for law faculty?

A. *New ABA Accreditation Standards*

The new ABA accreditation standards reflect a “fundamental shift” in the delivery of legal education and curricular design,¹⁵ a “renaissance” of sorts.¹⁶ They communicate a “quantum shift” in educational delivery from an emphasis on teaching to an emphasis on learning and from an emphasis on inputs to an emphasis on outcomes.¹⁷

The ABA first published accreditation standards in 1921 to improve the competence of new lawyers entering the practice of law.¹⁸ Since then, the dominant approach for law school accreditation has traditionally focused on the “input” and “output” of law schools, both the resources invested and the bar passage rates and job placement data achieved.¹⁹ A handful of iconic publications in prior dec-

15. Anthony Niedwiecki, *Prepared for Practice? Developing a Comprehensive Assessment Plan for a Law School Professional Skills Program*, 50 U.S.F. L. REV. 245, 247 (2016).

16. David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1 (2015) (explaining that this “renaissance has been building and growing for the last two decades, but in the last few years it has truly begun to flourish”).

17. Cara Cunningham Warren, *Achieving the American Bar Association’s Pedagogy Mandate: Empowerment in the Midst of a “Perfect Storm,”* 14 CONN. PUB. INT. L.J. 67, 68 (2014).

18. *Id.* at 70.

19. *See id.* For a general historical account of the regulation and licensing of lawyers, see A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1961–2015 (2012) (explaining how legal education changed from private readings and office apprenticeships to stand-alone law schools to university law schools to the Langdell modern American law school founded in the Socratic tradition to the ABA’s centralized regulation).

ades had considerably nudged law schools toward curricular reform, but they had not formally modified the correlating accreditation standards governing law schools.²⁰ In 2008, the ABA's Section of Legal Education and Admissions to the Bar began reviewing its accreditation standards, a process which lasted six years until final approval in 2014.²¹

These reforms were well overdue in legal education, following implementation across other schools of higher education in recent decades.²² The historical model of teaching content and testing at the end is decisively outdated and ineffective.²³ No longer can schools measure their performance by looking at inputs; rather, schools must now establish and assess clear learning outcomes.²⁴ These reforms push law schools to modernize their curriculum toward preparing students for practice within a student-centered learning environment.²⁵ These reforms require a "fundamental change" to the delivery of legal education, including "a more comprehensive view

20. See generally AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (the "MacCrate Report"); WILLIAM M. SULLIVAN, ET. AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (the "Carnegie Report"); ROY STUCKEY, ET. AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) ("Best Practices"); Thomson, *supra* note 16, at 6–16 (providing background on each of these underlying documents).

21. See ABA STANDARDS, *supra* note 1, at v. The United States Department of Education recognizes the ABA's Section of Legal Education and Admissions to the Bar as the national accreditation body for law school J.D. programs. Warren, *supra* note 17, at 69–70. The review of the accreditation standards was preceded by the work of an Outcome Measures Committee that recommended the re-evaluation of accreditation standards to reduce reliance on income measures and shift toward greater reliance on measures that were outcome based, consistent with other educational reforms. *Id.* at 71.

22. Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & EDUC. 473, 475 (2015) (explaining how law schools historically distanced themselves from reforms occurring in other sectors of undergraduate and higher education). "Law schools now find themselves isolated: untethered from the profession, unmoored from higher education, and beset by unrelenting calls to reform." *Id.*; see also Niedwiecki, *supra* note 15, at 252–53 (noting that "[l]aw schools [are] one of the last educational institutions to focus on learning outcomes and assessment[s]"); Warren, *supra* note 17, at 77–78 (explaining that legal education is "arriving much [more than] fashionably late to the party"). See generally Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. UNIV. L.J. 225, 227–28 (2011) (describing the history of assessment-based learning and legal education's move toward it); Thomson, *supra* note 16, at 4 (explaining that experiential learning became popular in the mid-twentieth century).

23. Niedwiecki, *supra* note 15, at 255–57.

24. *Id.* at 249–50 (For example, schools, must now have a learning outcome to achieve competency for students in the "knowledge and understanding of substantive and procedural law" and assess performance of that outcome.).

25. Valentine, *supra* note 22, at 484–93.

of its curriculum and a more deliberate process of assessing students.”²⁶

In broad strokes, law schools must now set goals for specific learning outcomes, gather information about how well students are achieving those designated learning outcomes, and work to keep improving student learning toward competency.²⁷ The shift is one from assessing the delivery of legal education to assessing what “students take away from their educational experience.”²⁸

This article focuses on the experiential learning and assessment requirements particularly. Standard 301 requires law schools to establish and publish learning outcomes to achieve objectives for the program of legal education.²⁹ Standard 302 requires that a law school’s learning outcomes at a minimum include competency in:

- (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.³⁰

Law schools must also require all students to complete at least six credit hours of experiential learning courses.³¹ These experiential courses must be “primarily experiential in nature” and they must provide multiple opportunities for performance; provide opportunities for self-evaluation; develop the concepts underlying the skills being taught; integrate doctrine, theory, skills, and legal ethics; and engage student performance in the skills identified in 302.³² David Thomson, in the inaugural issue of the *Journal of Experiential Learning*, expands upon this circular definition to explain that these courses should help students “form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional

26. Niedwiecki, *supra* note 15, at 279.

27. See Warren, *supra* note 17, at 71.

28. *Id.*

29. *Id.* at 15 (Standard 301).

30. ABA STANDARDS, *supra* note 1, at 15–16 (Standard 302(d) skills may include things like “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.”).

31. *Id.* at 16 (Standard 303(3)).

32. *Id.* See generally Thomson, *supra* note 16, at 16–26 (2014) (expounding upon the circular definition of “experiential learning” as “primarily experiential in nature” provided by the ABA).

life-long learners of the law.”³³ This uniquely positions experiential learning courses with a “focus[] on the student experience not the faculty function,” with students positioned “in the role of attorneys,” helping students to develop an identity, and preparing students to “build their legal careers in the ever changing legal landscape of their future” as “life-long learners of the law.”³⁴

Many schools were previously offering some experiential learning opportunities, like externships, but they were often more segmented and unique to public interest and government lawyering, not systemic for all students or subject areas.³⁵ The challenge for law faculty in implementing these courses is finding a way to make these courses valuable for all students.³⁶ While public interest and government lawyers have historically seen a more direct connection between the tasks they perform in experiential settings and those as a practicing lawyer, traditionally the learning transfer for private lawyers has been “less direct or immediate” for existing experiential opportunities.³⁷

Standard 304 defines what simulation courses should include.³⁸ Simulation courses are one format for offering a qualifying experiential learning course, in addition to externships and clinics. These

33. Thomson, *supra* note 16, at 20.

34. *Id.* at 20–21. Professor Thomson offers the following questions to help faculty assess whether their courses meet the experiential learning requirement:

- “Other than the question-based format in a mostly lecture-based class, do you place students in the role of attorneys through problems or exercises where they act as attorneys—such as drafting documents or interacting with (for example) either assigned co-counsel or opposing counsel?”
- “If so, does your class design use this teaching technique regularly or primarily throughout the course?”
- “Do you include opportunities for student self-reflection (in writing) about the experience of being ‘in role’ so as to help them form their professional identities as lawyers?”
- “Is a substantial portion of the student’s grade in the course based on your evaluation of these exercises or learning opportunities?”

Id. at 22–23.

35. See Margarey E. Reuter & Joanne Ingham, *The Practice Value of Experiential Legal Education: An Examination of Enrollment Patterns, Course Intensity, and Career Relevance*, 22 CLINICAL L. REV. 181, 183 (2015) (noting that most clinics and externships have historically been in public interest and government settings).

36. See *id.* at 207 (noting that public interest and government lawyers valued experiential learning more).

37. See *id.*

38. See AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 2 (This resolution adopted Standard 304: “(a) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following: (i) direct supervision of the student’s performance by the faculty member; (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iii) a classroom instructional component.”).

courses do not involve a live client, but are “reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.”³⁹ As a practical matter, this is likely to include law schools converting relic skills classes, advanced courses, and non-bar classes over to “simulation courses.” These classes are logical fits for conversion. It is much less likely that doctrinal and bar courses will make this conversion because of the high enrollment and the high demands on faculty to cover substantial course material.⁴⁰

Law schools must also use both formative and summative assessment in their curriculum to gauge student learning and to provide effective feedback to students.⁴¹ No longer are schools to just deliver content, but rather schools should be developing learning outcomes and ensuring that students are competently meeting these identified outcomes.⁴² Historically, law school was largely assessed through an overreliance on summative assessment, which can hinder student development.⁴³ Summative assignments focus on evaluating student work as a snapshot summing up what students have done to date, but with minimal opportunity to improve after the grade is given.⁴⁴

The ABA’s modern shift is toward greater formative assessment. Formative assessment serves a different function than summative assessment. Rather than a snapshot, it is intended to be an iterative process to help students improve over the semester.⁴⁵ Formative assessment also helps faculty gauge student progress and adapt accordingly based on what is working and what is not.⁴⁶

Yet, in such a high-stakes culture and a culture in which studies show that forty percent of law school students are clinically depressed, formative assessment needs to be “mindful not to import

39. *See id.*

40. *See, e.g.,* Thomson, *supra* note 16, at 25 (providing examples of courses that would be primarily experiential in nature, including a “legislative drafting course, where students are representing an agency and several interest groups in simulated hearings and recursive drafting exercises”).

41. ABA STANDARDS, *supra* note 1, at 23 (Standard 314). *See generally* Niedwiecki, *supra* note 15, at 251–55 (describing the differences between summative and formative assessment and offering examples of effective forms of each).

42. *See generally* Valentine, *supra* note 22.

43. Olympia Duhart, *It’s Not for a Grade: The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom*, 7 ELON L. REV. 491, 496 (2015); Niedwiecki, *supra* note 15, at 252–54, 272 (explaining that students need feedback along the way).

44. *See, e.g.,* Duhart, *supra* note 43, at 497 (noting that the course is often over by the time students receive this summative assessment); Niedwiecki, *supra* note 15, at 251–52.

45. Duhart, *supra* note 43, at 497.

46. *Id.* at 498.

the overemphasis on grades from the familiar world of summative assessment or final exams.”⁴⁷ These opportunities may need to be lower stakes from the student perspective as compared to the typical final exam or midterm, positioning students to practice.⁴⁸ This is particularly so when students are engaging with politically relevant modern content. If students are engaged in hot topic projects like criminal justice reform, reproductive rights, immigration reform, and more, the prospect of the faculty providing critical formative feedback, as the project develops, requires that feedback be more thoughtful, careful, and savvy than ever. Yet, many faculty have spent their whole career providing only summative feedback that the students might never have read or engaged with at all.

The revised standards were not wholly embraced by the academe. They invoked a range of reactions from confusion to concern to skepticism, and hope.⁴⁹ Some protested that assessment mandates particularly are “threatening, insulting, intrusive, and wrong-headed.”⁵⁰ Others raised academic freedom concerns.⁵¹ Some worried that this shift might, in turn, trigger the revisiting of existing and longstanding tenure and promotion standards, which historically have focused much more squarely on scholarship.⁵²

Perhaps most significant to this article, others have emphasized the general lack of training, knowledge, or experience of law faculty in these types of experiential learning and assessment techniques.⁵³ Legal educators are particularly unstudied in the incredible developments in the learning sciences that have taken place in recent years.⁵⁴ Most law school professors are not trained formally as ed-

47. *Id.* at 493.

48. *Id.* (noting that these could include quizzes, group assignments, out-of-class assignments, and self-graded work).

49. Warren, *supra* note 17, at 104.

50. *Id.* at 78 (citing Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School near You—What You Need to Know About Learning Outcomes & Assessment*, 16 J. LEGAL WRITING INST. 605, 609 (2010)). See also Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457, 467–68 (2011).

51. Warren, *supra* note 17, at 78.

52. *Id.* at 79.

53. *Id.* at 78.

54. Judith Welch Wegner, *Symposium 2009: A Legal Education Prospectus: Law Schools & Emerging Frontiers, Reframing Legal Education's 'Wicked Problems'*, 61 RUTGERS L. REV. 867, 885 (2009) (explaining that the Carnegie Report was “deeply informed by developments in the learning sciences”).

ucators and any ongoing efforts at continuing education for law faculty are typically voluntary and minimal.⁵⁵ These reforms suggest that existing law faculty may not be optimally suited for delivering the new curriculum without development and training support.⁵⁶

During the transition period leading up to implementation, various conferences, tools, and resources proliferated to help prepare teachers and law schools to implement the new standards.⁵⁷ The American Association of Law Schools, for example, devoted its 2015 mid-year meeting to assessment and learning outcomes.⁵⁸ Law journals are likewise focused on assessment and teaching pedagogy in new ways.⁵⁹

Yet, the implementation is also occurring in the wake of tremendous economic upheaval in legal education generally. These revised standards notably occurred contemporaneously with a considerable decline in law school enrollment and a related critique of legal education more broadly.⁶⁰ Law schools are being forced to do more with less as resources are strained, enrollment drops, hiring stalls, and layoffs occur.⁶¹ Formative assessment also may call for the expenditure of more resources, whether financial resources or human resources, which is a critical component of the critique and the conversation.⁶²

55. Warren, *supra* note 17, at 79. See also HESS & MCAVOY, *supra* note 3, at 213 (noting that teaching as a profession more broadly does not have “a well-articulated ethic”). Educational resources generally are rarely forced to confront the “ethics” of professional teaching, as compared to other professions, such as medicine. *Id.*

56. See, e.g., Spencer, *supra* note 19, at 2051.

57. See, e.g., Patricia E. Salkin, *Learning from Experience: An Introduction to the Journal of Experiential Learning*, 1 J. EXPERIENTIAL LEARNING vii, xv (2015) (introducing a new journal on experiential learning to “share ideas, critique experimental reforms and look towards the future as we navigate a course in uncharted waters”); *Third National Symposium on Experiential Learning in Law*, New York Law School, June 10–12, 2016 (focusing on “how to identify and effectively assess experiential learning outcomes in the legal education context”).

58. See *Workshop on Measuring Learning Gains, Orlando, Fl.*, AM. ASS’N OF LAW SCHS. (June 22–24, 2015), https://www.aals.org/wp-content/uploads/2015/05/Midyear15_eBrochure.pdf (providing a link to the workshop description and summaries of the panels and presenters).

59. See, e.g., *Call for Papers — The Impact of Formative Assessment: Emphasizing Outcome Measures in Legal Education*, UNIV. OF GA. SCH. OF LAW (October 2016), <http://www.law.uga.edu/calling-all-papers/node/473> (announcing a symposium to be held at the University of Detroit Mercy School of Law).

60. Spencer, *supra* note 19, at 1951–52 (explaining that legal education is “under attack,” with critics questioning the declining job market, rising student debt, and lack of practice readiness); Warren, *supra* note 17, at 80–81 (explaining a “perfect storm” in legal education in which enrollment has hit a forty-year low).

61. Warren, *supra* note 17, at 81.

62. See generally, Louis N. Schulze, Jr., *Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie*

Various scholars and observers have described the state of legal education as something of a “perfect storm” of conditions.⁶³ If the existing economic and professional conditions have led to a “perfect storm,” then the next section adds one more weather condition to that storm. The next section considers how the revised ABA Standards are being implemented in the context of great political divisiveness and unique university dynamics. These are both cause for worry, but also cause for opportunity, as discussed below.

B. Implementation in the Context of Political Divisiveness

Missing from the debate and preparedness for implementation is thoughtful consideration of the context in which these reforms are to be implemented. Implementing these reforms amidst political divisiveness and compromised civil discourse makes the context more challenging and unique.

Unrelentingly divisive politics seem to be the hallmark of modern times.⁶⁴ Meaningful civil discourse about political issues seems fleetingly rare, if not impossible, in professional and social circles alike. Some political scientists frame political discourse as less civil than ever. The political climate is dominated by confrontation, instead of cooperation.⁶⁵ Some studies have demonstrated increased party polarization and issue attitudes particularly for “wealthier and politically sophisticated voters.”⁶⁶ “Polarization” describes the state of extremism by partisan and ideological lines, which creates an “institutional paralysis” and “representational imbalance” in governance.⁶⁷ It reflects a divisiveness that exceeds ordinary politics, causing “dysfunctional politics.”⁶⁸

Report and Best Practices, 40 CAP. U. L. REV. 1, 1 (2012) (noting that “[e]ven the most forward-thinking reformers” will “struggle with the details of how to implement many of the recommendations”).

63. See, e.g., R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428, 429 (2014) (describing legal education in turmoil or crisis); Spencer, *supra* note 19, at 1952–53 (“Thus, we have what appears to be a perfect storm in legal education. . . .”) (quoting DAVID I. C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* 11 (2009)).

64. HESS & MCAVOY, *supra* note 3, at 8 (“Scholars have established that the United States is currently polarizing once more, causing a reevaluation of fundamental principles, especially with respect to the role of the government in individuals’ lives.”).

65. See Mahamat K. Dodo, *My Theory on the Trump’s Phenomenon. Why Donald Trump? And Why Now?*, 7 J. ALTERNATIVE PERSP. SOC. SCI. 593, 609–10 (2016).

66. Delia Baldassarri & Andrew Gelman, *Partisans without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 408 (2008).

67. POLARIZED POLITICS: THE IMPACT OF DIVISIVENESS IN THE US POLITICAL SYSTEM 1 (William Crotty ed., 2016).

68. *Id.*

The result of polarization is that the political system becomes stuck in a “continual loop in which the system over represents and responds most directly to the resources of those who have established themselves as the most economically powerful in the political culture,” leaving the mass citizenry on the periphery.⁶⁹ These accounts, if true, threaten pluralistic political systems.⁷⁰

We live in red states or blue states or on blue islands in red states or on red islands in blue states. Individuals sort themselves into spaces both online and geographically with people who agree with them. This might promote individual happiness, but it is ultimately compromising to political discourse.⁷¹ This creates further obstacles in the context of interpersonal communications.

And the powerful role of social media is changing political discourse for both professors and students. Social media can compromise the diversity of exposure to differing perspectives that users experience online. While the exchange of differing views is generally good for discourse and society, modern technology can both foster this interaction and also divert away from it.⁷² Social networking sites offer new spaces for political communication and with each recent presidential election this has been a more and more effectively utilized tool.⁷³ Yet, online patterns reveal that users cluster around other users who share their homogenous views so that social media serves to “reinforce in-group and out-group affiliations.”⁷⁴ Faculty and students alike, thus, isolate themselves to “political bubbles” or “ideologically homogenous environments.”⁷⁵ Facebook

69. *Id.*

70. Baldassarri & Gelman, *supra* note 66, at 408.

71. *See, e.g., Life in the Wrong Political Bubble*, SCI. FRIDAY (July 22, 2016), <https://soundcloud.com/scifri/life-in-the-wrong-political-bubble> (profiling University of Illinois–Chicago psychology professor Matt Motyl’s research on this topic).

72. Itai Himelboim, Stephen McCreery & Marc Smith, *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMM. 154, 156 (2013). Support for exposure to “cross-ideological opinions” has long been celebrated in political discourse from John Stuart Mill’s famous quote: “[I]f the opinion is right, they [people] are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.” *Id.*

73. *Id.* at 157 (documenting an increase in the use of social networking sites from 2006 to 2008, thus creating a new online political sphere).

74. *Id.* at 168. *See also id.* at 167 (explaining that “[p]olitically active voices, particularly younger voters, who use the Internet to express their opinions are moving away from neutral news sites in favor of those that match their own political views”). Moving in ideologically homogenous communities creates “aversion” to political conflict, which can reduce engagement overall. HESS, *supra* note 4, at 21.

75. HESS, *supra* note 4, at 20 (explaining that Americans have clustered in the past three decades in “communities of sameness, among people with similar ways of life, beliefs, and in the end, politics”). *See also id.* at 12 (noting that there is “mounting evidence that relatively few people in the United States currently engage in such political talk and the trend is clearly

news feeds, for example, position its users in an “echo chamber” as a combination of algorithms and human behavior that compromises engagement with differing views.⁷⁶ This “dampens the appetite for a wide range of political views,” which is “undeniably dangerous for a democracy” because of the ways it hardens opinions and breeds intolerance.⁷⁷

Donald Trump’s emergence on the national political stage has both leveraged this divisive polarization and fanned it.⁷⁸ He has built his brand and appeal on this political polarization.⁷⁹ Some commentators attribute Donald Trump’s emergence directly to “political gridlock” and “dysfunction.”⁸⁰ He has “astutely tapped into those social, cultural, and economic anxieties that millions of Americans feel unease and are angry about.”⁸¹ At least in terms of rhetoric, some political scientists have described Donald Trump as deploying the most inflammatory, brazen, and polemical tactics of any candidate in modern times.⁸² His rise on the political scene and the politics that he represents uniquely define the times that shape the implementation of real-world simulations in a course like legislation, but also the obstacles presented to achieve effective experiential learning and assessment in law school more broadly.

Others have responded by challenging this factual premise of polarization and suggesting that calls for more civil discourse are worrisome for other constitutional or political reasons.⁸³ These accounts argue that the request itself for more civil discourse is a form of discourse that is not neutral or apolitical, but a tactic deployed by mainstream, dominant voices.⁸⁴ Neither these factual assertions, nor the competing responses, are necessarily new to political

moving in a non-deliberative direction”). See generally NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLITICAL BUBBLES* (2015).

76. See, e.g., John Bohannon, *Is Facebook keeping you in a political bubble*, AM. ASS’N FOR THE ADVANCEMENT OF SCI. (May 7, 2015, 2:00 PM), <http://www.science-mag.org/news/2015/05/facebook-keeping-you-political-bubble>.

77. HESS, *supra* note 4, at 21.

78. See Dodo, *supra* note 65, at 609–10.

79. *Id.* at 609.

80. *Id.*

81. *Id.*

82. See, e.g., Scottie Lee Myers, *Trump’s Divisive Rhetoric Unparalleled in American Political History*, *Presidential Historian Says*, WIS. PUB. RADIO (Oct. 17, 2016, 1:00 PM) (explaining that the United States has seen plenty of periods of discord, but Trump’s demeanor and rhetoric are different than any others).

83. See generally Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375 (2012) (analyzing data about incivility).

84. See generally Bernard E. Harcourt, *The Politics of Incivility*, 4 (Chi. Pub. Law & Legal Theory Working Paper No. 377, 2012), <http://ssrn.com/abstracts=2020679>.

debate,⁸⁵ but they are at a heightened level of public scrutiny now, providing important context that is relevant to successful implementation of the revised ABA accreditation standards.⁸⁶

Importantly, the complexities raised in this section are both challenges and opportunities. From the 2016 presidential election, came a renewed conversation about political engagement and discourse.⁸⁷ Renewed calls for greater listening, understanding, and learning have also been raised.⁸⁸

C. *Modern University Dynamics*

Universities are not immune from the complexities of this modern divisiveness either.⁸⁹ From the ouster of the University of Missouri's President to divisive campus debates, universities struggle with modern debates about politics, diversity, and political agendas.⁹⁰ In 2016, one way in which this tension particularly manifested on university campuses throughout the country was in the

85. See HESS & MCAVOY, *supra* note 3, at 22 (noting that other periods of great polarization occurred before the stock market crash of 1929 and after World War II).

86. See generally John P. Hoffman & Alan S. Miller, *Denominational Influences on Socially Divisive Issues: Polarization or Continuity?*, 37 J. FOR SCI. STUDY RELIGION 528 (1998) (positioning the debate about increased polarization starting in the mid-nineties).

87. One study of citizen behaviors in Britain and the United States, for example, revealed that thirty percent of Americans and fifty percent of British citizens are "silent citizens." HESS, *supra* note 4, at 19. There is stronger support for the ideal of engaging in political issues. *Id.*

88. See, e.g., RGJ Editorial Board, *Our View: Get out of your political bubble*, RENO GAZETTE-J. (Nov. 14, 2016, 9:03 PM), <http://www.rgj.com/story/opinion/editorials/2016/11/12/view-get-political-bubble/93604722/> (concluding that Americans are not so far apart on policy, but have come to reinforce biases against the other side).

89. See, e.g., Sam Marcossan, *Defending UofL law school's compassion project*, COURIER-J. (Jan. 18, 2016, 3:02 PM), <http://www.courier-journal.com/story/opinion/2016/01/15/defending-uofl-law-schools-compassion-project/78865704/>; Luke Milligan, *UofL law school is no longer neutral*, COURIER-J. (Jan. 17, 2016, 4:11 PM), <http://www.courier-journal.com/story/opinion/2016/01/13/commentary-uofl-law-school-no-longer-neutral/78655014/>; Russell L. Weaver, *U of L law professor: 'Veered to partisan agenda'*, COURIER-J. (Jan. 19, 2016, 1:26 PM), <http://www.courier-journal.com/story/opinion/2016/01/16/uofl-law-professor-veered-partisan-agenda/78903362/>.

90. See Chris Kenning, *Ramsey sombrero photo sparks outcry, apology*, COURIER-J. (Oct. 30, 2015, 8:47 PM), <http://www.courier-journal.com/story/news/local/2015/10/30/ramsey-sombrero-photo-sparks-criticism/74825480/> (former President of the University of Louisville, James Ramsey, dressed in a stereotypical sombrero and poncho while staffers shook maracas, female staffers wore mustaches and beards, and male staffers wore mantillas, sparking criticism); Susan Svrluga, *U. Missouri president, chancellor resign over handling of racial incidents*, WASH. POST (Nov. 9, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/missouri-student-government-calls-for-university-presidents-removal/> (former President of the University of Missouri, Tim Wolfe, resigned in response to student protests accusing Wolfe of mishandling racist and bigoted incidents).

frequency of campuses issuing “disinvitations” to speakers previously invited to address the campus community.⁹¹ These cancellations were particularly informed by political divisiveness. California State Los Angeles, for example, cancelled Ben Shapiro’s speaking engagement because Shapiro opposed trigger warnings, safe spaces, and the Black Lives Matter movement.⁹² These cancellations were sparked particularly by student uprisings and protests.⁹³ In a letter the New York Times described as a “rebuke” to such protests on college campuses,⁹⁴ the University of Chicago issued a welcome letter to incoming students in 2016 informing them that “it is not the proper role of the university to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”⁹⁵

Immediately after Trump’s election, campus tensions and hostilities escalated. From hateful graffiti, to targeted comments, and offensive social media posts, the post-election campus tensions along the lines of race, sexuality, gender, and immigration status

91. See Abby Jackson, *‘Disinvitations’ for college speakers are on the rise—here’s a list of people turned away this year*, BUS. INSIDER (Jul. 28, 2016, 1:09 PM), <http://www.businessinsider.com/list-of-disinvited-speakers-at-colleges-2016-7> (citing Brown University, California State University at Los Angeles, University of California at Berkeley, University of Chicago, George Washington University, Trinity College, Hampshire College, University of Pennsylvania, Virginia Tech, and Williams College as examples); Susan Svrluga, *A conservative speaker was uninvited from campus. And then re-invited*, WASH. POST (Oct. 23, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/10/23/a-conservative-speaker-was-uninvited-from-campus-and-then-re-invited/> (explaining how Suzanne Venker was disinvited to speak about how feminism has failed after students complained, but was then eventually reinvited by the club “Uncomfortable Learning”).

92. Josh Logue, *Another Speaker Blocked*, INSIDE HIGHER ED. (Feb. 24, 2016), <https://www.insidehighered.com/news/2016/02/24/cal-state-los-angeles-cancels-conservative-speakers-appearance> (noting that he could speak at a later time). See also Susan Svrluga, *Williams College cancels a speaker who was invited to bring in provocative opinions*, WASH. POST (Feb. 20, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/02/20/williams-college-cancels-a-speaker-invited-as-part-of-a-series-designed-to-bring-in-provocative-opinions/?utm_term=.b73615f916c5 (explaining that Williams College canceled a speaker due to hateful speech about race).

93. See, e.g., Jennifer Kabbany, *Public university cancels conservative speaker after liberal students protest*, THE COLL. FIX (Feb. 23, 2016), <http://www.thecollegefix.com/post/26350/>.

94. Richard Perez-Pena, Mitch Smith & Stephanie Saul, *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES (Aug. 26, 2016), https://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html?_r=0 (The Student Body President countered that this letter was “based on the false narrative of coddled millennials.”).

95. *Id.* (quoting the letter’s declaration that “we do not support so-called trigger warnings, we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with their own”).

were volatile and contentious.⁹⁶ Some universities offered supportive resources and gatherings for students to discuss these events.⁹⁷ These efforts then swiftly suffered their own wave of mockery and criticism.⁹⁸ College campuses thus find themselves in modern times under the microscope, struggling to manage a volatile combination of free speech, student safety, diversity, and inclusion.⁹⁹

The potential for polarizing conflict entering the law classroom thus presents a risky environment for law faculty simulating real-world lawyering that is worthy of further discussion and strategizing. Faculty overall are reluctant to actively resolve classroom disputes, even when they perceive these disputes to be disruptive.¹⁰⁰ Some faculty might fear negative course evaluations for engaging students on difficult issues. Or worse, some faculty might fear adverse employment consequences.¹⁰¹ At a minimum, faculty members are ill-equipped to handle this type of conflict and have had little to no training in doing so.¹⁰²

Students, in turn, are not universally equipped with the language, savvy, or strategies to engage with each other on relevant, pressing, divisive topics. Some students have suffered adverse academic consequences, such as expulsion, for inappropriate conduct

96. See, e.g., Caitlin Dickerson & Stephanie Saul, *Campuses Confront Hostile Acts Against Minorities After Donald Trump's Election*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/police-investigate-attacks-on-muslim-students-at-universities.html> (chronicling events occurring on college campuses after the election).

97. Karen Sloan, *For Law Students Upset About Trump Win, Schools Lend Support*, NAT'L L.J. (Nov. 10, 2016), <http://www.nationallawjournal.com/id=1202772114898/For-Law-Students-Upset-About-Trump-Win-Schools-Lend-Support?slreturn=20170215134649>.

98. Dickerson & Saul, *supra* note 96.

99. See, e.g., *id.*

100. Steven A. Meyers, *Strategies to Prevent and Reduce Conflict in College Classrooms*, 51 COLLEGE TEACHING 94, 94 (2003).

101. See, e.g., Conor Friedersdorf, *Stripping a Professor of Tenure Over a Blog Post*, THE ATLANTIC (Feb. 9, 2015), <http://www.theatlantic.com/education/archive/2015/02/stripping-a-professor-of-tenure-over-a-blog-post/385280/>; Scott Jaschik, *Banned From Campus*, INSIDE HIGHER ED. (Sept. 6, 2016, 3:00 AM), <https://www.insidehighered.com/news/2016/09/06/northwestern-bans-professor-campus-and-faculty-members-split-whether-move-justified> (describing conflicting views regarding the termination of a Northwestern Professor whom some say was fired due to safety concerns and fears, while she argues that it was for her activism against deportations and private prisons).

102. Allie Grassman, *Preparing Professors to Teach*, INSIDE HIGHER ED. (Oct. 15, 2010), <https://www.insidehighered.com/news/2010/10/15/mit> (highlighting how many doctoral students anticipating a teaching future are now also looking for teaching programs and certifications).

and comments.¹⁰³ Other students have been targeted, harassed, and marginalized on campus for their identities or beliefs.¹⁰⁴

Of course, the complexities of divisiveness are not new,¹⁰⁵ but its intersection with evolving pedagogical techniques in law is contemporaneously unique. It is in this distinct political context that law schools are phasing in experiential learning requirements, assessment standards, and greater skills development. Successful implementation will accordingly require that more thoughtful and conscious consideration be given to the techniques that will implement these standards most effectively given modern political realities.

And existing law school pedagogy actually reinforces this distance and remoteness, marking an even starker transition. Existing law school pedagogy in the case-based tradition has been long criticized for tearing “the law from its social context” and for “extract[ing] from the living human beings whose struggles for advantage and for justice were what the law was really about.”¹⁰⁶ Simulation courses re-align law school experiences in a more engaging way that is responsive to this “remoteness” critique, but require adjustments and paradigm shifts for students and faculty alike.

Given these modern realities, converting a course that is politically grounded, like legislation, to a simulation course may reveal perils, challenges, and opportunities not previously considered. Avoiding political or divisive topics, as many professors have done historically in their course content selection, risks distorting the

103. See, e.g., *Orange Coast College Student Threatened with Expulsion After Recording Professor's Anti-Trump Tirade*, CBS LOCAL L.A. (Dec. 8, 2016, 11:47 PM), <http://losangeles.cbslocal.com/2016/12/08/orange-coast-college-student-threatened-with-expulsion-after-recording-professors-anti-trump-tirade/>; Justin Sayers, *U of L cheerleaders suspended for election posts*, COURIER-J. (Nov. 10, 2016, 3:02 PM), <http://www.courier-journal.com/story/news/local/2016/11/10/u-l-cheerleaders-suspended-election-posts/93582374/> (describing the suspension of University of Louisville cheerleaders following tweets on election night).

104. See, e.g., Hatewatch Staff, *Over 200 Incidents of Hateful Harassment and Intimidation Since Election Day*, S. POVERTY LAW CTR. (Nov. 11, 2016), <https://www.splcenter.org/hatewatch/2016/11/11/over-200-incidents-hateful-harassment-and-intimidation-election-day> (calculating from news reports, social media, and direct reports and spanning anti-Black, anti-woman, and anti-LGBT incidents). Many of these incidents occurred in educational settings. *Id.*

105. See, e.g., Steven C. Bahls, *Political Correctness and the American Law School*, 69 WASH. U. L. REV. 1041, 1041 (1991) (describing a “rising hegemony” of the Politically Correct within the academy”) (quoting Richard Bernstein, *Academia's Fashionable Orthodoxy: The Rising Hegemony of the Politically-Correct*, N.Y. TIMES, Oct. 28, 1990, § 4, at 1); POLARIZED POLITICS, *supra* note 67 (noting that “conditions of polarization in [American] politics have been present for over a generation, increasing in emotion and intensity and in effectiveness in shaping issue outcomes as the years pass”).

106. David R. Barnhizer, *Redesigning the American Law School* 9 (Cleveland-Marshall Legal Studies, Working Paper No. 09-182, 2009), <http://ssrn.com/abstract=1516468> (quoting Max Lerner).

goals of experiential learning and compromising our students' abilities to problem solve and engage in the real world to which they will graduate.¹⁰⁷ Yet, on the other hand, for faculty to compel a captive audience classroom to engage in simulations uniquely designed around the professors' interests is also worrisome and risks "reify[ing] the behaviors and values of polarization [in] structuring courses."¹⁰⁸ A class like legislation is an effective one to consider because of the pedagogical history of the course and the imperative of political relevance that this course carries.

III. THE LANDSCAPE OF LEGISLATION PEDAGOGY

A. *Curricular Reform as "Ground Hog Day"*

While this section looks particularly at the history of legislation pedagogy, it suggests that the quest to redesign any course offering to meet the ABA Standards builds on a legacy of course development in that field that may be worthy of further examination. For a legislation course, but not uniquely a legislation course, experiential learning and assessment pose difficult questions about how law faculty should best expose students to simulations and experiences that prepare them for practicing in such divisive conditions. For simulations to take head-on the challenges of lawmaking in a world heavily dominated by religion, ideology, identity, partisanship, etc. is to enter into thorny territory for law professors and students alike.

Using Legislation as a course example to consider how and why this contextual conversation might matter, this section explores the unique background of pedagogy development in a field like legislation to consider how to implement a simulation course. In perhaps no other class than legislation is it more important to position the academic classroom against the backdrop of real world experiences.¹⁰⁹ Legislation courses reveal a "political education paradox"

107. HESS & MCAVOY, *supra* note 3, at 6 (explaining that "how to [deliberate political issues] is a pedagogical challenge, in part because classrooms are unusual political spaces"); *see also* HESS, *supra* note 4, at 24 ("Many adults either want schools to mirror their ideas or fear that adding controversy to the curriculum *creates* controversy, as opposed to simply teaching young people how to deal more effectively with the kinds of political controversies that exist outside of school.").

108. HESS & MCAVOY, *supra* note 3, at 28. "[U]nlike adults in other public spaces, students are not able to easily exit situations that they find uncomfortable or offensive." *Id.* at 6. *See also* HESS, *supra* note 4, at 6 (2009) (avoiding controversial issues "send[s] a host of dangerous and wrongheaded messages").

109. *See* William Hurst, *The Content of Courses in Legislation*, 8 U. CHI. L. REV. 280, 284 (1941) ("But for the student[s], questions and notes are relatively barren unless set against

by which faculty need to provide students with a balanced education, while preparing them to participate in an ideological and divisive context.¹¹⁰

Conversations about how to successfully teach a law school legislation course might seem a bit like the popular film *Groundhog Day*.¹¹¹ The course has raised perpetual and longstanding pedagogical challenges.¹¹² A 1949 book review in the *Yale Law Journal* perhaps said it best that “[u]nless the instructor knows what he is after and keeps a firm grip on the material, a course in legislation is likely to wander almost anywhere and hence arrive nowhere.”¹¹³

Decade to decade, scholars continue to revisit the questions of whether to require a course in legislation, what content properly belongs in a legislation course, what materials are best suited for legislation.¹¹⁴ Legislation courses have always played a unique and often clunky role in law school curricula. Is it a first-year course or an upper-level course?¹¹⁵ Is it a doctrinal course or a skills course? Is the course about the political processes that led to a law’s enactment?¹¹⁶ Is it about interpreting and understanding legislative enactments as a matter of statutory interpretation?¹¹⁷ Is it about the

a rich record of legislative experience in a field such as this, where expertness must be sought not in terms of formulae but of trained intuition.”)

110. HESS & MCAVOY, *supra* note 3, at 4 (explaining that “[p]art of the ethical challenge of teaching about politics is determining where political education ends and partisan pro-stelyizing begins”).

111. GROUNDHOG DAY (Columbia Pictures 1993). *Groundhog Day* has become a slang term in society to refer to an unpleasant situation that keeps repeating like Bill Murray’s character who is stuck in the same day: Groundhog Day.

112. Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 174 (2008).

113. Thomas I. Emerson, *Book Review: Cases and Other Materials on Legislation*, 58 YALE L.J. 1414, 1414 (1949) (reviewing HOWARD E. READ & JOHN W. MACDONALD, CASES AND OTHER MATERIALS ON LEGISLATION (1948)).

114. See generally Hurst, *supra* note 109 (describing the challenges of positioning legislation in the law school curriculum); Leib, *supra* note 112, at 181–88 (explaining that approaches to teaching legislation can be “so varied,” ranging from legislation/regulation courses, legislative process courses, administrative law primer courses, or substantive law courses with legislative emphasis).

115. Leib, *supra* note 112, at 169 (noting that Harvard unanimously added legislation to its 1L curriculum).

116. See, e.g., Dakota S. Rudesill et al., *Legislation/Regulation and the Core Curriculum*, 65 J. LEGAL EDUC. 70, 78 (2015) (explaining that some courses approach the material from the perspective of the political process model, focused on procedural rules governing legislative bodies, ballot access, candidacy qualifications, campaign finance, lobbying, etc.).

117. See, e.g., *id.* at 71 (explaining that one-half of the time spent in Ohio State’s 1L legislation course is devoted to statutory interpretation).

administrative process of implementing legislation?¹¹⁸ These questions have plagued the field of legislation, but have also fostered a level of intentionality among faculty in the field.¹¹⁹

These questions have also plagued perceptions of the course. Confusion about course coverage can lead to student discontentment, so legislation faculty must deploy a unique intentionality.¹²⁰ Students can enter a legislation class with vastly different expectations and experiences. Some are politically-minded students seeking respite from the case-based method of traditional law school courses, while others might be looking to check a box and fulfill a skills requirement with little organic interest in the material.¹²¹ The course can feel confusing and disorganized to students because they do not know what to expect and because the course already feels notably different than other courses.¹²² Professors of legislation are consequently aware of student needs in designing the course.¹²³ They are attentive to ensuring that the class is organized and clear to students and to facilitating student enjoyment of the course materials.

Whatever the answers are to the challenging pedagogical questions raised above regarding course design and course content in any one particular institution, a few central points emerge from this ongoing pedagogy dialogue specific to the field of legislation. First, professors of legislation are uniquely self-aware and conscious about course design and outcomes. Unlike a more traditional law course tested on a bar exam, legislation professors have a level of consciousness to their course selection, course content, and organization that they have had to navigate in setting up the course. They have had to decide whether they are teaching a course with a substantive focus only or a skills component. They have had to decide

118. See, e.g., *id.* at 72–78 (explaining that the other half of the first year course not focused on statutory interpretation is focused on the administrative process). This reflects the “Leg-Reg” model of the course. *Id.*

119. See, e.g., Leib, *supra* note 112, at 169 (noting that it is important to think about the content in the course); Rudesill, et. al., *supra* note 116, at 82 (noting that professors have to decide the content of the course and then they have to decide the order of the course).

120. See Leib, *supra* note 112, at 174.

121. See Garrett, *supra* note 13, at 11 (noting that many “boutique” legislation courses “appeal to students with a special interest in legislatures and politics, but are not considered a necessary part of the course of study for most students”).

122. Leib, *supra* note 112, at 177 (explaining that “rather than shy away from these problems and refuse to make the course required, . . . schools just need to be honest with students about the course from the outset”).

123. See *id.* at 177–78 (explaining that professors of legislation need to have “greater attention to student needs and careful course design” to “mitigate—even if they cannot fully eliminate—student discomfort”).

whether they are teaching a course rich with political theory or political process. They have likely had to try many iterations of the course and adapt year to year. Legislation faculty are uniquely aware of what they are teaching and why it suits their course and their students.

B. A Clear Alignment with Experiential Learning

Legislation courses also offer a clear pedagogical alignment with the goals and objectives of simulation courses. While challenges lurk, so do great pedagogical opportunities. Legislation courses are uniquely grounded in political conditions in ways that common law classes are not consistently. They involve what Diana Hess would call “tipping” issues as they move from closed to open issues in the public debate or from open to closed.¹²⁴

Legislation faculty are also already fully challenging existing student schemas for law study. They correct the profoundly “court-centric” emphasis that is otherwise present throughout the law school curriculum.¹²⁵ They offset this common law focus and provide a different institutional focus that reveals the “dominance of statutes and regulations over common law.”¹²⁶ As Ethan Leib described, first year courses are heavily “dominated by a judge-centered perspective on the law, in which all legal questions are answered by people in black robes—and generally black-robed people at the appellate level. That neither reflects reality, nor approximates how lawyers need to perceive the workings of the law.”¹²⁷

Legislation courses “cure students of their excessive attention to appellate arguments and judge-made common law in their first-year coursework.”¹²⁸ They “instill respect for methodological pluralism about law” because “legislatures and agencies ‘think’ differently about lawmaking and law-application than courts do—and they operate quite differently too.”¹²⁹ Legislation courses frankly respond to what has been described as the “twentieth century’s ‘orgy of statute making.’”¹³⁰

124. HESS, *supra* note 4, at 124.

125. Garrett, *supra* note 13, at 11.

126. *Id.* at 14.

127. Leib, *supra* note 112, at 170.

128. See, e.g., William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 PITT. L. REV. 691, 692 (1987) (explaining how the first-year curriculum focuses on judicial analysis and “few, if any, courses [require] similar scrutiny of statutes”); Leib, *supra* note 112, at 170.

129. Leib, *supra* note 112, at 171.

130. Eskridge & Frickey, *supra* note 128, at 691 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977)).

Legislation courses play an important role in the curriculum generally and specifically in implementing the new ABA Standards. Legislation courses are distinctly contextual and grounded in law as well as politics, economics, and society.¹³¹ Legislation can be the “primary instrument of ordered social change.”¹³² This context requires a dynamic method of delivery. Avoidance of sensitive issues is not a desirable outcome in a course like legislation.¹³³ It diverts the students away from some of the important conversations in the legislative field, such as abortion, gender and racial equality, immigration, and education.¹³⁴ Professors want to avoid the “sterile view of the legislative process” that one might get from a book.¹³⁵

Successful learning requires student engagement with the material and with each other. Students need to see that the legislative process involves “grappl[ing] with live modern problems.”¹³⁶ They need to get a “flavor of practical politics and of the clash of social and economic forces.”¹³⁷ Students need to see that the “legislative process is awkward, unruly and badly integrated with other government functions; the problems it must solve are complex and pressing.”¹³⁸

In political debate also lies opportunity for effective teaching in an experiential approach.¹³⁹ Perhaps “[p]aradoxically, conflict also generates the tension which *stimulates* such learning.”¹⁴⁰ In that sense, the work of the Legislation professor to simulate for students how to work within the context of political divisiveness to achieve client-centered goals is more important than ever. Conflict is not “antithetical to democratic education;” it is central to the legislative process and to democracy itself.¹⁴¹

131. Emerson, *supra* note 113, at 1414 (“[I]n the field of legislative law-making, the play of political, economic and social forces is particularly strong.”).

132. Joseph Dolan, *Law School Teaching of Legislation: A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 63 (1969). *See also id.* at 71 (explaining that “law schools leave the impression that the common law and its evolution is the method of social change”).

133. HESS & MCAVOY, *supra* note 3, at 176 (concluding that “the cost of avoidance was simply too high” in the view of many public educators).

134. *Id.* at 175.

135. Emerson, *supra* note 113, at 1416 (“One fails to obtain from the book a clear appreciation of the function and actual operation of a modern legislative body.”).

136. *Id.* at 1416–17.

137. *Id.* at 1416.

138. *Id.* at 1417.

139. *See* HESS, *supra* note 4, at 6 (noting that schools can be great sites for dialogue about political controversies because teachers can foster deliberation and schools are often more diverse than the venues young people otherwise inhabit).

140. Louis Herman, *Teaching Through Conflict: A Peace Praxis for the Classroom*, 32 PEACE RES. 78, 78 (2000).

141. Sharon Todd & Carl Anders Sastrom, *Democracy, Education and Conflict: Rethinking Respect and the Place of the Ethical*, 3 J. EDUC. CONTROVERSY 1, 1 (2008); *see also* HESS,

Legislation students thus *should* be solving problems of real significance and import.¹⁴² Legislation courses reveal the benefits of experiential learning and the promise of it. Through successful experiential learning in a Legislation course, students can learn how to legislate in a pluralistic world, how to face conflict, and how to channel conflict into legislative activity.¹⁴³

Thus, the work of a Legislation professor training students in how to deal with conflict and how to *face* it is critical to our successful classrooms.¹⁴⁴ The modern political climate uniquely positions the Legislation classroom as a pioneer in modern legal education instead of the high-stakes outlier.¹⁴⁵ To successfully teach legislation, “it becomes crucial to ask how these conflicts arising out of different world views, and which often lead to violence, bullying, and ostracization, can be confronted” and confronted so as to see “respect emerging out of the minefield of contestation over values, beliefs, opinions and truth claims?”¹⁴⁶

Legislation faculty follow a longstanding legacy of thoughtful course design, organization, and intentionality in an individual professor capacity.¹⁴⁷ These unique perspectives and expectations cumulatively present challenges to teaching legislation successfully, but suggest an unparalleled readiness of legislation faculty to be leaders in implementing the new ABA Standards in a distinct modern backdrop.

IV. STRATEGIZING INTERACTIVE AND INCLUSIVE EXPERIENTIAL LEARNING CLASSROOMS

In this context, experiential learning and assessment need to be carefully designed to facilitate faculty and student success. Formally, experiential learning courses must be primarily experiential in nature, and must “integrate doctrine, theory, skills, and legal

supra note 4, at 12 (explaining that “there is an intrinsic and crucial connection between the discussion of controversial political issues, especially among people with disparate views, and the health of a democracy”).

142. See Dolan, *supra* note 132, at 69, 85 (noting that many early courses in legislation were unsuccessful because they did not deal with problem solving, instead only focusing on technical aspects).

143. See Todd & Sastrom, *supra* note 141, at 1.

144. *Id.* (“The question that we raise here is not how do we do away with conflict, but how do we actually *face* it in ways that further the democratic project?”).

145. See, e.g., Bahls, *supra* note 105, at 1046–47 (“Students therefore must understand how political objectives influence the law. Law schools should prepare students to make policy arguments to legislatures and courts to improve the law and the delivery of justice.”).

146. *Id.* at 5.

147. See, e.g., Emerson, *supra* note 113, at 1414 (“[T]here appears to be no particular agreement upon what it should attempt to do or how it should be taught. . . . [Thus,] “any study of legislation can readily lose touch with reality and degenerate into useless sterility.”).

ethics.”¹⁴⁸ They must also provide opportunities for students to perform in the Standard 302 professional skills.¹⁴⁹ They must also develop the concepts underlying the professional skills being taught, provide multiple opportunities for performance, and provide opportunities for self-evaluation.¹⁵⁰ Simulation courses, in particular, must recreate experiences “reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances.”¹⁵¹ These tasks must be supervised by the faculty member, including opportunities for feedback, and they must also include a classroom instructional component.¹⁵²

One model on which to structure a simulation course is to design the classroom itself around the intersection of deliberative democracy and education pedagogy.¹⁵³ This model designs the course around the principles of equality, tolerance, autonomy, fairness, engagement, and literacy.¹⁵⁴ Equality suggests that all students are expected to be contributing to the discussion and are equally capable of doing so, consistent with general governance principles.¹⁵⁵ Tolerance provides an important limit on decision-making, requiring students to be tolerant and respectful of the range of classroom discussion that transpires.¹⁵⁶ Autonomy empowers students to direct aspects of their projects and graded work.¹⁵⁷ Fairness serves as a balance on autonomy, requiring that individual self-interest alone not direct the class.¹⁵⁸ Engagement ensures that students consider competing evidence and peer perspectives.¹⁵⁹ Literacy requires students to consider evidence and materials supporting the particular assignment or simulation.¹⁶⁰ The next section builds on

148. ABA STANDARDS, *supra* note 1, at 16 (Standard 303(a)(3)(i)).

149. *Id.*

150. *Id.* (Standard 303(a)(3)(ii)–(iv)).

151. *Id.* at 17 (Standard 304(a)).

152. *Id.* (Standard 304(a)(i)–(iii)).

153. HESS & MCAVOY, *supra* note 3, at 77 (defining “deliberative democracy as a form of government in which free and equal citizens (and their representatives) justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future”).

154. *Id.* at 77–79.

155. *Id.* at 77 (explaining that “the principle of political equality holds that all citizens should be allowed to contribute to decision-making”).

156. *Id.* at 78 (encouraging students to consider their personal preferences and whether they align with the additional goal of tolerance).

157. *Id.* (including also the autonomy to “revise one’s values and commitments”).

158. *Id.* (ensuring that students do not solely engage the material from personal preferences).

159. *Id.* at 79 (encouraging students to be informed and concerned).

160. *Id.* (explaining that literacy is a precursor to engaging in democratic discourse).

this framework with specific assignment and assessment strategies.

A. *Student-Driven Projects*

Experiential courses are positioned for success when designed in a student-centered approach. At the heart of the ABA reforms is a shift toward student-centered learning. Training adult learners, like law students, particularly requires student-centered learning techniques. Adult learners uniquely want to be in control of their learning processes.¹⁶¹ In that sense, a legislation course navigating challenging political divisiveness will benefit heavily from student-driven content.

Student-centered learning is an approach in which students develop learning goals and work to achieve them.¹⁶² This allows students to build on their “unique background knowledge and experiences and further explore, select, and use tools and resources.”¹⁶³ Four main premises support the student-centered learning approach. First, learners are self-directed and prefer to manage their learning instead of having their learning imposed on them.¹⁶⁴ Second, learning occurs best experientially, particularly for more experienced students.¹⁶⁵ Third, students must be ready to learn.¹⁶⁶ Fourth, learning needs to be contextualized in the real world and seen as “problem-centered rather than subject-centered.”¹⁶⁷

This transforms students from passive recipients to “owners of learning, goals, decisions, and actions.”¹⁶⁸ This type of learning model is a “paradigm shift” for students and faculty alike.¹⁶⁹ It requires careful ownership and leadership to ensure that students are positioned for success¹⁷⁰ and allows students to have flexibility and options.¹⁷¹

161. See Warren, *supra* note 17, at 86.

162. Eunbae Lee & Michael J. Hannafin, *A Design Framework for Engagement in Student-Centered Learning: Own It, Learn It, and Share It*, 64 EDUC. TECH. RES. & DEV. 707, 708 (2016).

163. *Id.* (explaining that “[s]tudents navigate unspecified paths, monitor progress, and develop personal strategies”).

164. Kristin B. Gerdy, Jane H. Wise & Alison Craig, *Expanding our Classroom Walls: Enhancing Teaching and Learning Through Technology*, 11 J. LEGAL WRITING INST. 263, 269 (2005).

165. *Id.* at 269–70.

166. *Id.* at 270.

167. *Id.* at 271.

168. Lee & Hannafin, *supra* note 162, at 711.

169. *Id.*

170. See *id.*

171. Gerdy, Wise & Craig, *supra* note 164, at 269.

Recognizing the diversity of political and ideological perspectives in a legislation course and the range of students' level of engagement in the course, student-driven projects can shape the entirety of the simulation course content. In my course, as an example, a student-centered project is fifty percent of the students' overall course grade. The remaining half is allocated to participation and in-class assignments designed to teach, reinforce, and practice the skills and theories underlying the course. This ensures a considerable degree of autonomy and engagement.

Structuring a simulation course around student-centered learning is certainly central to the revised ABA Standards, but it is also integral to diffusing political volatility. Designing a simulation around faculty interest alone and faculty expertise alone, will limit the coverage, narrow course perspectives, and create a static pedagogy over time. Certainly for many "paper classes" in the upper-level curriculum, faculty have long since allowed students to direct the content of the papers they write. What is notable about this approach, in contrast, is the range of *types* of projects students can select and the role of the students in shaping the goals and means of assessment of their projects.

A sample directive to students regarding course project assignments is attached at Appendix A. In my course, for example, students can choose from three different types of projects. First, they can do field work where they embed themselves within a group, legislative office, committee, taskforce, etc. and help to achieve a legislative goal. In field work, the students are more advocacy driven and they are guided by the standing goals and directives of the group. For example, students might help a non-profit organize a rally day at the statehouse or write legislative position papers for an organization. Second, students can also do a case study on a live legislative or statutory interpretation issue. Here, students are often tethered to a bill or a topic less than a group or an event. They are often more objective than subjective in studying a bill or statutory interpretation dispute. The students seek to understand more objectively why a bill is proposed or sought, who supports/opposes it, what drafting considerations shaped it, how the bill moves through the process, etc. Third, students can conduct a historic case study of past legislative enactments. For this version, students are objective and independent. It ensures that students can pick a project that can be done remotely and subject to each student's individual availability.

If students select the *type* of project they want to engage in (thus selecting projects ranging from objective to advocacy and historic to

current events) and the subject matter of the project, the professor will have achieved three critical successes. First, the professor ensures that the simulation is dynamic and grounded in the kind of real-world lawyering anticipated in simulation courses. Second, if selected early enough in the semester, it gives the professor a springboard to design all other course content and simulations, thus diffusing critiques regarding the professor's role in selecting content. Third, it shifts some of the heavy lifting of course preparation and research to the students each semester.

Allowing students to self-direct their topic selection ensures a broad range of topics covering the political and subject-matter spectrum at the federal, state, and local level. For example, a prior legislation course offering included the following range of topics and projects:

- Comparative case study on efforts to legalize marijuana in Colorado, Washington, Ohio, and Kentucky (state-comparative).
- Drafting proposed Louisville City Council ordinance banning plastic bags in grocery stores following other city models (city-comparative).
- Case study on Kentucky's efforts to criminalize strangulation (state).
- Study of the political conditions leading to the passage of the Affordable Care Act and the political conditions that would be necessary for its repeal (federal).
- Historical study of G.I. Bill enactments and obstacles (federal).
- Study of how and why executive orders governing immigration policy are used in lieu of or in addition to legislation (federal).
- Study of "hate rhetoric" in legislation comparing the Chinese Exclusion Act to modern legislation seeking to limit or ban Muslim Americans (federal).
- Case study of proposed law requiring medical review panels in medical malpractice claims and the Kentucky Justice Association's lobbying efforts in opposition (state).
- Analysis of the legislative goals and objectives of the Black Lives Matter Movement (federal/state).
- Drafting legislation requiring personal finance curriculum in schools (state).

- Case study on Kentucky bill regarding students' rights of religious expression in public schools and universities (state).

These topics notably span the *type* of projects that students are electing to complete, the subject matter of projects that students are electing to study, and the political approach or perspective that shape the students' interests and objectives. This ensures that the projects are structured in a way that is relevant, dynamic, and diverse. It does not compel students to engage divisive topics if they are not comfortable, but it makes space for students to do so, if that is their professional and academic goal. This method also ensures that professors are fostering an environment and structure to facilitate experiential learning, but not growing fatigued or burned out from developing ongoing simulations from year to year.

Importantly though, faculty would not want their efforts to design a course around student-centered projects to transform into a cohort of eighteen to twenty independent studies that the faculty member oversees. Successful simulation course design should include a careful construct of "autonomy, scaffolding, and audience."¹⁷² Autonomy is the ability of students to make their own decisions and act voluntarily, owning and mediating the learning process to accomplish their learning goals.¹⁷³ Professors, in this capacity, support the learning process, rather than dictate it.¹⁷⁴ Here, professors support students in selecting, shaping, and executing a project of the students' own design and choosing, as is discussed above.

Autonomy, of course, has to be deployed with caution.¹⁷⁵ It is not the same as independence.¹⁷⁶ It involves an "internal locus of control," but faculty support this with scaffolding.¹⁷⁷ Scaffolding as a concept depicts how faculty build the structures to support learning, but are poised to gradually remove those structures as the students succeed and thrive.¹⁷⁸ The simulation course professor then builds the classroom time that complements the student-centered project around exercises that develop, strengthen, and inform the larger mass of student projects that are underway.

172. Lee & Hannafin, *supra* note 162, at 715.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *Id.* at 716 tbl.2.

178. *Id.* at 716 tbl.2, 719.

Of course, autonomous learning with scaffold support should not be occurring in a vacuum. Just as real-world lawyering does not occur in a vacuum, so to must a simulation course be sure to bring the student-centered projects to an audience in a thoughtful and dynamic presentation. Students need to present and discuss their work with “authentic” audiences.¹⁷⁹ This will help students see the value of their work beyond this teacher and this classroom to see its real application.¹⁸⁰ This model can be characterized as the “own it, learn it, and share it.”¹⁸¹

With that structure in mind, I have found it helpful to structure classroom presentations around a “student as expert” model that governs the scope of the project and ensures a strong degree of both literacy and engagement. This stands in stark contrast to the “student as advocate” model. The student is not advocating for the bill in his or her class presentation, even if a specific outcome was ultimately the student’s reason for selecting the project. What the student *wants* the outcome to be is not relevant to the presentation in front of the class. Those comments and perspectives may accompany a written submission to the professor.

Rather, students should plainly understand that the goal of their assignment is to be an expert on the topic that they have selected. Students should frame their project with a set of questions that they seek to answer and set out to answer those questions. In this sense, student presenters should prepare to answer any range of questions from any range of perspectives on the topic thoughtfully and objectively. For example, if a presenter is studying a felony expungement bill, the student should be prepared for questions about the risks of expunging felonies, the benefits of expunging, the stakeholders on all sides of the debates, the legislative challenges, the substance of the bill, etc. They will thus be assessed on their ability to analyze the questions they have identified and their ability to demonstrate mastery of the material.¹⁸²

A “student as expert” model positions students to begin in a thoughtful, objective frame. It teaches them to acknowledge weaknesses, counter perspectives, and context. It stands in stark contrast to a defensive framing as advocates defending a position. This

179. *Id.* at 717 tbl.2, 721.

180. *See id.* at 721.

181. *Id.* at 724 tbl.3.

182. I often explain this scope in class by analogy to the “pivot foot” in basketball. Students need to plant their foot on a topic with a set of inquiries. They must then be able to move agilely within a certain range of that pivot foot. For example, if the student has studied a “tort reform” bill in Indiana, he should be prepared to answer questions such as how that bill compares to bills enacted in other states or prior bills proposed in that state.

models professionalism for our students and teachers them to engage with adverse perspectives thoughtfully and respectfully. Ultimately, it prepares them to be better advocates because their advocacy begins with a candid objective understanding of the subject matter.

Because the topics that students select are relevant, timely, current events, it is critical that the class share a common set of knowledge (literacy) to ensure equality in engagement. Some students in the class may hold entrenched perspectives on the topic and the level of knowledge and support for the topic may vary considerably. To manage these considerations, the student presenters must select short readings to prepare the classmates for the presentation. For example, if a student is presenting on the legalization of marijuana, she might include the legislation considered in her home state, a successful bill passed in another jurisdiction, and a short reading in support of and in opposition to legalizing marijuana. This technique ensures that the speaker grounds herself in an objective command of the material. It ensures that classmates have a common set of terminology, facts, and content as a foundation to further discussion. These readings are assigned to the class on the day the student presents. This also empowers students to move their presentation toward the analysis of the legislative process, statutory interpretation, or other substantive points tied to the course, instead of wasting precious presentation time on the who, what, when, where, and why of the particular legislative proposal.

B. Experiential Observations

Students enter any class with existing preconceptions about the world and concepts, particularly in a politicized class like legislation.¹⁸³ The trick for law faculty is to harness that constructivist approach by which students want to evaluate new knowledge and concepts against existing experiences.¹⁸⁴ An experiential learning requirement seeks to harness these constructivist approaches. It positions students to learn through connecting new information to existing knowledge.¹⁸⁵

One way to help students experience a field with more candor, sophistication, and relevance is to require them to each complete an experiential learning component of the course. This is a graded requirement that directs the students to go spend one to two hours

183. See Warren, *supra* note 17, at 86.

184. See *id.*

185. See *id.*

observing the legislative process (or it could apply in any substantive field) in action.¹⁸⁶ For legislation, it might be a committee hearing, a legislative debate, a meeting between a constituent and a legislator, or any other observable component of the legislative process. Although it is not the pedagogical “gold standard,” this can even be done via television, live streaming, recordings, etc. This softens the ability of working, overwhelmed, busy students to contest the requirement as difficult or overwhelming.

Whether students are savvy and interested in the course or just taking the course to fulfill a graduation requirement, an experiential observation learning requirement can be a useful pedagogical tool. For savvy students, it will position them to act as observers to test their existing assumptions or views about the field. They can use their constructivist adult-learning approaches to compare and contrast their experience to their existing assumptions about the field. For students just trying to complete a graduation requirement, this will ensure that they get closer to the field and more entrenched in it.

Ideally, this requirement will also ensure that the students see real world conflict in action. They can observe how disagreements manifest in the legal system, how lawyers navigate that disagreement, how they prepare for that conflict, and how they lawyer through it. It can help “show” instead of “tell” the roles that successful lawyers must play.

Students are able to see theory come to life, give shape to process and procedure, and also master a substantive area. This allows the students to pick a substantive area of interest to them. For example, a student interested in drafting a “bag ban” bill imposing a fee for the distribution of plastic bags in grocery stores was able to locate an online video of a city council meeting in another jurisdiction to watch and brainstorm strategies for passing a similar bill in Louisville. Another student attended training for citizen activists organized by a group of progressive nonprofits before the peak of the Kentucky legislative session to observe and critique how citizens are informed of the legislative process and advised to engage in it. This requirement gets the students out of the classroom and observing the field in action.

186. See Appendix B for a sample Experiential Learning Assignment.

C. *Assigned Roles in Simulation Role Plays*

Assigned role plays can also be an effective tool to train students to work in adversarial conditions and to diffuse political divisiveness. It can build more versatile literacy and also tolerance. Students are more likely to participate more inclusively when they are playing a role.¹⁸⁷ Many law faculty use simulation exercises, but distinctly here the roles are all assigned and rotating to allow all students to experience different roles on various issues. It also ensures fairness in student experience, ensuring that all students are more systemically pushed out of their comfort zone to play new roles.

For example, one effective way to teach statutory interpretation might be to assign students to role play a judicial confirmation hearing. They each draw a dominant approach to statutory interpretation (e.g., textualist, purposivist) out of an envelope and they role play in that character. A judge in the confirmation process will then be called to “testify” before the class in which she will describe her approach to statutory interpretation. The other students—in their roles as members of the judiciary committee—will then ask the types of critical questions a purposivist would ask of a textualist, etc. This technique pushes students to try on various identities, to master the material, and to see the interplay between different theories. It avoids a critique on, for example, Justice Scalia or a personalized debate in which students opine on the theories in the abstract based merely on their own political and legal views. The goal is to ensure that students are versatile in discussing and critiquing all theories.

Role plays are also useful in the presentation of final projects.¹⁸⁸ Rather than allowing students to ask questions and critique a final project from their subjective perspective or their own individual political perspective, the final projects are presented as testimony with some students assigned (with tent cards visually displayed in front of them) as “supporters,” “opponents,” and “undecideds” with respect to the proposal being presented. This technique ensures that presenters are asked a balanced range of questions. It will also ensure that the student participants are not dogmatic or ideologically entrenched in their questioning of the presenter. Rotating the tent cards around from speaker to speaker ensures that students

187. Stephanie Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326, 329 (1989).

188. See Appendix C for a sample peer feedback form for final project presentations.

play different roles and view different proposals more or less critically depending on their assigned role.

This technique also incorporates graded assessment of the students' abilities to stay in role and to actualize the role they were assigned. These accompanying assessment points are addressed in the next section.

D. Holistic, Sustained, and Assessed Student Participation

Student-centered learning, however, cannot allow a classroom to become a series of individual independent studies, each under faculty supervision. It would not be effective or sustainable to merely supervise a series of individual projects whereby students only stay narrowly focused on their own learning and performance. Rather, it is also critical that faculty create a collaborative classroom in which students work together within the course framework.¹⁸⁹

The classroom must also be an inclusive place in which faculty and students can share respective views and perspectives.¹⁹⁰ This is not simply about respecting student space, but rather about expanding the range of perspectives they will face in the field. In legislation specifically, students will encounter opposition in enacting legislation, interpreting legislation, and implementing legislation. That opposition will most likely come from adversaries with competing views and perspectives. To complete a simulation course project in isolation is to distort the experiential component of the course. To create an inclusive classroom is an important normative goal for teaching generally, but also to avoid distorting the realities of the field.¹⁹¹

Thus, a successful simulation course should be built around graded participation that is holistic and sustained. Left unmanaged, most law students approach class participation in a serial or sporadic manner.¹⁹² A serial manner means that students generally let one classmate carry the load of class participation until they are done. Another student then picks up the weight of class partic-

189. Meyers, *supra* note 100, at 95 (“A shared set of goals and a common course agenda are important determinants of students’ reaction to the class and their motivation to learn.”).

190. Sheri Saunders & Diana Kardia, *Creating Inclusive College Classrooms*, UNIV. OF MICH. CTR. FOR RESEARCH ON LEARNING & TEACHING, http://www.crlt.umich.edu/gsis/p3_1 (last visited Mar. 27, 2017).

191. *See generally id.* (explaining that inclusive classrooms require thoughtful attention to course content, session planning, and knowledge of the enrolled students).

192. *See, e.g.*, Kevin J. O’Connor, *Class Participation: Promoting In-Class Student Engagement*, 113 EDUC. 340 (2013) (suggesting techniques to break from the typical participation patterns in college classrooms).

ipation and carries it another distance. The stakes of class participation thus are passed along like “participation hot potato” from student to student.

In addition, students generally approach class participation as a sporadic exercise. In this sense students manage all of their competing responsibilities—from work to journals to family commitments—as one would approach the arcade game of “whack-a-mole.” If they have not participated regularly or lately in a particular class, they might make a push to get it out of the way or build up some professional capital with the professor. They then disengage and turn to “bopping” out other tasks like the moles that pop out of the arcade game in an endless and exhausting flurry of activity.

Neither of these approaches, serial participation nor sporadic participation, adequately reflects law practice or prepares students well to be law colleagues. Both also present the risk of being implicitly exclusionary. Women, for example, are often more acculturated to be silent, well before they arrive in a law school classroom.¹⁹³ Rather, class participation should be consistent and assessed.¹⁹⁴ It should be active and inviting to engage a large number of students.¹⁹⁵

Effective experiential learning will also require useful feedback.¹⁹⁶ Effective education requires formative feedback that gives students the chance to gauge their performance and adjust.¹⁹⁷ The incorporation of more assessment into the syllabus is a critical component of the new ABA reforms, despite very little research supporting how law students will perceive the increased use of assessment.¹⁹⁸ Effective feedback needs to be non-controlling and informational, provide rationales, and affirm student competency.¹⁹⁹

193. Wildman, *supra* note 187, at 326–27.

194. See generally Alex Steel, Julian Laurens & Anna Huggins, *Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students' Engagement, Skills Development and Deep Learning*, 36 U.N.S.W. L.J. 30, 54 (2013) (recommending ways to tie assessment to reinforcing learning outcomes and to minimizing barriers to class participation).

195. See generally O'Connor, *supra* note 192 (proposing a range of techniques to achieve effective class participation).

196. See Emily Zimmerman, *What Do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 RUTGERS L.J. 1, 1 (2010) (“Some of the most pointed critiques of legal education focus on law student assessment.”).

197. Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance* 2–3, 7 (Minn. Legal Studies, Working Paper No. 16–13, 2016), <http://ssrn.com/abstract=2772393> (noting, however, that “remarkably limited empirical evidence actually demonstrates that better feedback can improve students' performance in the law school setting”).

198. See Zimmerman, *supra* note 196, at 4.

199. Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 245 (2013).

When delivered properly, the feedback should promote an internalization of values and a sense of purpose.²⁰⁰ Notably, a majority of law students surveyed wanted multiple graded assignments—as the new ABA Standards would suggest; these preferences decline from the beginning to the end of the students' first year of law school.²⁰¹ Exit surveys of first year students revealed consistent interest in having class participation graded, but diverse perspectives about other forms of assessment.²⁰²

Simulation courses create a carefully constructed classroom community that “encourages a culture of questioning, respect, and risk taking.”²⁰³ And, the remainder of the class that is not presenting, simultaneously, on any given day needs to be engaged in thoughtfully critiquing the student to ensure that they are advancing their knowledge of the course material.²⁰⁴ It is not a productive use of class time to allow students to sit and passively absorb their classmates' presentations.

V. CONCLUSION

In modern political times, legislation faculty are presented with unique challenges implementing the ABA Standards in the wake of great polarization and divisiveness. While these challenges might not have been anticipated, they merit additional development, discussion, and training to help faculty and students alike implement successful simulation courses. This article begins the dialogue with at least one model of how a course might be adapted to reflect real-world lawyering on current event issues while tempering criticism or marginalization. This article highlights how student-centered projects can structure the entire course with assigned role plays and graded participation as at least one effective model for a simulation course.

200. *See id.*

201. *See generally* Zimmerman, *supra* note 196 (studying student preferences for assessment in terms of quantity and type of graded assignments, ungraded assignments, feedback, and class participation).

202. *See id.* at 49.

203. *See* Warren, *supra* note 17, at 100 (quoting NAT'L RESEARCH COUNCIL, HOW STUDENTS LEARN: HISTORY, MATHEMATICS, AND SCIENCE IN THE CLASSROOM (M. Suzanne Donovan & John D. Bransford eds., 2005)).

204. *See* Appendix C for a sample peer feedback form for final project presentations.

APPENDIX A

**Legislation
Professor Abrams****Overview of Final Course Project**The Task

- You will pick from one of three options for a final class assignment or a hybrid of these options. We will work together in the first weeks of the semester to finalize a project proposal and work plan for each of you. Any of these could be done on the federal, state, or local level. They can build on existing work and expertise.
 - OPTION A: Interactive legislative field work
 - OPTION B: De-constructing a “live” legislative or statutory interpretation issue
 - OPTION C: Historical survey of landmark legislation

Objectives

- Cultivate your subject-matter expertise in a particular statutory field;
- Apply theories of statutory interpretation, legislative process, and lawmaking to real world contexts;
- Practice the legislative process, research, interpretation, and drafting skills that we have covered this semester;
- Enhance the depth and breadth of your professional skills beyond the casebook experience;
- Expand your lens for analyzing law, careers in law, and law reforms to include legislative roles and avenues for legislative and political advocacy;
- Re-invigorate your law school educational experience by getting you in the legal community or engaging you in historical, social, political factors to consider, not just what the law is, but how it is made and interpreted.

Assessment

- This project counts for 50% of your overall course grade.
- 40% of your work will be a written submission documenting the project.

- 10% of your work will be a presentation to your classmates highlighting your work on the project and responding to questions effectively.
- The various deadlines along the way will count for the “skills exercises” component.
- I will distribute an assessment framework at a later date.
- Assessment categories will generally include (1) successful and accurate integration of substantive course material; (2) mastery of hierarchy of authority and source usage; (3) thoughtful and sincere engagement in the subject matter; (4) professionalism and polish.

Description of Options

- *OPTION A*: Interactive legislative field work
 - Successful performance of this option requires you to connect with a local organization and complete experiential legislative work with the group, for the group, or in observation of the group. This might include drafting proposed legislation for an organization, writing a position paper on proposed legislation, conducting state research of comparative legislation, attending a lobbying day, etc. The key goal is to engage yourself in an interactive manner in any part of the legislative process. If you select this option, you will spend more time “doing,” thus the fieldwork emphasis.
 - Your final written work product will be a journal documenting your project, reflecting on what you’ve learned, and critiquing the task that you observed or on which you worked. It should be polished, professional, and thoughtful. It should answer the questions of (1) with whom did you work; (2) on what issue(s) did you engage; (3) what did you learn from your experience; (4) how could the process or product be strengthened. Your journal should focus heavily on integrating the course material and showing mastery of it. Your intended audience is law scholars.
 - Your final journal should attach as appendices a billable hours report documenting your hours completed; and any relevant materials (e.g., the legislation at issue).

- You will circulate your journal to the class in advance of your final presentation.
 - Your oral presentation will highlight your experience; distribute representative work product (e.g., draft legislation, lobbying notes, etc.); highlight critiques and reflections; and answer any student questions about the fieldwork effectively.
 - This entire project should take approximately 15 hours to complete.
- *OPTION B: De-constructing a “live” legislative or statutory interpretation issue*
 - Successful performance on this component requires you to dissect or de-construct an existing “live” statutory interpretation debate at the federal or state level. Your final work product will be a “bench memo” to the judge summarizing the issue in specific terms; highlighting the positions of both parties; documenting those positions in theoretical and specific terms related to our course material; and suggesting a position.
 - The final work product is a bench memo. The accompanying briefs and statutory texts should be attached as appendices.
 - You will circulate your bench memo to the class in advance of your final presentation.
 - Your oral presentation will summarize the key issues; answer student questions about the text; and critique the strengths and weaknesses of the parties’ arguments.
 - This requires less collaboration, but is more research-oriented. You are not facilitating an entity in achieving its specific goals, but studying a particular subject matter or piece of legislation.
 - This entire project should take approximately 15 hours to complete.
 - *OPTION C: Historical survey of landmark legislation*
 - Successful performance on this option will require you to select a book that chronicles the enactment of a piece of landmark legislation. (I am pleased to provide a sample listing of texts that suit this assignment well or help you brainstorm one.) You

will read the text and prepare a book review critiquing the book and summarizing its contributions to legislation and statutory interpretation. It should summarize the legal framework of the piece of legislation depicted in the text using primary sources exclusively; summarize the narrative of statutory enactment presented by the author; describe legislative obstacles presented in the text; and critique the text overall. Your target audience is law scholars contemplating reading the text. Your review should answer the questions of (1) why read this book; (2) what does this book offer; (3) what are the limitations of this book. It should, at bottom, present a thoughtful articulation of the substance of the book and a reflective critique on the books' strengths and weaknesses. I will provide samples. Your commentary should be tightly grounded in analyzing the book through our course material. It should consider legislative theories, competing approaches to statutory interpretation, procedural and drafting considerations, etc., as relevant to the scope of the book.

- You will circulate your book review to the class in advance of your final presentation.
- Your oral presentation will highlight excerpts from the text that reinforce your key points; highlight key pieces in your book review; and answer any student questions about the text.
- This entire project should take approximately 15 hours to complete.

APPENDIX B

SAMPLE Legislation Experiential Learning Assignment

ASSIGNMENT: You will complete a 1–2 hour experiential learning assignment. I have canceled a class session to make time in the syllabus for you to complete this requirement. This assignment invites you to get out of the law school and attend an event related to the legislative process. You have complete flexibility to select the event or subject matter that interests you most and advances your professional goals most directly. You could watch a committee hearing or floor debate. You could attend a rally at the Statehouse for a cause of your choosing. You could interview lawyers or lobbyists who do legislative work as a career. You could meet with your Senators or Representatives to discuss an issue of interest to you. The opportunities are endless. You are also welcome to do this with another classmate or two, but you must submit the write-up independently. To help you brainstorm, I've listed below a few opportunities and sites of interest. Just pre-approve it with me to be sure it meets the expectations *before* you attend.

- Here is a link to meetings related to Louisville Metro Government: <https://louisville.legistar.com/Calendar.aspx>. Call and confirm before attending.
- Live coverage via Internet stream of Kentucky Assembly: <http://www.ket.org/legislature/>.
- Federal legislative coverage on C-SPAN. This is a link to forthcoming coverage, but archived materials also exist: <http://www.c-span.org/schedule/>.

The experience that you select should involve at least one hour of observing and experiencing the legislative process in action. After you have completed your observation/engagement, send me a journal of approximately 2–3 pages in length responding to the following questions:

(1) **What experiential learning opportunity did you select?** Provide specific details of what you attended or observed, where it was held (or Internet source), and length of time.

(2) **Why did you select this experience particularly?** Explain what you hoped to learn from the experience or how you sought to grow from the experience.

(3) **Describe in detail the substance of the experience.** For example, what was the committee meeting about, what was the floor debate discussing, what did you discuss with your legislator, etc.?

(4) * **Reflect actively on what you learned from the experience.** * How did it comport or not comport with your expectations? What surprised you? What impressions did it leave with you? How did the experience connect back to your course material directly or indirectly? I've starred this question to reflect that it is the core of what I want you to focus on in your write-up.

DUE DATE: This assignment is due by ____, but I strongly encourage you to complete it much sooner than that. I am giving you the bulk of the semester to complete it just to provide maximum flexibility.

Please have fun with this. This is intended to be an interactive way to bring the course content to life. Pick something that advances you professionally, not merely a "busy work," "check the box" approach. Use this as a chance to network, engage, and learn!

APPENDIX C

**LEGISLATION FINAL PROJECT PRESENTATIONS
Peer Feedback**

Feedback provided to: _____

Feedback provided by: _____

What did you find most interesting about your peer's presentation?

How did your peer's work product strengthen your mastery of the course material?

What questions do you have for your peer about the scope, purpose, or outcome of the project that your peer undertook?

How can your peer strengthen the project content and its rooting in the course material?

Writing the Law¹: Developing the ‘Citizen Lawyer’ Identity through Legislative, Statutory, and Rule Drafting Courses

*Ann L. Schiavone**

ABSTRACT

At the time of the American Founding, Thomas Jefferson, among others, viewed lawyers as the class of citizens most suited to lead the American institutions of government, as well as preserve and protect them. Jefferson valued the ideal of the “Citizen Lawyer” who would have a broad liberal education, experiential learning, and be capable of using knowledge of the law to promote the public good.

In more recent years, American law schools have been criticized for failing to achieve many of these goals first envisioned by Jefferson. Particularly, law schools have often failed to promote strong public service identities in students, failed to provide students with extensive experiential learning, and neglected to provide courses in public policy, legislation, and lawmaking.

1. This title evokes the historical concept of “reading the law,” a system of apprenticeship where students studied the law by reading treatises and working with an established attorney. See generally Blake D. Morant, *The Continued Evolution of American Legal Education*, 51 WAKE FOREST L. REV. 245, 248 (2016) (“This system of apprenticeship not only imparted substantive knowledge of the law, but also inculcated an appreciation for the professionalism required of a successful lawyer. Professionalism in this context embodied the recognition of the significance of the human dynamic and the historic responsibility of lawyers to foster society.”). This essay promotes the idea that it is not just reading the law, but also writing it, that helps produce attorneys with strong professionalism and a dedication to advancing the law for the public good.

* Assistant Clinical Professor of Law, Duquesne University School of Law. Having spent my early career as staff in the Pennsylvania legislature, I have always found the lack of attention to legislative matters in law schools surprising. This symposium, I hope, was a strong step in the direction of rectifying missed opportunities. My deepest thanks to Prof. Jan Levine, who, sharing my interest in legislative process, came up with the idea for the symposium and spent countless hours making it happen. Many thanks also to Profs. Richard Neumann and Lyn Entrikin whose expertise enriched the program. Thanks to Duquesne University School of Law for supporting the event, and to the *Duquesne Law Review* staff for its work publishing the articles arising from it. Special thanks to Allen Page (J.D., 2018) for his invaluable research assistance.

Today, our nation is once again in need of strong lawyers who can work for the public good, to protect our system of government, preserve the rule of law, and promote the positive reformation of law when needed. Through the teaching of more robust legislative and policy courses that include experiential learning components and consider issues of social justice and public policy, law schools can support the needs of law students and society. Such courses can help law students develop their “Citizen Lawyer” identity, and our society will be better off for having more lawyers who take their role of public service as a professional duty.

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I. INTRODUCTION

From Thomas Jefferson and Alexander Hamilton to James Madison and John Adams, lawyers have played a pivotal role in the founding of the United States, and the establishment of its government.² Twenty-five lawyers signed the Declaration of Independence, accounting for approximately forty-five percent of the signers, and over half of the members of the First Congress were legally trained.³ Thomas Jefferson, particularly, believed that lawyers should and would be instrumental to the success of the American

2. See Anna Masoglia, *The Founding Fathers as Lawyers*, LAWYERIST (July 4, 2016), <https://lawyerist.com/120002/founding-fathers-as-lawyers/> (describing the history of prominent founders of the United States who were also lawyers).

3. Nick Robinson, *The Declining Dominance of Lawyers in U.S. Federal Politics* 10 (HLS Ctr. on the Legal Profession, Research Paper, No. 2015–10, 2015).

government and that lawyers had a special role to fulfill in public life, as “citizen lawyers” tasked with maintaining and improving laws and making a difference in our society.⁴ His vision of the “citizen lawyer” influenced his efforts to formalize legal education in America through establishment of a law professorship at the College of William and Mary.⁵ In Jefferson’s vision, aspiring lawyers were trained not only in legal doctrine through study of common law, statutes, and constitutions, but also in broader knowledge through the study of humanities, such as philosophy and history, as well as social sciences, including the science of government and politics.⁶ They were educated holistically, including elements of both academic and professional education traditions.⁷ Law students were expected to think critically about the law, and lead the way in reforming and developing it for the public good.⁸ The Jeffersonian ideal of legal education promoted both excellence in the lawyer as a lawyer, and excellence in the lawyer as a leading citizen with responsibility for shaping society and government.

4. Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 733 (2000). “A lawyer, Jefferson said, must aspire to be a public citizen. In this single phrase he captured the singular notion that educated citizens, and especially legally educated citizens, can, and therefore must, strive to make a difference in the world.” *Id.*

5. Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 197 (2001).

6. *Id.* at 199.

7. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 532 (1990) (“Thus, what Jefferson envisioned as a ‘nursery’ of patriots was to be neither purely academic nor purely professional, although it partook of both.”). Carrington also notes that George Wythe who held the first professorship of law at William & Mary, and was Jefferson’s own mentor in the law, used teaching methods that would be considered “clinical” or experiential today. *Id.* at 535.

8. *Id.* at 528–29 (“Thus, for Jefferson, university legal education was to be part of ‘the nursery’ in which the political leadership of the republic could be nurtured, forming ‘the statesmen, legislators, and judges, on whom public prosperity and individual happiness’ so much depended.”).

Today, in a time of upheaval for the legal profession,⁹ legal education,¹⁰ and, arguably, for our constitutional democracy itself,¹¹ law schools should renew commitments to produce “citizen lawyers” in the Jeffersonian model, who can and will be prepared and motivated to shape and lead our law and our society moving forward, and defend our democratic institutions.¹²

While this may seem a tall order for law schools, I argue in this essay that adding just one type of course to the curriculum, an experiential legislative course, can make a significant and positive im-

9. The legal profession has experienced a retraction of certain types of traditional (and lucrative) legal jobs over the past decade as companies seek to reduce legal bills and large law firms trim their workforce. See Adam Cohen, *Is There a ‘Lawyer Bubble’?*, TIME (May 7, 2013), <http://ideas.time.com/2013/05/07/is-there-a-lawyer-bubble/?iid=tsmodule>. However, it does not necessarily follow that the need for legal services has declined. A major gap in affordable legal services persists for middle- and low-income Americans, causing significant hardship. See Martha Bergmark, *We don’t need fewer lawyers. We need cheaper ones*, WASH. POST (June 2, 2015), https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/?utm_term=.d4dc6c499c5b. The profession must now adapt to the shifting market. See *Lawyers advised to embrace the changing legal market*, AM. BAR ASS’N (Aug. 11, 2014), http://www.americanbar.org/news/abanews/abanews-archives/2014/08/lawyers_advised_toe.html.

10. Hand-in-hand with crisis in the profession comes a crisis in legal education. Students are stressed by higher tuition, but few available jobs in traditional markets. See Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, Op-Ed, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html>. Schools must continue to adapt and innovate to increase the value of the legal education and its affordability. See Leo P. Martinez, *Legal Education and Change*, THE ASS’N OF AM. LAW SCHS., <https://www.aals.org/services/presidents-messages/legal-education-change/> (last visited May 17, 2017).

11. Ironically, just as legal education and the profession face crises of relevance and survival in the economy, the need for lawyers as “public citizens” has grown in importance to counteract increasing attacks on our democratic systems. For example, the current president, Donald J. Trump, a businessman, not a lawyer, has not hidden his disdain for many constitutional principles essential to our system of government including: freedom of the press (Joel Simon, Op-Ed, *Trump Is Damaging Press Freedom in the U.S. and Abroad*, N.Y. TIMES (Feb. 25, 2107), <https://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html>); freedom of assembly (Amanda Erickson, *Americans’ right to protest is in grave danger under Trump*, UNITED NATIONS WARNS, WASH. POST (Apr. 2, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/04/02/americans-right-to-protest-is-in-grave-danger-under-trump-united-nations-warns/?utm_term=.adbd196ae5f4); the independent judiciary (Kristine Phillips, *All the times Trump personally attacked judges—and why his tirades are ‘worse than wrong,’* WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.5cd84e79d51f); and the system of government itself. Julian Borger, *Donald Trump blames constitution for chaos of his first 100 days*, THE GUARDIAN (Apr. 30, 2017), <https://www.theguardian.com/us-news/2017/apr/29/trump-blames-constitution-for-first-100-days-chaos-presidency> (quoting President Donald Trump: “‘It’s a very rough system,’ he said. “‘It’s an archaic system . . . it’s really a bad thing for the country.’”).

12. See Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 155 (2006) (“[R]anking among an American lawyer’s greatest professional responsibilities is the duty to understand and to support democracy.”).

pact on students and help develop in them the “citizen lawyer” identity.¹³ Engaging in research, discussion, writing, and creation of law helps develop the whole lawyer and promotes a type of problem solving and analytical process that is very different from the type developed in reading court cases, writing legal memos or briefs, or even participating in moot court experiences. Experiential legislative courses are excellent means of teaching core legal skills and professionalism, but perhaps more importantly, they develop students’ sense of responsibility for the law and its development. The Jeffersonian ideal of the “citizen lawyer” included both developing excellent lawyers and leading citizens; experiential legislative courses help accomplish that goal. Part II of this essay will briefly consider what it means to be a “citizen lawyer” and why it is a worthy goal for most lawyers. Part III will describe some of the varied versions of experiential legislative courses, and how they develop both the “lawyer” and the “citizen” in law students. Part IV of this paper will discuss the pedagogical benefits of experiential legislative courses and how such courses develop the “lawyer” skills of the “citizen lawyer.” Finally, Part V will explore the impact such courses can have on the development of the “citizen” in the “lawyer citizen” identity, through the promotion of social justice, law reform, and leadership in public life.

II. RELEVANCE OF THE “CITIZEN LAWYER” TODAY

The phrase “citizen lawyer” does not have a specific definition.¹⁴ Some might describe the phrase as pertaining to government lawyers or public interest lawyers, alone.¹⁵ Others suggest that, perhaps, “all lawyers are citizen lawyers,” because all lawyers play “a critical role in the justice system or economic life of the country.”¹⁶ In this essay, I will focus on a broad view of the “citizen lawyer” that may include government and public interest lawyers, but which also includes lawyers, involved in any field, who, in some way, take

13. Many law schools have included a legislation and regulation course in their first-year curriculum already. See James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or Necessity?*, 65 J. LEGAL EDUC. 3, 4–5 (2015) (discussing the proliferation of “leg-reg” courses and their benefits). These courses, in so far as they focus mostly on statutory and regulatory interpretation, will not be the focus of this article.

14. Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1153 (2009).

15. See *id.* at 1153–54 (suggesting neither description gives an accurate portrayal of the “citizen lawyer”).

16. See *id.* at 1154 (finding this “broadest view” complex and worthy of discussion).

responsibility for their role in promoting public good through development and reform of law.¹⁷ I focus on the term “citizen lawyer” precisely because it is a broad term that can encompass many roles of lawyers in society, so long as the lawyer focuses some attention on the public good over individual enrichment.

At the founding, lawyers were among the primary leading citizens of the new nation,¹⁸ and even to this day, a significant number of lawyers continue to play key roles in government, politics, social justice movements, education, and other fields that shape and develop our laws and our civil society. A survey conducted last year by The National Conference of State Legislators and the Pew Charitable Trusts revealed an estimated 14.4% of state legislators across the country are lawyers, down from a high of 22% in 1976.¹⁹ A little less than 40% of the 114th Congress was made up of lawyers.²⁰ Historically, 59% of U.S. Presidents and 68% of all Vice-Presidents were trained lawyers, while the profession accounts for 78% of all Secretaries of State and 70% of all Secretaries of the Treasury.²¹ Countless others work on legislative staffs, executive agencies, and non-profit organizations, and even more sit on boards of community groups, serve on local government councils, and school boards. Lawyers continue to be prominent and important members of the community, primarily because of the knowledge, skill, and professionalism developed over the course of their education and career.²²

Our most prominent legal organization, the American Bar Association (ABA), promotes the concept of the lawyer as a leading pub-

17. See Rosen *supra* note 12, at 165 (“[B]y recognizing a responsibility to uphold America’s democratic values and principles, lawyers will . . . work to further improve our democracy.”). See also Harry T. Edwards, *A Lawyer’s Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1150 (1990) (“[A]s a part of their professional role, lawyers have a positive duty to serve the public good.”).

18. See Alexis De Tocqueville, *DEMOCRACY IN AMERICA* 304 (Henry Reeve trans., 1965) (1835) (“The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice.”).

19. Jen Fifield, *State Legislatures Have Fewer Farmers, Lawyers; But Higher Education Level*, STATELINE (Dec. 10, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/12/10/state-legislatures-have-fewer-farmers-lawyers-but-higher-education-level>.

20. Robinson, *supra* note 3, at 12–13.

21. *Id.* at 9 (Note: These numbers do not reflect changes resulting from the 2016 general election.).

22. See W. Taylor Reveley III, *The Citizen Lawyer*, 50 WM. & MARY L. REV. 1309, 1320 (“Being a citizen lawyer is rarely about being a transcendent political leader who saves the galaxy. It is about the countless ways, most of them small and mundane, in which any lawyer can make a difference for the better, drawing on the comparative advantages for leadership inherent in legal training and experience.”).

lic citizen. For example, in its preamble to the Model Rules of Professional Conduct, the ABA notes that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”²³ While representing clients is important, it is placed on equal footing with our role as a public citizen protecting and improving quality and access to justice.²⁴ The preamble goes on to further note that:

[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. 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.²⁵

Lastly, the preamble calls for lawyers to “strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”²⁶

Our law schools, too, promote a mission of educating the lawyer as a public citizen and as a figure that contributes to the larger society. Based upon its history, it should be no surprise that William & Mary Law School espouses a “dedication to educating citizen lawyers who will serve with distinction in their communities, the nation, and the world.”²⁷ But other schools have similar missions. Tulane University Law School in Louisiana expresses in its mission the importance of educating students “to serve clients and the broader society” and to “serve the community by advancing the fundamental values of diversity, justice, and the rule of law.”²⁸ Duquesne University School of Law promotes a mission of educating students to not only assist individual clients but to act for the “betterment of society and in furtherance of justice.”²⁹ Like the ABA, many law schools view the responsibility of lawyers to extend not only to clients, but also to the greater good of society.

23. MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶ 1 (AM. BAR ASS'N 1983).

24. *See id.*

25. *Id.* at ¶ 6.

26. *Id.* at ¶ 7.

27. *Our Mission*, WILLIAM & MARY LAW SCH., <http://law.wm.edu/about/ourmission/index.php> (last visited Nov. 28, 2016).

28. *Mission Statement*, TULANE UNIV. LAW SCH., <http://www.law.tulane.edu/tlsabout/index.aspx?id=1870> (last visited Nov. 28, 2016).

29. *Mission Statement*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/about/mission-statement> (last visited Nov. 28, 2016).

Despite the continued importance of lawyers in public life, the profession's hegemony of public service is seemingly in decline. In recent years, there has been a significant reduction in the percentage of lawyers involved in public service and government.³⁰ At the same time, there is also an overall decline in knowledge and understanding of our governmental system in the general populace.³¹ Lack of civics education is not reserved for the uneducated or poor;³² it even rears its head in law school classrooms.³³ Ignorance among the electorate regarding the value of individual liberties, checks and balances, and the basic framework of our institutions, could have grave consequences regarding their ultimate survival.³⁴ Lawyers are the natural solution to help educate and inform the public regarding civics.³⁵ In fledgling or developing democracies the lawyers are expected to act as civics educators, much as they were in early American history.³⁶ While the United States is a well-established

30. See Robinson, *supra* note 3, at 27 ("In recent years, the proportion of lawyers in the U.S. Congress has hit an all time low. There is also evidence of a similar general decline in lawyer representatives in state legislatures.").

31. See Sam Dillon, *Failing Grades on Civics Exam Called a 'Crisis,'* N.Y. TIMES (May 4, 2011), <http://www.nytimes.com/2011/05/05/education/05civics.html?module=ArrowsNav&contentCollection=Education&action=keypress®ion=FixedLeft&pgtype=article> (discussing the poor performance of students on a national civics exam and efforts to re-emphasize civics education in schools.) See also Margaret Warner, *David Souter Gets Rock Star Welcome, Offers Constitution Day Warning*, PBS NEWSHOUR (Sept. 17, 2012), <http://www.pbs.org/newshour/runtdown/conversation-justice-david-souter/> (discussing interview with former Supreme Court Justice, David Souter, where he described the "pervasive civic ignorance" of Americans as the greatest risk to the survival of our republican form of government).

32. See Jonathan R. Cole, *Ignorance Does Not Lead to Election Bliss*, THE ATLANTIC (Nov. 8, 2016), <https://www.theatlantic.com/education/archive/2016/11/ignorance-does-not-lead-to-election-bliss/506894/>.

33. I have found, in teaching legislative process courses, that even upper-level law students lack some basic understanding of how the system is supposed to work, and the brilliance of the "checks and balances" that protect freedom. The lack of ability to easily accomplish goals is a frustration for those who seek instant gratification. I try to show my students that passing laws is hard for good reason, so that the views of many can be accounted for and addressed. However, if law students have difficulty appreciating our institutions of checks and balances, it is no wonder that other citizens struggle more profoundly.

34. See Warner *supra* note 31 (quoting retired Supreme Court Justice Souter who claimed that ignorance of civics is "how democracy dies."). See, e.g., Television interview by Jake Tapper with James Clapper, former Director of National Intelligence, CNN (Mar. 14, 2017), <http://www.cnn.com/videos/us/2017/05/14/james-clapper-full-intv-sotu.cnn> (discussing attacks against United States governmental institutions from both "external" and "internal" sources.).

35. Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home:" the Lawyer as Civics Teacher in *Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1213-14 (2009) ("In society, lawyers in fact teach their fellow citizens how to understand their rights and responsibilities as members of a community—their obligations to obey the law, aspirations to fulfill the spirit of the law, and responsibilities to the good of their neighbors and the general public.").

36. *Id.* at 1234 (noting that with regard to developing democracies "[the] bar ascribes to lawyers an important role in promoting and sustaining democratic legal and institutional reform, largely through work outside the everyday representation of private clients").

democracy, as noted above the civics knowledge of the populace is lagging, and it logically falls to lawyers to shoulder a large burden in helping to close the knowledge gap and educate clients and the public regarding the rule of law and democratic institutions.³⁷ This role was one initially anticipated at the founding, but it is one that is equally important today.

Engagement of lawyers as citizens begins in law school. While the reason for the recent decline in lawyers in public service and government is likely multi-faceted, law schools have been criticized particularly for this trend, due to their failure to actively cultivate the “citizen lawyer” or promote the lawyer’s responsibility for the common good.³⁸ One possible solution to correct this shortcoming of current legal education and encourage law students to focus more on their duty to public good is to go back to the beginning, and consider how the original “citizen lawyers” were first educated.

When Thomas Jefferson appointed George Wythe, the preeminent lawyer in Virginia at the time, to head the William & Mary Law School, Jefferson wanted the law school to train public citizens to take on the responsibility of self-government; in other words, to train “citizen lawyers.”³⁹ Wythe accomplished this goal through two main tools: first, he promoted a liberal education involving not only legal doctrine, but also humanities, philosophy, natural sciences, and social sciences subjects; second, Wythe included experiential learning in his curriculum.⁴⁰ Wythe began a moot court, in the style that had originated in the English Inns of Court, which allowed students to bring cases and argue them before their professors.⁴¹ This practice continues in most law schools today, not as a requirement, but as a supplemental learning opportunity. But even more important to the idea of educating the lawyer as a public citizen, Wythe also introduced a mock legislative body, where students, pre-

37. *Id.* at 1221 (arguing that lawyers, through client interactions as well as interactions with others in society, such as “[f]riends, family, coworkers, employees, employers, adversaries, [and] community members,” should purposefully work to educate people on civics). The article further notes that “[i]t is also well-acknowledged that schools do not always do the job [of teaching civics] successfully and thoroughly, and people have too few other effective opportunities to learn.” *Id.*

38. See Robert J. Araujo, *The Lawyer’s Duty to Promote the Common Good: The Virtuous Law Student and Teacher*, 40 S. TEX. L. REV. 83, 87 (1999) (discussing the argument that the “case method” of legal instruction tends to harm students’ “commitment to the public interest” because it focuses students on making arguments in a value-free, dispassionate way). See also Robinson, *supra* note 3, at 50–51 (discussing recent criticism of scholars who believe law schools are not educating lawyers for leadership or civic responsibility).

39. Douglas, *supra* note 5, at 194–95.

40. *Id.* at 201.

41. *Id.*

viously taught parliamentary procedure, were organized in legislative assembly and would meet once a week to draft, debate, and amend legislation on issues then pending in the Virginia House of Delegates.⁴²

Thomas Jefferson noted the importance of this mock legislature and similar teaching methods employed at William & Mary in training the new leaders of the government:

Our new institution at the College has had a success which has gained it universal applause. Wythe's school is numerous. They hold weekly courts and assemblies in the capitol. The professors join in it; and the young men dispute with elegance, method and learning. This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.⁴³

Today, the legal profession has reached a point where our rhetoric continues to promote the importance of the “citizen lawyer” in our society, but our law school curriculum in many ways has moved away from it.⁴⁴ We no longer can rely upon a foundation of strong liberal arts education in our students, making it more difficult to connect legal education to the valuable learning of humanities and social sciences.⁴⁵ We have few courses in public policy, legislation and regulation, and legislative drafting instruction remains rudimentary, if it exists in a law school at all.⁴⁶ The fact that many lawyers continue to participate in public life may be a result of the

42. *Id.* at 201–02.

43. *Id.* at 202 (quoting a Letter from Thomas Jefferson to James Madison (July 26, 1780)).

44. See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 39 (1995).

A significant body of literature has developed in support of the notion that instruction in the law is fundamentally lacking unless it includes as a core component significant opportunities for learning about the social setting which shapes the practice of law and issues of justice in the adoption and application of the law. The core of these arguments questions the Langdellian model of legal instruction based on the concept of law as reason-based, abstract, and value-free, and thus best studied in a detached and scientific method. The Langdellian method, the argument goes, ignores the impact of social and political factors on law and therefore presents a picture of the legal system and lawyers' place in it that is, at best, hopelessly naive, and at worst, dangerously misleading.

Id.

45. See Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Law Schools*, 116 PENN ST. L. REV. 1119, 1143–44 (2012) (noting that law students no longer have the core liberal arts education that was once nearly universal, and arguing that while diversity can be good, law schools are “seeing students with much weaker, less expansive educational backgrounds” as well as poor research and critical thinking skills).

46. See J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 16–17 (2017)

interests of the individual student, the efforts of individual faculty members, or the informal serendipity of the law school experience. However, without formal commitment in the curriculum, the percentage of lawyers in public life seems destined to continue on a downward trajectory.⁴⁷

It is nearly undisputed, at least within the profession, that lawyers should and will continue to play significant roles in shaping law, justice, and society moving forward. However, what role does legal education play in developing lawyers capable of doing so? The next section describes one type of course—an experiential legislative course—that can have an impact on developing both the “lawyer” and the “citizen” aspects of the “citizen lawyer” identity.

III. EXPERIENTIAL LEGISLATIVE COURSE DESIGN

Courses focusing on legislative process, and drafting statutes and rules, come in many shapes and sizes.⁴⁸ I, personally, have taught legislative courses in different ways, depending on the size of the class, the needs of students, and the role of the course in the larger curriculum.⁴⁹ Despite some differences in format or pedagogical method, legislative courses generally satisfy a core set of goals and objectives including the following:

- To foster understanding of the legislative process, and its role in making law at all levels of government.
- To foster understanding of the legislative process as both a tool to help solve the problems of clients, and as a means of

47. See Robinson, *supra* note 3, at 12 (finding that after hitting a peak in the mid-nineteenth century where lawyers held nearly 80% of Congressional seats, the legal profession now accounts for less than 40% of Congress).

48. See, e.g., Jamie Abrams, *Experiential Learning and Assessment in the Age of Donald Trump*, 55 DUQ. L. REV. 75, 92–93 (2017) (discussing how to approach controversial and divisive topics in experiential public policy courses); Rex D. Frazier, *Capital Lawyering & Legislative Clinic*, 55 DUQ. L. REV. 191 (2017) (describing McGeorge School of Law’s Capital Lawyering Concentration which seeks to train law students in advocacy and public policy in the California legislature); Lisa A. Rich, *Teaching Public Policy Drafting in Law School: One Professor’s Approach*, 55 DUQ. L. REV. 151, 165–66 (2017) (describing the professor’s pedagogical approach in teaching a public policy drafting class at Texas A&M University School of Law).

49. At the University of Akron School of Law, I taught a Legislative Drafting course to a section of approximately twenty-five students. The course fulfilled a mandatory curriculum requirement, so while some of the students were interested in the topic, others simply used it as a conduit to fulfill their course needs. At Duquesne University School of Law, I teach a Pennsylvania Legislative Process and Drafting course that is an elective. It satisfies experiential credits, but tends to attract a smaller group of students specifically interested in law-making and politics. While the basic course goals are similar, the techniques for each group of students are necessarily different.

reforming law and improving the quality and access to justice to benefit our society.

- To encourage students to think deeply about particular legal problems, research, and solve problems through the drafting of statutes and rules.
- To provide opportunities to learn and practice statute and rule drafting skills that are necessary for crafting good law and are transferable to any area of law practice.
- To provide experiential learning opportunities that reinforce the theories of legislative process and drafting learned in the classroom.
- To enhance understanding of the political process and how it influences lawmaking.
- To encourage students to take on leadership roles within the classroom and the community.
- To provide an opportunity to engage in practice-ready skills including: negotiation, drafting, and oral communication.⁵⁰

While different faculty members may focus on different goals, this list encapsulates the wide range of benefits such a course may provide to students.

One of the central facets of the legislative courses I have taught is the incorporation of a mock legislature. By taking on the role of a legislator working within the legislative body, students are able to experience the process first-hand, as opposed to learning theory and techniques purely through reading, lecture, and discussion. The learning here is very much in the doing. A class can discuss the difficulty of writing a law, forming consensus on that law, and compromising with those who have opposing views. Actually participating in this process is what deepens the student's understanding. Wythe and Jefferson inherently understood that practicing the art of statesmanship would necessarily make the William & Mary students better equipped, at the end of their studies, to accept roles in the republican government.⁵¹ Today, while such experience is helpful for those who will eventually work in legislative government, it is equally important for lawyers working in almost any sector of law to have a firm grasp on the lawmaking process. In my

50. Ann L. Schiavone, Syllabus, Pennsylvania Legislative Process and Drafting (Spring 2015) (on file with Duquesne University School of Law Dean's Office).

51. See Douglas, *supra* note 5, at 202 ("Wythe agreed with Jefferson's assessment of his purpose of training political leaders. Writing John Adams in December 1785, Wythe articulated his purpose as 'to form such characters as may be fit to succeed those which have been ornamental and useful in the national councils of America.'").

own experience I have frequently been surprised by what law students do not know about government, politics, and lawmaking. Based on this experience, it is essential that we, as educators, do a better job of grounding our students in the full landscape of the law, which includes the legislative function.

The size of the class determines the type of legislative body the course can support. If the class is in the twenty to thirty student-range, it can support a “mock senate” format, with organized committees, parties, and elected leadership. If the class is smaller—certainly anything less than fifteen students—a mock “legislative committee” is likely the best format. No matter the size of the legislative body, students should have the opportunity to research and draft legislation, present that legislation to colleagues, face questions and debate about the legislation, face critique in the form of amendment by colleagues, and ultimately face a final vote on their work by the full senate or committee.

If one of the goals of the course is to foster understanding of the political process of lawmaking, the course can be structured to incentivize competition and compromise.⁵² By granting bonus points for individual success (passage of your bill, passage of a bill you co-sponsored; or acceptance of your amendment to someone else’s bill), and party success (passage of a bill sponsored by your party or blocking the bill of another party), students are motivated to calculate their best interest. Should the student cross the aisle to support a bill in which he or she believes? Should she stay strong and support the party? Can he trade his support for the support of another? That decision-making process differs depending on whether the student is in the majority or the minority party.

Legislative drafting is generally considered “the most difficult form of drafting,” because of the complexities of the issues, and the variety of audiences and interests that play a role in formation.⁵³ Students in legislative courses should have the opportunity to learn the theory and techniques behind such drafting and try their hand at it with multiple opportunities to draft and redraft. It is also beneficial for students to work on legislative projects that interest them. Students in my legislative courses have the opportunity to

52. Competition and compromise are significant movers of the political process; it can sometimes be difficult to create these artificially. To the extent the class has a tendency to want to collaborate and support one another, rewarding competition is necessary. To the extent students are already competitive with one another, it may become important to reward compromise. Flexibility on the part of the professor, and even “changing rules” mid-semester, may be necessary.

53. ROBERT J. MARTINEAU & MICHAEL B. SALERNO, *LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH* 92 (2005).

research and draft a bill on a topic of their choosing, and these are the bills considered by the legislative body. The only major restriction is that it must be a bill within the purview of the legislative body constituted for the course.

The mock legislative experience requires students to research, problem-solve, communicate orally and in writing, think deeply about a problem, and also think on their feet. They work in groups and individually to accomplish goals and have the opportunity to reflect upon their experiences. While such opportunities certainly make a student readier to pursue a career in public life, the skills are also transferable to other career paths and actively promote the lawyer as a public citizen.

In addition to the mock legislative component, I also suggest that legislative courses are excellent vehicles for service learning, sometimes called community-engaged learning. Service learning,⁵⁴ a staple on most undergraduate campuses, has found limited purchase in law school classrooms. The responsibility of providing students with experiential learning opportunities and community engagement is often left solely to overburdened clinics. While clinics provide excellent opportunities for law students to learn in the field and engage with marginalized populations in their community, law schools should not silo community engagement purely within the clinic context.

Incorporating service learning within existing law school courses, particularly legislative courses, can complement the current efforts of clinics to accomplish the dual goals of producing practice-ready and community-minded lawyers.⁵⁵ Legislative and regulatory writing projects, such as draft legislation, position papers, or other similar research documents, provide a vehicle for engagement between students and community groups. Students write for audiences outside the classroom and learn to collaborate with varied individuals and populations. They respond to client needs, and often take on the role of educator on a particular issue or issues. These students are empowered through the act of producing work that matters to

54. See Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y. L. SCH. L. REV. 561, 565 (2011) (“Service-learning as a pedagogical approach and educational philosophy has a rich legacy and history in the United States. This approach integrates hands-on social action, volunteerism, and learning objectives into a third apprenticeship model that resembles, but is not identical to, clinical legal education.”). The authors of this article beautifully articulate the benefits of service learning and why law schools should employ it more regularly.

55. See *id.* at 568 (describing the dual goals of clinical education as providing practical skills experience and “access to justice” for underrepresented members of the community and extrapolating those goals to a service-learning course).

others, and similarly their work then can further empower the group or groups with whom they are collaborating.

In my course I assign groups of students to work with local non-profit organizations to pursue legislative solutions for issues facing the population that the organization benefits. For example, students in my courses have worked on various issues for non-profits including homelessness, human trafficking, and immigration. The students work with these groups, researching a problem, drafting the legislation, and providing written explanations of the bill. They then present it to the organization for revisions and approval. Later, the students can meet with legislators who may be willing to pursue the legislation in the local council, state legislature, or Congress. When included in a course along with the mock legislature, my students gain even more insight to the complexities of the legislative process. They also sometimes help the non-profit to better understand the process and the variables faced in reforming the law.

Regardless of whether the legislative course is focused on legislative simulation, service-learning, or incorporates both, it provides students with hands-on learning. The next section will explore the theory of experiential learning in legal education, and show why a legislative course is an ideal way to teach excellence in lawyering that is necessary for any “citizen lawyer.”

IV. LEGISLATIVE COURSES AS EXPERIENTIAL LEARNING FOR THE “CITIZEN LAWYER”

A. *The History of Experiential Learning in the Law*

Experiential learning theory is no mere fad. Its foundations reach as far back as Aristotle who famously noted that humans learn the art of building or of music by doing them.⁵⁶ More recent pedagogical scholarship builds upon Aristotle’s observations, finding “experience” plays a vital role in the learning process.⁵⁷ One of the pioneers

56. J. E. C. WELLDON, *THE NICOMACHEAN ETHICS OF ARISTOTLE* 35 (MacMillan and Co., Limited 1897). “It was not by seeing frequently or hearing frequently that we acquired the senses of seeing or hearing; on the contrary, it was because we possessed the senses that we made use of them, not by making use of them that we obtained them. But the virtues we acquire by first exercising them, as is the case with all the arts, for it is by doing what we ought to do when we have learnt the arts that we learn the arts themselves; we become builders by building and harpists by playing the harp.” *Id.*

57. See Jan L. Jacobowitz & Scott L. Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY’S J. LEGAL MAL. & ETHICS 198, 201 (2014) (“Aristotle spoke of virtue and ethics as practical wisdom, which one may develop by acquiring knowledge and engaging in

in the field, David A. Kolb, described experiential learning as “the process whereby knowledge is created through the transformation of experience.”⁵⁸

Experiential learning has long been a fundamental part of legal education. The study of law is, at once, both a professional practice and an academic pursuit.⁵⁹ The historical record and current consensus generally agree that the best legal education requires the two models to work in concert.⁶⁰ The law is both an art and a science; thus to become excellent lawyers, one must learn the science, but practice the art.⁶¹

For over 800 years, the English Inns of Court furnished a hybrid learning environment for training barristers, providing “a combination of educational institution, boarding facility, and professional association” for the English litigators.⁶² These Inns of Court sponsored moot courts to teach aspiring lawyers their craft as early as the Middle Ages.⁶³

habituation—an individual gains wisdom only after he combines his knowledge with personal experience. Perhaps one of the earliest proclamations of the value of experiential learning, the Aristotelian view, reappears throughout history . . .”).

58. DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT 38 (1984) (“This definition emphasizes several critical aspects of the learning process as viewed from the experiential perspective. First is the emphasis on the process of adaptation and learning as opposed to content or outcomes. Second is that knowledge is a transformation process, being continuously created and recreated, not an independent entity to be acquired or transmitted. Third, learning transforms experience in both its objective and subjective forms. Finally, to understand learning, we must understand the nature of knowledge, and vice versa.”). Kolb’s theory of experiential learning describes the process as cyclical, with four primary stages: (1) Abstract Conceptualization (THINK); (2) Active Experimentation (PLAN); (3) Concrete Experience (DO); and (4) Reflective Observation (REFLECT/OBSERVE). He believed that a learning experience can begin at any point in the cycle, but ideally a student will move through the cycle several times over the course of a learning experience. *Id.* at 31.

59. Brian A. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775 (2004). “For many years, American legal education reflected two contrasting schools of thought. One held that the practice of law was primarily a craft to be learned like other crafts by the handing down of knowledge from master to apprentice. The other viewed law as a learned profession to be taught as a social science in a university setting. Both theories had vigorous partisans, and both have dominated or co-existed in uneasy compromise at different points in our history. Echoes of the dichotomy continue today in the debate over the proper role of the clinical experience in legal education.” *Id.* at 775.

60. See WILLIAM M. SULLIVAN ET. AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, 12–14 (2007) [hereinafter CARNEGIE REPORT] (discussing a comprehensive “framework” of legal education that focuses, concurrently, on three pillars: legal analysis, practical skill, and professional identity).

61. Moline, *supra* note 59, at 802.

62. *Id.* at 775.

63. Douglas, *supra* note 5, at 201.

In early America, there were no formal legal education programs, and the demand for legal services soon exceeded the supply of available English-trained lawyers, leading to the rise of the practice of “self-study” for the bar or legal apprenticeships.⁶⁴ Early law students in America could either attempt to “read the law” on their own, or they would work with an established lawyer in a mentor-mentee relationship.⁶⁵ The mentor-lawyer ideally would set out a course of study for the student including the reading of treatises, constitutions, and statutes and also provide the student with opportunities to practice the skills of lawyering.⁶⁶ The mentor-lawyer would receive free labor in return.⁶⁷ The quality of this type of education varied, depending on the quality of the mentor’s instruction, the type of experience gained, and the books available.⁶⁸ Thomas Jefferson and John Adams both earned admittance to the bar in this manner.⁶⁹

Jefferson became a strong opponent of the apprenticeship method of study, working to bring more formal legal education to Virginia during his time as Governor.⁷⁰ His vision for university-based education for lawyers, however, did not exclude experiential learning.⁷¹ As he noted in his letter to James Madison about the course of study at William & Mary, the “performance” of the students in the moot courts and mock legislatures were integral to training the “citizen lawyer.”⁷² Formal law schools took root in the nineteenth century and continued their development over the course of the next 200

64. Moline, *supra* note 59, at 778.

65. *Id.* at 779.

66. *Id.* at 780–81. “Legal education in the United States began as an extension of practice. Lawyers in the colonies were educated much as they were in Britain at the time—by ‘reading the law.’ This entailed the painstaking study of texts and treatises, . . . under the watchful eye of a practicing attorney.” Jeffrey J. Pokorak, Ilene Seidman & Gerald M. Slater, *Stop Thinking and Start Doing: Three-Year Accelerator-to-Practice Program as a Market-Based Solution for Legal Education*, 43 WASH. U. J.L. & POL’Y 59, 63–64 (2013). The apprenticeship method is looked upon with fondness by many who favor a return to practical skills, but even in early American history it was not always looked on favorably, especially by those interested in producing true citizen lawyers. Learning to be a lawyer was more to them than the narrow process of learning to “practice” law. *Id.*

67. See Douglas, *supra* note 5, at 190 (describing the reality of an apprentice’s life which often consisted of copying documents).

68. See Moline, *supra* note 59, at 781–83 (contrasting the varying experiences of lawyers within an apprenticeship program prior to the Revolution, including future Supreme Court Chief Justice Oliver Ellsworth, and future Presidents, John Adams, Thomas Jefferson, and John Quincy Adams).

69. *Id.* at 783–84. Alexander Hamilton, Aaron Burr, and John Marshall took advantage of patriot exceptions to apprenticeship requirements for veterans of the Revolutionary War and entered the bar following abbreviated self-study. *Id.* at 784–86.

70. See Douglas, *supra* note 5, at 197 (describing Jefferson’s various efforts for educational reform, including the establishment of a professorship of law at William & Mary).

71. *Id.* at 201–02.

72. *Id.* at 202.

years, but experiential learning never completely left legal education.⁷³ The history of early American legal education supports the view of law as both “a science that can and should be taught and an art that can only be learned by doing.”⁷⁴ To this day, legal education continues to balance the science and the art of the profession.

For a time, the pendulum swung away from the need for experiential learning, as law schools attempted to separate themselves from their “trade school” past and gain respect as an academic discipline.⁷⁵ Toward the end of the twentieth century, however, the ABA and others, recognizing a gap between legal education and the practice of law, began introspective consideration of the education of lawyers.⁷⁶ As a result of that introspection, in 1992 the ABA published *Legal Education and Professional Development—An Educational Continuum* (commonly known as the MacCrate Report), which set about attempting to “narrow the gap” between legal education and legal practice.⁷⁷ The report, among other things, identified fundamental skills and values necessary for the practice of law and encouraged law schools to incorporate such skills and values into the curriculum to bridge the gap for students entering practice.⁷⁸

In 2007, further developing ideas first considered in the MacCrate Report, the Carnegie Foundation for the Advancement of Teaching published *Educating Lawyers: Preparation for the Profession of Law* (commonly known as the Carnegie Report). It urged the uniting of formal legal knowledge and the experience of practice into a “single educational framework.”⁷⁹ The Carnegie Report recognized three “pillars” of legal education—legal analysis, practical

73. See Moline, *supra* note 59, at 800–01 (noting that early law schools, including Harvard, maintained more or less a “trade school” approach to teaching law, and that it was not until “the 1870s . . . [that] . . . law schools begin to establish liberal education requirements,” and adoption of a “comprehensive legal education system, integrating theory and practice” did not arise until after World War II).

74. Moline, *supra* note 59, at 802.

75. *Id.* at 800–01.

76. AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992) [hereinafter MACCRATE REPORT].

77. *Id.* at 3.

78. See *id.* at 135–221.

79. CARNEGIE REPORT, *supra* note 60, at 12. See also Stephen R. Alton, *Roll over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339 (2010). “Echoing the MacCrate Report’s recommendations, the Carnegie Report urges the legal academy to adopt modes of pedagogy that provide the opportunities for law students to learn in a way that combines the main elements of ‘legal professionalism—conceptual knowledge, [professional] skill, and moral discernment.’” *Id.* (quoting CARNEGIE REPORT, *supra* note 60, at 12).

skill, and professional identity—and called for law schools to integrate these pillars across the curriculum.⁸⁰

The release of these publications, coupled with the economic downturn of 2008, which increased the pressure on law schools to produce “practice ready” law students who could compete in a contracting legal market, organically resulted in increased experiential learning in many law schools.⁸¹ Additionally, the ABA has pushed all accredited law schools toward production of “practice ready” graduates, by requiring emphasis on experiential learning and skills development.⁸² Most recently, the ABA upped the ante on experiential learning in its Standards and Rules for Approval of Law Schools and revised Standards 303⁸³ and 304,⁸⁴ which now require any student graduating from an ABA-accredited school to complete at least six credits of experiential learning.⁸⁵ These credits may be earned through clinics and externships (called “field placements”), but they also may be earned via simulation courses.⁸⁶ The experiential credits, whether earned via clinic, simulation, or external placement require the experience to: “(i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.”⁸⁷ These four requirements map to the theoretical steps of experiential learning, which require students to think, plan, do, and reflect, in a cyclical fashion, such that a student will perform these steps more than once during a learning experience.⁸⁸

80. CARNEGIE REPORT, *supra* note 60, at 13–14.

81. See Morant, *supra* note 1, at 246 (“In fact, the changes stimulated by the decline in applications to law schools and less market demand for law school graduates have accelerated the continuing evolution of American legal education. From its inception based in apprenticeship to its present form that includes classroom instruction heavily supplemented with experiential learning, legal education in the United States continues to evolve, and the resultant programmatic changes are reflective of market realities.”).

82. See Legal Skills Prof, *ABA approves new accreditation standards to require more “experiential” opportunities*, LEGAL SKILLS PROF BLOG (Aug. 12, 2014), http://lawprofessors.typepad.com/legal_skills/2014/08/aba-approves-new-accreditation-standards-that-require-more-experiential-learning-opportunities-.html.

83. AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017 16 [hereinafter ABA STANDARDS], (Standard 303) (See Appendix A for full text.).

84. *Id.* at 17–18, (Standard 304) (See Appendix B for full text.).

85. *Id.* at 16 (Standard 303(a)(3)).

86. *Id.*

87. *Id.*

88. *Id.* These requirements set forth in Standard 303 reflect the Kolb model of experiential learning, requiring the learning environment to include thinking, planning, doing and

Standard 304 differentiates between simulations, clinics, and field placements, noting that simulations do not involve actual clients, clinics are conducted within the purview of the law school, and field placements are made with practicing attorneys.⁸⁹ All three of these experiences, whether involving real clients, or not, require a classroom component, feedback from faculty, and proper supervision of the student activities by qualified individuals.⁹⁰

B. Legislative Courses as Experiential Opportunities

Legislative courses provide ideal opportunities to satisfy Standard 303 for experiential learning. Whether the course is conducted as a mock legislature or via another learning model, faculty can satisfy the ABA requirements and provide students with meaningful learning experiences. Students in legislative courses will invariably be required to consider legislative solutions for real-world legal problems. Such problem solving will require students to understand the doctrine and theory connected with the area(s) of law involved, to practice skills of research, writing, and oral presentation, and to consider ethical and moral questions that may arise in the development of any legislative solution.⁹¹ Faculty are there to guide and develop a student's understanding of both doctrine and skills, to provide multiple opportunities to perform specific skills, and to give students the chance to reflect on the experience both orally and in writing.⁹²

While the mock legislature format for a legislative course likely qualifies as a simulation under Standard 304, where a service

reflecting, as well as multiple opportunities to work through the experiential learning cycle. See KOLB, *supra* note 58, at 32–33.

89. ABA STANDARDS, *supra* note 83, at 17–18 (Standard 304).

90. *Id.*

91. Again, it is interesting to note that this process maps well to Kolb's experiential learning model with overlapping experiential cycles. For example, in the mock legislative body, the students may begin with drafting a bill. They start with brainstorming about a problem or issue (THINK), then they research, collect examples, and consider a solution (PLAN). The next step is to actually "write" the bill (DO), followed closely by presentation of the bill to peers and colleagues who critique and amend the bill resulting in revisions based on reflection (REFLECT). Similarly, the legislative process of the mock legislature is an experiential cycle. Students will learn about the legislative process and rule of order abstractly (THINK); then they will organize parties, elect leadership, constitute committees, and co-sponsor bills (PLAN). Once the bills are prepared, the action of presenting, debating, and amending bills follows (DO). While some students are acting out their roles in the legislative process, others are watching and learning from observing their colleagues and reflecting on the process (REFLECT). See KOLB, *supra* note 58, at 33.

92. Kolb's model and ABA Standard 303 require multiple opportunities for students to move through the experiential cycle over the course of a learning experience. *Id.* at 31.

learning-based course fits is less clear.⁹³ The ABA released a guidance memo on Sections 303 and 304 in March of 2015 to assist law schools in the implementation of these new requirements, but the memo is silent on the question of whether service learning may satisfy any of the requirements.⁹⁴ Service learning does not perfectly match any of the approved methods of experiential learning listed in Standard 304, as it is neither fully simulation, as it requires actual engagement with community partners, nor is it a clinic or a field placement, either.⁹⁵ A service learning opportunity usually involves real clients, and students do pro bono legal work or “law-related public service activities.”⁹⁶ While such activities are encouraged under Standard 303(b) as “substantial opportunities” for students, it is not clear that service learning activities will count toward the required experiential credits.⁹⁷ If service learning courses include classroom instruction, faculty feedback, and proper supervision, as are required for the simulation, clinical, and fieldwork options, there does not seem to be a reason why service learning could not be counted toward the experiential learning requirements, but that question currently remains open.⁹⁸

Regardless of whether an experiential legislative course specifically satisfies the ABA Standards, it will fulfill the purpose of experiential learning by giving students opportunities to integrate legal concepts with practical skills and professionalism as called for by the Carnegie Report, experiential learning theory, and the Jeffersonian model of legal education.⁹⁹

93. Service-learning also lends itself to the Kolb experiential learning cycle. Again, students gather information and brainstorm, then research and plan, followed by drafting, presentation, redrafting and further lobbying on behalf of the measure. Again, it includes thinking, planning, doing, and reflecting, and multiple opportunities for repetition, until the students' work is complete. *Id.* at 31, 33–34.

94. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO, STANDARDS 303(A)(3), 303(B), AND 304 (March 2015) [hereinafter GUIDANCE MEMO].

95. *See* ABA STANDARDS, *supra* note 83, at 17–18 (Standard 304).

96. *See id.* at 16 (Standard 303(b)).

97. *See id.*; *see also* GUIDANCE MEMO *supra* note 94, at 1.

98. GUIDANCE MEMO *supra* note 94, at 3 (“By meeting the requirement that a course be primarily experiential in nature, the requirement that the course provide ‘substantial experience’ likely is also met, as long as the course also includes ‘direct supervision of the student’s performance by the faculty member’ and ‘opportunities for performance, feedback from a faculty member, and self-evaluation’ as further required by the Standard.”).

99. CARNEGIE REPORT, *supra* note 60, at 13–14; KOLB, *supra* note 58, at 31; Douglas *supra* note 5, at 185.

V. STATUTORY COURSES CAN HELP DEVELOP STUDENTS' IDENTITY AS "CITIZEN LAWYERS" THROUGH ATTENTION TO SOCIAL JUSTICE, LAW REFORM, AND COMMUNITY LEADERSHIP

In recent years, a number of legal scholars, especially clinical-focused legal scholars, have argued in favor of more purposeful attention to social justice education in law schools.¹⁰⁰ In his *Letter to a Law Student Interested in Social Justice*, Professor William Quigley tells the story of a group of law students he worked with in assisting New Orleans property owners in the aftermath of Hurricane Katrina.¹⁰¹ Following a week of long hours sifting through belongings and trying to identify owners of homes scheduled for demolition, Professor Quigley sat with the students and asked them to reflect on their experiences.¹⁰² After many shared tears and stories, one student quietly reflected on the privilege he felt in being able to help people in a real way.¹⁰³ The student observed: "The first thing I lost in law school was the reason that I came. This will help me get back on track."¹⁰⁴

As faculty, how many stories have we heard from incoming students, or early first-year students about why they wanted to be lawyers? How many of those stories revolve around the desire to help people, a goal to improve justice, a desire to make a difference in the world? By graduation, how many of those students enter the area of the profession that drew them to the profession in the first place?

One of the primary critiques of these scholars is that while lawyers pay "lip service" to the profession's responsibility of advancing justice, there is no true commitment to that goal.¹⁰⁵ They argue that legal education works hard to instill a sanitized, purely reason-based, and abstract view of the law in students.¹⁰⁶ Discussion of legal problems and issues are too often divorced from social, emotional, moral, and political influences and implications.¹⁰⁷ Thus,

100. See, e.g., John O. Calmore, "Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY.L.A. L. REV. 1167 (2003); Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459 (2006).

101. William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 7-8 (2007).

102. *Id.* at 8.

103. *Id.*

104. *Id.*

105. *Id.* at 11.

106. Quigley, *supra* note 44, at 39.

107. *Id.*

students who enter law school specifically for the purpose of engaging in work that benefits society learn quickly that there is no room for social justice in their legal educations.¹⁰⁸

Ultimately, these scholars urge law schools to embrace the opportunity to connect law students with “lessons of social justice,” to urge students to critique the law as it exists, and to connect the law to the world it affects and which affects it.¹⁰⁹ Anything less amounts to an incomplete legal education.¹¹⁰

The movement to reconnect law to the social, political, and economic context from which it arises is very much in line with the Jeffersonian view of the “citizen lawyer” and the legal education necessary to produce “citizen lawyers.” Jefferson, and others like him, insisted students learn philosophy, history, government, social sciences, ethics, and politics.¹¹¹ Jefferson, too, recognized that the young republic needed lawyers willing to advance the improvement of the law.¹¹²

While “social justice” was not likely a turn of phrase in Thomas Jefferson’s vocabulary, the movement to incorporate social justice in legal education dovetails well with the goal of producing “citizen lawyers”—lawyers not just committed to the individual client, or their own careers, but lawyers ready to service the public good. While not every lawyer will be called to work for the American Civil Liberties Union or Neighborhood Legal Services, all lawyers can identify as a “citizen lawyer” in all the various manifestations of the concept.

Certainly clinical legal education lends itself to teaching social justice because clinics can “bring[] abstract notions of justice to life”¹¹³ and can challenge students to move beyond thinking like a lawyer to “engage in creative, reflective, and strategic thinking.”¹¹⁴ But it is not just the responsibility of clinicians to connect law students to social, moral, economic, political and historical influences

108. *Id.* at 42.

109. *Id.* at 44.

110. *Id.*

111. *See* Douglas, *supra* note 5, at 199 (“This ambitious education served a specific purpose: to provide wisdom and perspective necessary for governance. As Herbert Johnson has noted, ‘with Jefferson and Wythe the study of law was coordinated with other studies designed to place the law in context with the emerging social science disciplines, and to give the future lawyer a broader view of law as an instrument of social policy.’”).

112. *See id.* at 199 (“Jefferson believed that nations must modify their legal rules to reflect their particular social and political environment. Jefferson himself was deeply involved in reshaping the English common law to suit the American context . . . He argued that lawmakers and judges could not properly adapt English law to the American context if their education were limited merely to a reading of the English common law.”).

113. Quigley, *supra* note 44, at 44.

114. Calmore, *supra* note 100, at 1174.

on the law, or to challenge students to think deeply about how to improve law. Law schools should support such learning across the curriculum. Many law schools¹¹⁵ and individual professors¹¹⁶ do promote such comprehensive learning, connecting law to its social context and to experiences of the “real world.”

ABA Standards 303 and 304 may provide additional impetus for legal education to further invest in comprehensive experiential learning, including social justice, law reform, and “citizen lawyer” education. As noted above, experiential learning by its very nature connects abstract concepts to real world events. All the various manifestations of experiential learning, whether clinics, simulation courses, field placements, or service learning courses, provide opportunities to show students that the law is not an abstract, unquestionable concept alone, but rather, a messy, imperfect man-made thing, that sometimes does not always work as you hope it will work, and that sometimes the imperfect law needs reform and development.

Participation in legislative activities including mock legislative courses, statute and rule drafting exercises, legislative-related field placements, and clinics involved in public policy and law reform, provide excellent, if largely untapped, opportunities to help students form their “citizen lawyer” identity.¹¹⁷ Giving students the freedom to think about the law critically and to think creatively about possible solutions can often challenge students’ preconceived notions, resulting in what adult learning theory calls the “disorienting moment” where expectation and reality do not match.¹¹⁸ It is through these disorienting moments that “real transformation” begins.¹¹⁹

115. See, e.g., *George Barrett Social Justice Program*, VANDERBILT LAW SCH., <https://law.vanderbilt.edu/academics/academic-programs/george-barrett-social-justice-program/index.php> (last visited May 17, 2017); *Law and Social Justice Initiatives*, THE CATHOLIC UNIV. COLUMBUS OF AM. SCH. OF LAW, <http://lsji.law.edu> (last visited May 17, 2017); *New Maryland Carey Law Course Examines Causes of and Solutions to Baltimore’s Recent Civil Unrest*, UNIV. OF MD FRANCIS KING CAREY SCH. OF LAW, http://www.law.umaryland.edu/about/features/feature_details.html?feature=411 (last visited May 17, 2017); *Thelton E. Henderson Center for Social Justice*, UC BERKELEY SCH. OF LAW, <https://www.law.berkeley.edu/research/thelton-e-henderson-center-for-social-justice/> (last visited May 17, 2017).

116. Many of the articles cited here are written by law professors dedicated to infusing the law school curriculum with social justice lessons. See, e.g., Jane H. Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63 (2003); Calmore, *supra* note 100, at 1168; Quigley, *supra* note 44, at 38.

117. See Rich, *supra* note 48 at 155–56 (discussing how legislative and public policy courses can help students develop their identity as a lawyer-statesman).

118. See Quigley, *supra* note 101, at 46.

119. See *id.* (describing a “disorienting moment” for the learner as an instance when “prior conceptions of social reality and justice are unable to explain the clients’ situations, thus

In legislative simulations, students may be required to research, write, and debate on controversial legislation currently being considered in the state or in Congress. Perhaps students will have the opportunity to think creatively about the need for reforming a current law that is not effective. In clinics, field placements, or service learning-based courses, students will tackle issues of real clients or real agencies that require legislative solutions. As discussed in Part II, the experiences of a legislative course are every bit as impactful as a criminal, litigation, or business clinic opportunity. The projects completed may be discrete, but the transformative effect on students is just as powerful.¹²⁰

There is a persistent myth within the legal profession that the role of promoting social justice and safeguarding civil rights falls primarily to litigators in high profile court cases. But historically, seminal court cases are often preceded by successful efforts by lawyers and activists to change public opinion and reform laws legislatively, state by state.

Take, for example, the case of *Loving v. Virginia*, a seminal civil rights case where the United States Supreme Court struck down, as unconstitutional, a Virginia law against interracial marriage.¹²¹ Prior to the Court accepting this case for consideration, significant battles had raged in states across the country, often in legislatures, resulting in the repeal of interracial marriage bans in all but seventeen states by the time *Loving* was decided in 1967.¹²² The court case was certainly necessary to push the holdout states forward, but the movement toward civil rights did not start with the court case.¹²³

The story of the legalization of interracial marriage is not an anomaly. Courts inherently understand that their power is derived

proving what adult learning theory holds is the beginning stage of real perspective transformation"); see also Calmore, *supra* note 100, at 1172 ("When intuitive spontaneous performance yields nothing more than the results expected for it, then we tend not to think about it. But when intuitive performance leads to surprises, pleasing and promising or unwanted, we may respond [with reflection].").

120. Jan Levine, Opening Remarks to Fifth Colonial Frontier Legal Writing Conference, Duquesne University School of Law (Dec. 3, 2016). In his remarks, Professor Levine described two students he taught whose perspectives on social justice issues of welfare and unions changed one hundred and eighty degrees simply from conducting research and problem solving a legislative issue concerning the topics.

121. *Loving v. Virginia*, 388 U.S. 1 (1967).

122. See Philip Bump, *What overturning interracial marriage bans might tell us about what happens next with gay marriage*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/06/what-overturning-interracial-marriage-bans-might-tell-us-about-what-happens-next-with-gay-marriage/?utm_term=.7eb9341434c9.

123. *Id.*

from the public's acceptance of their legitimacy.¹²⁴ Legislative and public opinion advocacy frequently precede seminal court cases because courts, especially the U.S. Supreme Court, rarely move against the majority of the public or of the states on key and controversial issues.¹²⁵ Thus, the legislative advocacy is just as important to legal reform as the court case.

VI. CONCLUSION

The concept of "citizen lawyer" espoused by Thomas Jefferson, in its simplest form, supports the goal of producing lawyers educated not only in the law, but in the contextual foundation for law, and trained in the arts and skills necessary to undertake improvement and reform of law and government as necessary for the public good. "Citizen Lawyers" must be both excellent lawyers and dedicated citizens. Today, just as the participation of lawyers in public life is waning, the role of the "Citizen Lawyer" has never seemed more important for our democracy.

While, training lawyers as "citizen lawyers" is vital to the continuance of our government and legal systems, it is also good for the development of the law student. Experiential legislative courses in law school can expand students' understanding of how to reform and improve law, and help students develop their "citizen lawyer" identity. While the ABA has focused on increasing experiential learning opportunities for students by propagating Standards 303 and 304, it is up to us, as legal educators, to assure those experiences are of the quality necessary to truly impact students. Legislative courses can serve these goals, thus serving both society and the law student.

124. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1833 (2005).

Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could cause their doctrinal handiwork to collapse. Possibly as a result of the Court's concern for its own sociological legitimacy, it has seldom remained dramatically at odds with aroused public opinion for extended periods. In ways that are still little understood, the Justices undoubtedly are influenced by popular political movements and by the evolving attitudes of their society.

Id.

125. *Id.*

APPENDIX A

ABA Standards and Rules of Procedure for Approval of Law Schools
2016–2017

STANDARD 303. CURRICULUM

- (a) 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 the history, goals, structure, 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. To satisfy this requirement, a course must be primarily experiential in nature and must:
 - (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
 - (ii) develop the concepts underlying the professional skills being taught;
 - (iii) provide multiple opportunities for performance; and
 - (iv) provide opportunities for self-evaluation.
- (b) A law school shall provide substantial opportunities to students for:
 - (1) law clinics or field placement(s); and

- (2) student participation in pro bono legal services, including law-related public service activities.

Interpretation 303-1

A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3).

Interpretation 303-2

Factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student's written products, and the number of drafts that a student must produce for any writing experience.

Interpretation 303-3

Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 303(b)(2). Pro bono and public service opportunities need not be structured to accomplish any of the outcomes required by Standard 302. Standard 303(b)(2) does not preclude the inclusion of credit-granting activities within a law school's overall program of law-related pro bono opportunities so long as law-related non-credit bearing initiatives are also part of that program.

Interpretation 303-4

Law-related public service activities include (i) helping groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights; (ii) helping charitable, religious, civic, community,

governmental, and educational organizations not able to afford legal representation; (iii) participating in activities providing information about justice, the law or the legal system to those who might not otherwise have such information; and (iv) engaging in activities to enhance the capacity of the law and legal institutions to do justice.

APPENDIX B

ABA Standards and Rules of Procedure for Approval of Law Schools
2016–2017STANDARD 304. SIMULATION COURSES, LAW CLINICS, AND
FIELD PLACEMENTS

(a) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

- (i) direct supervision of the student's performance by the faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.

(b) A law clinic provides substantial lawyering experience that (1) involves advising or representing one or more actual clients or serving as a third-party neutral, and (2) includes the following:

- (i) direct supervision of the student's performance by a faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.

(c) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

- (i) direct supervision of the student's performance by a faculty member or site supervisor;
 - (ii) opportunities for performance, feedback from either a faculty member or a site supervisor, and self-evaluation;
 - (iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student's academic performance;
 - (iv) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;
 - (v) a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and
 - (vi) evaluation of each student's educational achievement by a faculty member[]; and
 - (vii) sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard, which shall include, but is not necessarily limited to, the written understandings described in Standard 304(c)(iii).
- (d) Credit granted for such a simulation, law clinic, or field placement course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(e) Each student in such a simulation, law clinic, or field placement course shall have successfully completed sufficient prerequisites or shall receive sufficient contemporaneous training to assure the quality of the student educational experience.

Interpretation 304-1

To qualify as an experiential course under Standard 303, a simulation, law clinic, or field placement must also comply with the requirements set out in Standard 303(a)(3).

Teaching Public Policy Drafting in Law School: One Professor's Approach

*Lisa A. Rich**

ABSTRACT

This article provides an overview of the Drafting for Public Policy course offered at the Texas A&M University School of Law. The article addresses the theoretical and pedagogical underpinnings of the course, including how such a course easily encompasses the teaching of cultural context and awareness, as well as professional identity, and encourages students to engage deeply in the policy-making process. It also explores the continued relevance of the work of Harold D. Lasswell, as well as that of Myres McDougal and Anthony Kronman. These works, from 1943 and 1993 respectively, resonate now because they called on law schools to engage students in practical application and ensure they developed a sound professional identity with an emphasis on commitment to the public good—two calls the legal academy hears loudly today. The article also provides a sample syllabus, ideas for assignments, and discussions of elements of the textbook used in the course to provide readers guidance in developing their own courses.

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* Lisa A. Rich is the Director of the Texas A&M University School of Law's Residency Externship Program in Public Policy. Prior to joining the faculty of Texas A&M she was the Director of Legislative and Public Affairs for the United States Sentencing Commission. She would like to thank Dean Andrew Morriss for his support for the creation of the Residency Externship Program and its requirement that students take Drafting for Public Policy; the ALWD Teaching Grants Committee for the generous teaching grant that assisted with the development of the course; and Avery L. Ory, her indispensable research assistant. Finally, she would like to thank Judge Ricardo H. Hinojosa for his professional guidance and mentorship—he is the embodiment of the lawyer-statesman.

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I. INTRODUCTION

The Drafting for Public Policy course at Texas A&M School of Law—and, indeed, all of the thoughtful courses and programs discussed at the Fifth Colonial Frontier Symposium—is designed to stand in stark contrast to Harold D. Lasswell and Myres McDougal’s 1943 lament about the state of legal education:

Any relation between the factual problems that incidentally creep into particular [law school] fields or courses, in a curriculum so “organized,” and the important problems of contemporary society is purely coincidental; and all attempts to relate such fields or courses to each other are frustrated by the lack of clear social goals and inadequate criteria of importance.¹

The course is purposefully designed to (1) integrate other course doctrine and skills into its structure; (2) address current real world issues facing policymakers, stakeholders, and lawyers; (3) instill broader depth of skill and judgment in students that, hopefully, will make them productive policymakers and advocates; and (4) provide students participating in the Residency Externship Program in Public Policy² exposure to various forms of policy drafting that they may not have otherwise experienced during their law school education. In short, the course (and the larger public policy program) seeks to find the “lost lawyer” Anthony Kronman discussed in 1993³ and to bring back some of the lawyer-statesperson ideal with a good dose of current professional identity pedagogy.⁴ The course exposes students to the types of documents

1. Harold D. Lasswell & Myres S. McDougal, *Legal Education & Public Policy*, 52 *YALE L.J.* 203, 204 (1943).

2. The Texas A&M University School of Law Residency Externship Program in Public Policy is a capstone program that places students in public policy-related externships in Washington, D.C. and Austin, Texas. Students are required to take the Drafting for Public Policy course as well as Administrative Law or a similar regulatory-based course prior to being placed by the Program.

3. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1 (1993).

4. See, e.g., WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF THE LAW*, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF

that are used throughout the policymaking process beyond statutes and regulations. It is designed to emphasize the importance of analytics, strategy, good communication, and messaging across multiple platforms, and encourages the concepts of team building and coalitions.

This article provides some of the underpinnings of the course as well as discussion about its structure and goals. Part II of the article discusses the impact that Lasswell and McDougal, Kronman, and the recent work on developing professional identity and experiential learning in law school had on the formation of the course. Part III addresses the format of the course, the theoretical and pedagogical reasons behind the progression of the assignments, and how the course can be adapted to incorporate not just “real-time” events, but also cultural awareness, cultural context, and professional identity. A sample syllabus and suggested course assignments are included in an appendix to this article. The article concludes with the observation that the course, coupled with other curricular changes at the law school, have at least anecdotally helped center students and bring more dimension to the study and practice of law and policy by emphasizing cultural awareness and context, professional identity, and the civic-mindedness of the lawyer as statesperson.

II. SOME FUNDAMENTAL UNDERPINNINGS OF THE COURSE

As this course began to take form, I wanted to go back through the history of legal education development and see what sort of “roots” I could find with respect to lawyers as policymakers. My formative experiences in law school and professional life did not distinguish between “law and morality”⁵; for me, a good lawyer was a moral one, and a policymaker could only craft “good” policy, in the normative sense, if he or she came from a “good” place. Lasswell and McDougal’s 1943 *Yale Law Journal* article resonated

TEACHING 128 (2007) [hereinafter 2007 CARNEGIE REPORT] (suggesting that law schools should “deepen their knowledge of how the apprenticeship of professionalism and purpose works”); Neil W. Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L. REV. 470, 476 (2008) (exploring the development of the professional identity concept and its application in the law school setting).

5. See Winston P. Nagan, *Lasswell, McDougal, and Contemporary Theories of Justice*, SOC’Y FOR THE POLICY SCIS., YALE LAW SCH. 2–3 (Oct. 16, 2010) (discussing McDougal and Lasswell’s writings and the “jurisprudential crisis . . . concerning the extent to which law should be distinct from morality” that continued after World War II), <http://www.worldacademy.org/files/Yale%20Presentation%20-%20Lasswell%20and%20McDougal%20and%20Contemporary%20Theories%20of%20Justice%20-%202010.09.14.pdf>.

with me because in it they articulated an approach to legal education that embodied my own view of teaching: “[I]f legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making*.”⁶ The authors also observed, as I have in my own career, that “[a recurrent] problem for all who are interested in implementing policy, the reform of legal education must become ever more urgent in a revolutionary world of cumulative crises and increasing violence.”⁷

The above quote seems to be as applicable today as when it was written—in 1943. The world is replete with crises and violence, and lawyers remain at the forefront of policymaking, policy implementation, and policy interpretation. At the same time, the legal market continues to demand “practice ready,” savvy law school graduates.⁸ These constraints make the idea of a lawyer-statesperson—someone who thinks deeply and wisely about a problem and acts, as counselor and advisor—seem almost unattainable.

This can be particularly troubling in the area of public policy given that “[a] disproportionate number of America’s political leaders have always come from the legal profession.”⁹ In his 1993 book, *The Lost Lawyer*, Anthony Kronman theorized that “[i]f lawyers are especially well equipped to play a leading role in politics, . . . [i]t is because their training and experience promote the deliberative virtues of the lawyer-statesman ideal” that is paramount to effective policymaking.¹⁰

Today’s world seems to be more about market efficiencies, optimal use of technology, and rapid outcome—even in the deliberative world of public policy.¹¹ But does the state of affairs today

6. Lasswell & McDougal, *supra* note 1, at 206.

7. *Id.* at 203.

8. See Lexis Nexis, HIRING PARTNERS REVEAL NEW ATTORNEY READINESS FOR REAL WORLD PRACTICE 1–2 (2015) (reporting that “95% of hiring partners and associates in a recent survey believe[d] recently graduated law students lack key practical skills at the time of hiring” and law schools must do more to ensure “practice-ready” students).

9. KRONMAN, *supra* note 3, at 3–4.

10. *Id.* at 4.

11. See, e.g., Kurt Orzeck, *New Technology Transforms Law Firms’ Bottom Lines*, LAW360 (Apr. 24, 2016), <https://www.law360.com/articles/435340/new-technology-transforms-law-firms-bottom-lines> (noting that law firms are moving towards “new software and more powerful electronic devices” and “are looking to replace employees, streamline workflow and mine their extensive case libraries for valuable data”); Eli Stokols, *Trump’s Twitter addiction could reshape the presidency*, POLITICO (Nov. 29, 2016), <http://www.politico.com/story/2016/11/donald-trump-twitter-231959> (explaining that President Trump’s use of Twitter to convey his position on issues could have a tremendous impact on policy and government).

mean that there is no more room for the lawyer-statesperson? Does it mean that law school curricula have become so weighted in the technical that there is no room for deliberative virtues in the classroom? Kronman certainly worried that, in 1993, we had reached the precipice. But I believe strongly that, as the American Bar Association (ABA) and others, such as Neil Hamilton,¹² encourage law schools to do more to ground students in professional identity, and address social and civic issues squarely, there may indeed be room for a course (or courses) that can bridge all approaches. I submit that courses such as this one and the many discussed at the symposium do in fact bridge the gap and go far toward training lawyer-statespeople.¹³

In his scholarship on the “lost lawyer,” Kronman was profoundly concerned that, without a change in the way law schools and professors trained lawyers, those men and women who were destined to become the country’s political leaders “[would] be less qualified . . . than before” because they would “be less likely to possess the traits of character—the prudence or practical wisdom—that made [lawyers] good leaders in the past.”¹⁴ Kronman presents what he freely admits is a somewhat idealized version of the lawyer-statesman, particularly as manifested in the late nineteenth century.¹⁵ In this “perfect world” the lawyer-statesperson is one who “cares about the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends.”¹⁶

One way this course, and others like it, may be reviving the idea of the lawyer-statesperson is that it emphasizes the role of the public sector lawyer as a “counselor in matters of state” with the important task of “offer[ing] advice about ends.”¹⁷ Each exercise, reading, and class discussion requires students to ask the fundamental question, “why now?” in the context of the stakeholder/client’s articulated mission and the dual goals of promoting the formation of good policy and the prevention of bad policy. The

12. Hamilton, *supra* note 4.

13. See generally 2007 CARNEGIE REPORT, *supra* note 4, at 87–125 (discussing the “bridges to practice” from thinking like a lawyer to lawyering). In this chapter the report also explains the need not just for elective courses like the one discussed here, but for an integrated curriculum that “would also make legal education more like preparation in a number of other professions.” *Id.* at 88. Although not the subject of this article, this notion of a fully integrated curriculum provides the foundation for the Residency Externship Program in Public Policy, of which this course is a part.

14. KRONMAN, *supra* note 3, at 4.

15. *Id.* at 14.

16. *Id.*

17. *Id.* at 15.

subtext of the course is that as lawyers crafting public policy, we should aim to be paragons of judgment, people who others look to “for leadership on account of [our] extraordinary deliberative power.”¹⁸

Another aspect of the course that reflects some of Kronman’s lawyer-statesperson ideal is the emphasis on coalition-building strategies and viewing issues from multiple perspectives. Of course, this can make students as nervous as implementing the more traditional case-based method of law school learning: By stressing coalition techniques and multiple sides to an issue, students may be left thinking that every position is respectable, therefore, what is the point of having personal thought or integrity?¹⁹ The intent of the course, however, is to incorporate the concepts of judgment and wisdom, and to instill a sense of prudence over selfishness, which is only caring about the client’s stated ends. In other words, the course seeks to have students not resolve an issue “by always putting the client’s well-being before the law’s” but to explore ways in which the client’s mission and ends can be achieved while also ensuring good policy and leadership.²⁰ Of course, pursuing the client’s ends may be the only path a lawyer can take, but knowing the alternatives and recognizing the outcomes of different choices throughout the policymaking process places the client, and her advisor, in a better position.

This leads to another point of the course that is consistent with Kronman’s lawyer-statesperson ideal: recognizing the difference between advocacy and counsel. Today it seems as if the public lawyer dwells solely in the world of advocacy. In other words, these lawyers show little to no “ambivalence or uncertainty about the client’s position” which would be apparent in our role as counselors.²¹ Every policy and decision, are polarized, and *compromise* and *consideration* seem to be words left unspoken.²² The mix of assignments in this course, however, takes a student through the

18. *Id.*

19. *See id.* at 114–15.

20. *Id.* at 145.

21. *Id.* at 146.

22. *See, e.g.,* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (noting that continued political polarization, particularly in Congress, has altered the dynamic between the Supreme Court and Congress on issues such as statutory interpretation and that the resulting power shift effects in the long term remain uncertain); *Partisanship & Political Animosity in 2016: Highly negative views of the opposing party—and its members*, PEW RESEARCH CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> (noting that for the first time since 1992 its survey found that “majorities in both [major U.S. political] parties express not just unfavorable but very unfavorable views of the other party,” including its proposals).

worlds of advocacy and counselor. For instance, students act as counselors when preparing briefing memoranda and hearing summaries in which they make careful observations, suggest strategies, and pose questions to gain further information. They act as advocates when preparing position papers, hearing testimony, and commenting on rulemaking. In so doing, the course emphasizes that lawyers involved in policy wear different hats and bring a multitude of skills to a task at hand.

Finally, Kronman criticized the case method of learning because it “robs [students] of [their] faith in large ideas, and . . . puts in place . . . a form of skepticism.”²³ Reliance on the case method perhaps could explain why some students may experience in this course (and, to some degree, in courses of a similar nature) an initial feeling of discomfort—the whole course really is about big ideas and big strategies. These concepts are untethered to typical case analysis, but if students step back from the precipice they eventually see that all the analysis and attention to picayune details they have showered on the study of case law can serve them extraordinarily well in public policy drafting. They can thrive if they let themselves because their brains have become hardwired to see patterns, make connections, and process information quickly.

In *Roadmap*,²⁴ Neil Hamilton asks his readers (on the very first page of the book) to consider two “easy” questions: “[Can you] [t]ell me about a project that you managed and what you learned from that experience[?] [Can you] [t]ell me specifically about how you handled a difficult team member in implementing the project[?]”²⁵ He then notes that many, if not most, students in law school may think about the typical group assignment in which someone always is the “weakest link” but, beyond that, may struggle with an answer.²⁶ Hamilton then asks, what if the questions get trickier? What if you are asked “[w]hat value do you bring beyond just technical legal skills to help our clients be successful?”²⁷

The questions raise two important aspects of the Drafting for Public Policy course and how it is structured. The first is its emphasis on policy as coalition and compromise; its exercises and discussions are designed to encourage teamwork and coalition

23. KRONMAN, *supra* note 3, at 159.

24. NEIL W. HAMILTON, *ROADMAP: THE LAW STUDENT’S GUIDE TO PREPARING AND IMPLEMENTING A SUCCESSFUL PLAN FOR MEANINGFUL EMPLOYMENT 1* (2015).

25. *Id.*

26. *Id.*

27. *Id.*

building, to raise students' awareness of the power of both majority and minority stakeholders in the legislature, and to enforce the importance of character and judgment to one's success in the public sector. The second is the course's emphasis on developing a student's professional identity in the public policy context. How do you want to be perceived? How do you want to garner your successes?

At a 2007 Vanderbilt Law School symposium, scholars proposed ways in which the legal education system could amend curricula to "expand students' understanding of what law is, to move beyond adjudication and the courtroom, to introduce broader forms of knowledge, and to develop a wider range of skills."²⁸ But as scholars noted, the typical law school experience is a "journey of collective learning" in which we encourage students to "get [] it"—good grades, good reviews, good opinions of a student's "getting it"²⁹ which results in a highly competitive, individual-focused culture.³⁰ In the decade that has passed since the Vanderbilt symposium, law schools and the ABA have made a great effort to change this "culture" of individualism, but we have far to go. Observations made in 1943 and 2007 still very much remain alive today—"[t]he template for legal thinking established in the first year of law school has real staying power."³¹ As such, in innovative courses such as the ones discussed at the Fifth Colonial Frontier Symposium, law school professors are encouraging flexible thinking beyond first-year rigidity and providing "real world" examples of doctrine in practice.³²

Although a 2015 *Governing* magazine article suggested the diminishing presence of lawyers within government,³³ there is no

28. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition & Conformity*, 60 VAND. L. REV. 515, 517 (2007).

29. *Id.* at 521–23.

30. *Id.* at 523.

31. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 607 (2007).

32. See, e.g., Jamie Abrams, *Experiential Learning and Assessment in the Era of Donald Trump*, 55 DUQ. L. REV. 75 (2017) (discussing pedagogical advancements in law school curricula in a politically charged environment); J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 17 (2017) (noting that while legislative and regulatory courses in law school curricula remain "sparse," these courses and other "innovative teaching materials promote [] improvement in law school curricula and legal education generally"); Rex D. Frazier, *Capital Lawyering & Legislative Clinic*, 55 DUQ. L. REV. 191 (2017) (describing the development of McGeorge's Capital Lawyering & Legislative Clinic from its innovative course beginnings and the need for law students to understand the importance of legislative advocacy).

33. See Alan Ehrenhalt, *Why It's Important to Know Lawmakers' Day Jobs*, GOVERNING (Oct. 2015), <http://www.governing.com/columns/assessments/gov-state-legislator-professionals.html> (noting that the number of lawyer-legislators has declined since the 1960s in

shortage of lawyers in the federal government or the state government of Texas. During the 84th Legislative Session in Texas, for example, 57 of 179 (31.8%) total filled seats belonged to lawyers.³⁴ In the United States Congress, lawyers occupy 202 of the 535 total seats.³⁵ Of that number, 51 senators (thus over half) are lawyers and 151 representatives are lawyers.³⁶ Lawyers also occupy positions throughout local, municipal, and other quasi-governmental entities.³⁷

Thus, it is extraordinarily unlikely that a lawyer will not, at some point in his or her career, be engaged in some aspect of public policy. Recognizing this, it would seem an important mission (if only in the most normative sense) of a law school to cultivate a law student's professional identity and cultural competency³⁸ to

many states); *see also* Jen Fifield, *State Legislatures Have Fewer Farmers, Lawyers, But Higher Education Level*, PEW CHARITABLE TRUSTS: STATELINE (Dec. 10, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/12/10/state-legislatures-have-fewer-farmers-lawyers-but-higher-education-level> (explaining that “[t]he percentage of lawyers serving in statehouses dropped from 22.3 percent in 1976 to 14.4 percent [in 2015]”).

34. These statistics are based on a review of the Texas House and Senate conducted by the Texas State Historical Association. *See* Tex. State Historical Ass'n, *State Senate—84th Legislature*, TEXAS ALMANAC (2016), <http://texasalmanac.com/topics/government/texas-senate> (listing 11 attorneys in the Texas Senate); Tex. State Historical Ass'n, *Texas House of Representatives*, TEXAS ALMANAC (2016) <http://texasalmanac.com/topics/government/texas-house-representatives> (listing 46 attorneys in the Texas House of Representatives).

35. JENNIFER E. MANNING, MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE, CONG. RESEARCH SERV. 3 (2016).

36. *See id.*

37. A 2016 bulletin from the National Association for Law Placement indicated that “[t]he number of government jobs taken by law school graduates has been remarkably steady over the long arc of time.” James G. Leopold & Judith N. Collins, *The Stories Behind the Numbers: Jobs for New Grads Over More Than Two Decades*, NALP BULLETIN (Dec. 2016), <http://www.nalp.org/1216research?s=public%20sector>. The bulletin notes, for example, that the graduating law class of 1994 took 3,529 positions in government and the 2015 graduating class took 4,117. *Id.*

38. Cultural competency has a variety of definitions within professions. In 2011, the American Bar Association's Section on Labor and Employment Law accepted this definition within the legal profession:

The ability to engage in actions or create conditions that maximize (sic) the optimal development of the client and client systems. [It] is achieved by the counselors acquisition of awareness, knowledge, and skills needed to function effectively in a pluralistic society (ability to communicate, interact, negotiate, and intervene on behalf of clients from diverse backgrounds) and on an organization/societal level, advocating effectively to develop new theories, practices, policies, and organization structures that are more responsive to all groups.

Blanca Banuelos et al., *Embracing Diversity and Being Culturally Competent is No Longer Optional*, AM. BAR ASS'N SECTION LABOR & EMP'T. LAW 4–5 (Mar. 2012) (citing 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, 24 (2011) (internal citation omitted)), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/ethics_professional_responsibility_committee_midwinter_meeting/mw2012_cultural_compentancy_authcheckdam.pdf. In June 2015, the American Bar Association incorporated “cultural competency” into the professional skills learning outcomes law schools should

navigate this legislative and regulatory realm. As such, the Drafting for Public Policy course builds on the introduction to professional identity and professionalism that is already a part of the Texas A&M curriculum and requires students to consider these important concepts as part of their work throughout the semester.³⁹

III. STRUCTURE OF THE COURSE

I received a very sound legal education and left law school “thinking like a lawyer.”⁴⁰ I was thrilled with my new skills in analysis, research, and writing, and my growing ability to communicate effectively.⁴¹ Then, I returned to Capitol Hill and felt a bit like the proverbial fish out of water. Although my law school education and legal experiences while working gave me the skills to “get up to speed” quickly, life in the legislative branch was very different, and certainly had its own language and processes. This became more clear to me as my career progressed as a lobbyist and, later, as the director of legislative and public affairs for a federal agency.

As I progressed in my career, I set a goal for myself that I would pursue opportunities to teach at the law school level—in part to pay forward my incredible good fortune at having outstanding mentors throughout my legal career—so that I could (hopefully) better prepare future lawyers for a career in the public sector. Serendipity, luck, karma, or whatever it might be, placed me in the right place when Texas A&M purchased its law school and provided me the chance to develop the Drafting for Public Policy course, which is a prerequisite for the broader Residency Externship Program in Public Policy. Not only could I prepare our students for the types of assignments they might encounter in the public sector but I could perhaps instill in them a sense of the

consider incorporating into their curriculum. See ABA Managing Director’s Guidance Memo: Standards 301, 302, 314 and 315 1–2 (June 2015) (Interpretation 302–1), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf

39. Texas A&M has begun to require its first year students to take a professional identity course. The course, which spans the entire year, introduces students to the *Roadmap* book and encourages them to begin developing their own identities early in their law school career. The course is then expanded upon in a variety of ways throughout the second and third year curriculums. For more on the professional identity course, see generally *Professionalism & Leadership Program*, TEX. A&M UNIV. SCH. OF LAW, <https://law.tamu.edu/current-students/academics/centers-clinics-programs/professionalism-leadership-program> (last visited Apr. 13, 2017).

40. Rakoff & Minow, *supra* note 31, at 607.

41. *Id.* at 597.

lawyer-statesperson; to see the law not just as a means to an end but as the embodiment of a greater calling, much as my mentors had done for me.

While the creation of this course was in large part a result of my own naivety when I first worked in government, it was designed with purpose both pedagogically and methodically. Professor Lawrence Mead of New York University notes that effective public policy research requires “three educations—in policy analysis, in political analysis, and in government.”⁴² While this course certainly does not make experts of students, it does introduce them to “public policy” through the lens of each of these categories of learning—and with a lawyer’s analytical perspective.⁴³ In other words, it attempts to give them the skills “to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they [can] apply their very well honed analytic skills.”⁴⁴ It also embodies the practices and traits that I witnessed and learned from my own mentors within the public sector. I was incredibly fortunate to have learned from men and women who embodied strong character and professional identity along with an incredible understanding of the political process that I continue to feel obliged to return the favor by teaching my students.

Of course, there are myriad definitions of “policy” and what makes it effective (or ineffective).⁴⁵ Returning to Lasswell and

42. Lawrence M. Mead, *Teaching Public Policy: Linking Policy and Politics*, 19 J. PUB. AFF. EDUC. 389, 399 (2013).

43. See, e.g., Charles Szypszak, *Teaching Law in Public Affairs Education: Synthesizing Political Theory, Decision Making, and Responsibility*, 17 J. PUB. AFF. ED. 483, 484 (2011) (discussing how modern public affairs scholars have noted that the “understanding of law [] is important for preparing public officials to meet their professional responsibilities”). Szypszak observes that public policy programs that fail to incorporate an understanding of “law” can apply in the reverse to the law school curriculum, much as Lasswell and McDougal discussed back in 1943. *Id.* at 486; see generally Lasswell & McDougal, *supra* note 1. Thus, courses like those discussed at this symposium help create a two-way bridge between the “disciplines” of law and public policy. Szypszak, *supra*, at 483–84.

44. Rakoff & Minow, *supra* note 31, at 602. The various assignments in the course, including the representation of a client at different points in the policymaking process, can be likened more to the types of exercises business or medical school students engage in than our more typical law school curriculum. See *id.* at 603–04 (discussing how the “archetypical” assignment in business schools, for example, is much more open-ended and subject to myriad possibilities than the more traditional case model method).

45. *Id.* at 602–04; see also Christopher M. Weible, *Introducing the Scope and Focus of Policy Process Research and Theory*, in THEORIES OF THE POLICY PROCESS 4 (Paul A. Sabatier & Christopher M. Weible eds., 3d ed. 2014) (commenting on the “elusive concept of public policy” and its myriad definitions set forth in policy literature) (citations omitted). Merriam–Webster defines policy as “a definite course or method of action selected . . . to guide and determine present and future decisions” or “a high-level overall plan embracing the general goals and acceptable procedures [especially] of a governmental body.” *Policy*, MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993). Furthermore, the Bouvier

McDougal, for example, “[e]ffective policy-making (planning and implementation) depends on clear conception of goal, accurate calculation of probabilities, and adept application of knowledge of ways and means.”⁴⁶ As such, they advocated for courses that required a developing law student/lawyer to gain “goal-thinking, trend-thinking, and scientific-thinking” skills.⁴⁷ This course fits neatly into this description of curricular needs by incorporating each of these skills and building upon them throughout the course.

Lasswell and McDougal also believed that a solid legal education required students to gain “experiences that aid the developing lawyer to acquire certain skills of thought: goal-thinking, trend-thinking, and scientific-thinking.”⁴⁸ In so doing, students would “clarify [their] moral values (preferred events, social goals); . . . orient [them]self in past trends and future probabilities; [and] . . . acquire the scientific knowledge and skills necessary to implement objectives within the context of contemporary trends.”⁴⁹

In this course, students take goal thinking, and a “clarification of values” beyond the wartime footing that certainly colored the Lasswell and McDougal article.⁵⁰ They are asked to consider the values of effective policymaking at the broadest level and the client’s values at the most narrow, thus incorporating both the Lasswell and McDougal concepts of humanity and dignity in the policy context and Kronman’s view that good counselors must consider the continuum, not just the client. Overarching this “funnel” is the clarification of one’s own values, which makes up the professional identity portion of the course.⁵¹ From this “internal perspective” students move toward the consideration and drafting of public policy.

According to Lasswell and McDougal, “[t]rend thinking, in contradistinction to goal thinking, is conspicuously naturalistic in

Law Dictionary defines policy as “[t]he sum purpose that a legal rule or institution is intended to achieve.” *Policy*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

46. Lasswell & McDougal, *supra* note 1, at 212.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*; see, e.g., Nagan, *supra* note 5, at 2 (noting that “[o]ne of the most influential factors on the collaboration of McDougal and Lasswell was the crisis of World War II”).

51. This part of the course and its concomitant discussions dovetail with both the Lasswell and McDougal and Kronman theories of legal education. Kronman analyzes the various legal theories of contemporary legal education from Langdell’s “geometry of law” through the predominance of the law and economics model and concludes that there is a familiarity with Lasswell and McDougal’s emphasis on science and humanity and his own emphasis on the need for a restored lawyer-statesperson purpose in legal education. KRONMAN, *supra* note 3, at 170, 355.

form, characterizing as it does the structure of past and future events.”⁵² Trend thinking, in the context of this course, occurs when law students new to the concept of public policy formation enter a new realm—or at least they think they do. This is so because trend thinking, in its most basic form, requires the examination of how an issue was “handled . . . in the past and to what extent the past should condition the present and the future.”⁵³

As such, I contend that every law student, and every lawyer, is engaged in trend thinking based on this definition because even the most basic objective, predictive memorandum written by virtually every first year law student in this country is an exercise in trend thinking.⁵⁴ Students are predicting the future outcome of a case based on past precedent. By the end of their first year of law school, students hopefully feel as if they have become rather expert at this objective form of analysis.

The drafting course simply takes students to another, parallel level so that they can “orient [themselves] . . . in contemporary trends and future probabilities”⁵⁵ or in more direct terms, think strategically about a particular issue and its interrelation to broader policy. It asks them to make predictions based on past and present behavior and apply that to policy that affects future behavior. The course then asks them, through assignments that circle back to previously covered topics, to re-evaluate both their “trend-thinking” and the policy resulting from it in light of both the goals identified and the current arena in which policy is being formed. In other words, it is asking students “to think creatively about how to alter, deter, or accelerate probable trends in order to shape the future” in a way that achieves the policy goal.⁵⁶

The scientific-thinking skill set is a matter of growing importance in public policy.⁵⁷ “Good” policy seemingly is defined

52. Lasswell & McDougal, *supra* note 1, at 270.

53. Nagan, *supra* note 5, at 27.

54. For example, the textbook I use in my first year legal writing classes, *Legal Reasoning, Writing and Other Lawyering Skills*, explains that a “good [objective] office memo[ramandum] should evaluate every significant aspect of the relevant rule of law and issues, the previous cases that have interpreted the law, and the effect of the law and case precedent on the client’s factual situation.” ROBIN WELLFORD SLOCUM, *LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS* 150 (3d ed. 2011). This review of the past, its application to the present case, and the predictive nature of the future exemplifies “trend thinking.”

55. Lasswell & McDougal, *supra* note 1, at 213.

56. *Id.* at 214.

57. See, e.g., NAT’L RESEARCH COUNCIL, *USING SCIENCE AS EVIDENCE IN PUBLIC POLICY* 50 (Kenneth Prewitt et al. eds., 2012) (“The goal is realizing better and more defensible policy decisions by grounding them in the conscientious, explicit, and judicious use of the best available scientific evidence.”).

more and more now as being based in “best practices” and empirical data.⁵⁸ For example, in the field of federal criminal sentencing the Supreme Court has placed a premium on the use of “empirical data” and “national experience” in the formation of federal sentencing guidelines and policy statements.⁵⁹ In fact, it places such a premium on these aspects of policymaking that it instructed courts that they could disagree with and not follow the federal sentencing guidelines for sentencing federal crack cocaine drug traffickers because those guidelines were based on congressional directive “and did not take account of ‘empirical data and national experience.’”⁶⁰

Understanding how both the hard and soft sciences are incorporated into policy is an important tool in this course.⁶¹ How one reads, interprets, and incorporates “science” into policy requires finesse and practice—and doing so often falls onto the staff or advisers (in other words, the lawyers) who support policymakers. But “scientific-thinking,” as envisioned by Lasswell and McDougal, went beyond actual understanding of the scientific methods of “observation” in the scientific realm. As they saw it, “[a]cquaintance with various methods of observation not only furnishes a sound basis for policy planning; it contributes directly to skill in the practical management of human affairs.”⁶² Thus, in some ways their definition of “scientific thinking” meshes with the notions of professionalism and professional identity that also are woven throughout the course.

As demonstrated in the remainder of this part, the assignments given throughout the course build not just on the typical flow of

58. See *id.* at 1–2 (explaining the history of science and evidence in public policy and concluding that “[k]nowledge from all the sciences is relevant to policy choices: the physical sciences inform energy policy on renewable efficiencies; the biological sciences inform public health policy on infectious diseases; the engineering sciences inform national defense policy on weapon design; the social sciences inform economic policy on international trade trends”).

59. See *Kimbrough v. United States*, 552 U.S. 85, 100 (citation omitted) (reflecting the “important institutional role” that the U.S. Sentencing Commission plays in the setting of federal sentencing policy and noting that it is uniquely positioned to do so because of its access to “empirical data and national experience, guided by professional staff with appropriate expertise”).

60. *Id.* at 109 (citation omitted).

61. See, e.g., JANET BUTTOLPH JOHNSON & H.T. REYNOLDS, POLITICAL SCIENCE RESEARCH METHODS (7th ed. 2011) (explaining the intersection of politics and science and how “empirical research on political phenomena can be used to improve understanding of, and find solutions to, difficult problems facing governments and citizens like crime or poverty—this work is commonly referred to as applied research because it has a fairly direct, immediate application to a real-world situation”).

62. Lasswell & McDougal, *supra* note 1, at 215.

law school curricula but also follow the Lasswell and McDougal ideal of incorporating three sets of thinking into the process.

A. *Moving from Familiar to Unfamiliar: A Survey of Public Policy Documents*

Students at Texas A&M School of Law are required to take Legislation and Regulation during the first semester of their first year, which is one of the reasons I decided to join the faculty.⁶³ This requirement, combined with the inculcation of legal skills and substantive knowledge they gain in their first year through legal writing and doctrinal classes, positions our students (in theory, at least) to dive into public policy drafting with an understanding of the American legislative and regulatory processes. This knowledge does not always make it into their second or third year, having been replaced by the myriad of other subjects they are learning and experiences they are gaining. As such, this course is designed to start them with tasks they know—the memorandum (although, in this case, it is a briefing memorandum on a policy topic)—and move into the more “exotic” documents, such as position papers, hearing testimony, “one pagers,”⁶⁴ and comments⁶⁵ to

63. I found the “LegReg” requirement to be an example of the forward-thinking of the faculty at what was, in 2012, Texas Wesleyan School of Law. To me, the inclusion of this course in the first year curriculum demonstrated the faculty’s recognition that, “[w]e rely on law to achieve many of our collective purposes, including economic regulation, social justice, and national security . . . through legislation and administrative action.” Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 654 (2007). In so doing, we “look to lawyers’ skills as policymakers, planners, and implementers” which is the theme that is further developed in this course. *Id.* Dean Morris and the Texas A&M faculty have greatly broadened our students’ exposure to these types of “lawyer skills,” not just through adoption of this course, but through the more typical doctrinal classes, so that students have the opportunity to learn “to read a case, a statute, a regulation, a contract, a lease, a complaint, an interrogatory, and [even] a treaty” by the time they graduate. *Id.* at 655 (discussing how law school curricula could change to include student exposure to all sorts of materials drafted and used by lawyers). Texas A&M also has moved to incorporate a “skills component” into its first-year courses so students in civil procedure, for example, draft motions and those in contracts actually see—and work with—a contract. *See id.* at 663.

64. “One-pagers” in the policy context refers to short (often one page) synopses of a particular policy position and the entity that is advocating for it. These documents provide key talking points and positions, often employing graphics and statistics, for easy reader use and understanding. For examples of one-pagers and guidance, see Betty T. Izumi et al., *The One-Pager: A Practical Policy Advocacy Tool for Translating Community-Based Participatory Research Into Action*, 4 PROGRESS COMMUNITY HEALTH PARTNERSHIPS: RES., EDUC., & ACTION 141 (2010) and Stephen M. Petterson et al., *Relying on NPs and PAs Does Not Avoid the Need for Policy Solutions for Primary Care*, 88 AM. FAM. PHYSICIAN 230 (2013), <http://www.aafp.org/afp/2013/0815/p230.pdf>. Both of these are good examples of how to compile and distribute one-pagers because they illustrate the use of science in the policymaking process.

rulemaking.⁶⁶ In doing so, the course recognizes that education “is a developmental process”⁶⁷ and, by the end of it, hopefully, students recognize the interrelationship of the documents. A brief description of the assignments, the reasoning behind them, and the intended student outcomes and takeaways follow below. The outline below is based on a standard fourteen-week semester.

1. *The Course and the Book*

I considered many books (including crafting my own) for this course, but I ultimately settled on Catherine F. Smith’s *Writing for Public Policy: A Practical Guide to Communicating in the Policy Making Process*.⁶⁸ The book is extremely short but impactful. Most importantly to me as a professor, it is written for non-lawyers. This provides an important element to the course: It allows law students to see the policymaking and communication process through the lens of a non-lawyer. Students not only see how non-lawyers view the policymaking process, but how their analytic skills position them uniquely in the process. Moreover, the book helps them see how their combined analytic, research, and communication skills can be used to maximum advantage in a non-case-based environment.⁶⁹ Based on my experience with the

65. Formal rulemaking typically requires solicitation for comments from the public prior to the final promulgation of the rule. Comments to rulemaking can be submitted by individuals or organizations, and may be highly complex and formal or in the form of an email or letter. For examples of how to draft and submit comments to rulemaking see OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf and *How to Comment*, FED. COMM’NS COMM’N (Oct. 25, 2016), <https://www.fcc.gov/consumers/guides/how-comment>.

66. The Drafting for Public Policy course does not include assignments on legislative drafting or rule promulgation because those skills are covered in other classes in the Texas A&M curriculum. The course does, however, take the drafting of these documents into consideration as the discussion about the other documents covered in the course progresses. That is another benefit of the course: It allows the professor to draw on students’ previous course experiences and make them recall that material in a new setting. As such, it encourages the positive transfer of knowledge. See, e.g., THOMAS L. GOOD & JERE BROPHY, CONTEMPORARY EDUCATIONAL PSYCHOLOGY 215–16 (5th ed. 1995) (discussing the basis for positive transfer learning and explaining that courses that “encourage [] students to process [] material in ways that make it meaningful rather than by rote learning” help eliminate interference effects on learning transfer).

67. Rubin, *supra* note 63, at 659.

68. CATHERINE F. SMITH, *WRITING PUBLIC POLICY: A PRACTICAL GUIDE TO COMMUNICATING IN THE POLICY MAKING PROCESS* (4th ed. 2015).

69. See, e.g., *id.* at 27–28. In this section of the book, the author describes the “General Method of Communicating in a Policy Process.” *Id.* The general steps of “prepare,” “plan,” and “produce” are broken down into categories such as actors and problems. I contend that this is similar to the analytic approach taught to students during law school and exemplified in the legal analysis and writing organizational paradigms such as CREAC and PrEACH. See DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE*

course and comments students have made about applying what they learned to activities outside the classroom, the book and corresponding assignments seem helpful to students desirous of entering advocacy at a grassroots level where they will encounter a number of non-lawyers and must help craft messages and policy that addresses their needs.⁷⁰

Also, because the chapters are short, there is less need for the professor to spend time ensuring that students “got” what was covered in a traditional question-and-answer format. Instead, the professor can spend time applying the reading both to the examples provided in the book as well as current events and policy issues. Students are encouraged to bring in examples of what they read outside of class and discuss current events in the context of the thematic questions of the day as well as from a programmatic lens of good drafting.

Each block of the course is also guided by a set of thematic questions laid out in the syllabus to further guide students in their reading. The thematic questions are designed to encourage reflection, promote a sense of professional identity, and further develop recognition that the writing, research, and analytic skills students have learned up to this point are still very much applicable.⁷¹ The thematic questions also guide the discussion of the concepts at the start of a new block of material and conversations during each class.

In the first class session, students are introduced to the concepts and constructs of public policy. Although many students enter law school with an undergraduate degree in some form of political science, my observations suggest some uncertainty about the political process at the start of class.⁷² The course is designed

FUNDAMENTAL SKILL 120 (2d ed. 2009) (discussing the different organizational paradigms lawyers use to analyze and communicate in writing).

70. Grass roots is defined as “the basic level of society or of an organization [especially] as viewed from higher or more centralized positions of power.” *Grass roots*, MERRIAM-WEBSTER DICTIONARY (10th ed. 1993). Grass roots entities include “neighborhood or block associations, community clubs, workplace voluntary groups, and student organizations,” among many others. SMITH, *supra* note 68, at 123. Thus, by definition, it is likely that these entities often will consist of few, if any, lawyers.

71. *See, e.g.*, 2007 CARNEGIE REPORT, *supra* note 4, at 87 (noting that while “the primary focus of future lawyers’ education is legal analysis . . . developing lawyers must at some point learn [the] demanding skills” of practice).

72. According to the Law School Admissions Council, in academic year 2015–2016, enrolled students with an undergraduate major in political science constituted the majority of enrolled students at 9,030. LSAC SOC. SCI. RESEARCH, UNDERGRADUATE MAJORS OF APPLICANTS TO ABA-APPROVED LAW SCHOOLS [ACADEMIC YEAR 2015–2016], [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/2015-16_applicants-major.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/2015-16_applicants-major.pdf). The next largest defined category of students (2,106) had undergraduate majors in criminal justice. *Id.*

to (re)introduce students to basic definitions of public policy. It borrows extensively from policy texts to give students this “vocabulary” for discussion and participation both throughout the course and in policymaking more generally. It reinforces that lawyers control every word used, so a sound vocabulary and understanding of a word’s potential impact is essential.⁷³

To that end, the course begins with the definitions of “public” and “policy,” which supplements the introduction to public policymaking included in the Smith text.⁷⁴ Students then examine and discuss Eugene Bardach’s “[E]ightfold [P]ath” to policy analysis.⁷⁵ Bardach’s approach to policy analysis fits well within the course because he sees policy analysis as a “social and political activity.”⁷⁶ He notes that the realm inhabited by policy analysts includes “colleagues drawn from law, engineering, accounting,” and other disciplines so that students begin to see how lawyers fit within a multidisciplinary team when drafting public policy.⁷⁷ Emphasizing that policy analysis is about solving problems, Bardach defines his eightfold approach as—

Defin[ing] the Problem[;]
 Assembl[ing] Some Evidence[;]
 Construct[ing] Alternatives[;]
 Select[ing the] Criteria [to use in the problem solving;]
 Project[ing] Outcomes[;]
 Confront[ing] the Trade-offs[;]
 Decid[ing to Take Action (or Not); and]
 Tell[ing] [the] Story⁷⁸

This “path” is then used as the structural backdrop to each of the class discussions and assignments that follow in the course.⁷⁹ The Bardach and Smith texts are particularly well-suited for one

73. This is consistent with the Lasswell and McDougal approach that helped form this course in that they advocated for graduating law students to possess “legal technicality” that they believed included the “command of vocabulary” used by courts but applies equally in the policymaking setting. Lasswell & McDougal, *supra* note 1, at 216.

74. SMITH, *supra* note 68, at 1–16 (providing an overview of policy and its promulgation).

75. EUGENE BARDACH, A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING (4th ed. 2011).

76. *Id.* at xv.

77. *Id.* at xvi.

78. *Id.*

79. The “path” is not always linear, and this is emphasized throughout the course. As Bardach notes, “[t]he primary utility of this structured approach is that it reminds [students] of important tasks and choices that otherwise might slip [their] mind; its primary drawback is that, taken by itself, it can be mechanistic.” *Id.* at xvi–xvii.

another because both stress the fluid nature of policymaking, analysis, and drafting processes. As Bardach notes, “policy problems [can] appear as a confusing welter of details [tied up with] personalities, interest groups, rhetorical demands, budget figures, legal rules and interpretations, bureaucratic routines, [and] citizen attitudes. . . .”⁸⁰ During this lecture, students are asked to think about the approach to an issue, including whether to define it as a “problem” at all because doing so immediately impacts the framing of the message and “solution.”⁸¹

After this more typical lecture discussion, the remaining classes are structured to be more interactive and example-oriented. Chapters two through four of the Smith text are taken somewhat out of order. The next class begins with chapter three of the text, “Definition: Frame the Problem.” In so doing, students are given further context to the notion of describing something as a “problem” and how doing so suggests viewpoints that could be taken in policymaking by the various stakeholders. As examples of how this plays out (and providing a way in which social and cultural policy can be adopted into the course), during this second class, students are broken up into groups of “stakeholders” in a particular issue. During this most recent semester, one of the issues discussed was the current heroin and opioid epidemic in the United States.⁸² Instead of the “typical” prosecutor, defense counsel, and legislators, students were broken up into representatives for emergency medical personnel, child and family services representatives, mental health providers, and drug manufacturers. Each of these groups had a significant stake in the epidemic and a voice that policymakers should hear. Students were then asked to “define the issue” through the lens of their assigned group. The groups then presented these positions and considered, based on how they framed the issue, which stakeholder groups might be a

80. *Id.* at xvii.

81. *Id.* Bardach discusses this inherent tension in terms of “[i]ssue rhetoric.” *Id.* at 4. He notes that over reliance on issue rhetoric often results in “partisan or ideological flavor.” *Id.* at 4. He also points out that issue rhetoric can result in issue labeling, which in itself can result in identifying more than one problem in a topic. *Id.* at 4–5. As discussed more below, *see infra* Part III.A.3, the current “opioid epidemic,” for example, may encompass a variety of conditions including the need for revised criminal penalties, improved mental health care, improved family and child services, improved or increased resources for first responders, and emergency room personnel.

82. Students were given fact sheets from the United States Sentencing Commission on heroin trafficking, substance abuse trends in Texas, news articles, and testimony from a variety of scientific, community, and healthcare providers.

natural ally or supporter of their particular approach to solving the problem.⁸³

The third class picks up with chapter two and the bedrock of the book—"Communicating." I reverse the chapters and presentation of the material in this way because one cannot be expected to communicate effectively about an issue if he or she does not understand its underpinnings.⁸⁴ As such, this third class effectively builds on the materials covered during the prior courses in a hands-on manner. Specifically, during this week of the course, students are given a chance to participate in a "roundtable" similar to the less formal exercise they engaged in the prior week.

Students arrive in class and are given a "flyer" announcing the roundtable and its topic. They also are assigned a "stakeholder" group. Acting as the moderator of the roundtable, the professor welcomes students to the evening's discussion and provides them with background materials on the topic.⁸⁵ Students then break into their respective stakeholder groups to "frame the issue," develop their positions, and prepare a one minute "elevator speech" to present their respective positions to the roundtable.⁸⁶ After that, we discuss commonalities and possible points of contention. All the while, students are told to take notes throughout the roundtable.

These notes, along with the materials provided at the start of the class, and the professor's notes of the stakeholder elevator speeches, provide the materials used for their first assignment—a briefing memorandum to a legislator's chief of staff. Shifting the student's role in the process "forces" students to view the discussion in yet another light and consider how to frame the issue for a stakeholder who knows very little about the topic or the stakeholders involved. The assignment also gives them a sense of fa-

83. This also coincides with the first step in Bardach's Eightfold Path. One of the caveats that Bardach highlights about conducting policy analysis is slipping the conclusion into the formation of the problem. BARDACH, *supra* note 75, at 8. Part of the class discussion during this session is identifying when students, representing a particular stakeholder interest, slip the solution into the definition of the issue.

84. See CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 9 (6th ed. 2011) ("First and foremost, you must have something to say. You cannot expect to communicate clearly or persuasively unless you have a clear understanding of the points you wish to express.")

85. The materials are typically pulled from a variety of sources including news articles, testimony, scientific journals, and presentations so that students are exposed to a variety of documents that support policymaking and implementation.

86. Students specifically are not told in advance about the exercise or their assigned stakeholder groups. Part of the implicit purpose of the exercise is to have students think quickly, analytically, and strategically about the issue. The exercise also forces them to engage in listening and observation because of the "newness" of the materials being covered.

miliarity: writing an objective and strategic memorandum that can be more easily compared to their previous law school writing and analysis assignments.

The fourth class represents the final block of the introductory section of the course. During this week students read chapter four of the Smith text: “Evaluation: Analyze and Advise.” Although previous exercises have already employed aspects of analysis and decision, this week is dedicated to exploring it in more depth. It is also here that students explore the use of data, best practices, and experience-based research in policymaking. Of course, these materials are used in every aspect of policymaking, but emphasizing it here gives students a new perspective from which to view the materials given to them previously.⁸⁷

For example, in the class discussion of the opioid epidemic, students received materials from the Drug Enforcement Agency as well as testimony from leading scientists about the issue. Students are asked to revisit these materials and discuss how the data and science are used in framing the issue—and how once the issue is framed in a certain way, students discuss how all other information is viewed either from that position or in opposition to it.⁸⁸ The class discussion also encompasses Bardach’s second point of the Eightfold Path, “assembling evidence.”⁸⁹ Students explore what evidence is available on a given issue, what sources of additional evidence or expertise are available, and to what extent, if any, that evidence is agenda-driven. For example, students explore how data and evidence can be manipulated to fit a rhetorical position and how to identify when this occurs.⁹⁰

87. Emphasis of evidence and data at this juncture is also consistent with the notion of transfer learning, which can be problematic for “older students and adults, especially when they are learning abstract scientific concepts that contrast with naive ideas about the world that they have built through concrete experiences.” GOOD & BROPHY, *supra* note 66, at 222. By emphasizing the importance of data and evidence—including the notion that data and evidence can be presented in an agenda-driven way—students may “confront [their own] common misconceptions” about a policy issue, and, thus, learn to assimilate material, including material learned in other classes and contexts, into a new schema. *Id.* at 223–24.

88. New in the fourth edition of the Smith book is an appendix on using data and science in policymaking that is very accessible and useful in getting students acclimated to this type of evidence. SMITH, *supra* note 68, at 215 app. B.

89. See BARDACH, *supra* note 75, at 13. See also *id.* at 11 (discussing the assemblage of evidence and the fact that, as a policy analyst, one is engaged in two things: “thinking. . . and hustling data that can be turned into evidence”). During this block, students also are encouraged to consider the definitions of data, evidence, and information as used in the policy context. *Id.* at 11–12.

90. For a broader discussion of the potential pitfalls associated with evidence in policy analysis and drafting see *id.* at 12–15 (describing best practices for evaluating what evidence to collect and use in policy analysis).

The remaining class sessions focus on specific documents prevalent in policymaking, including another round of briefing memoranda, hearing testimony, position papers, and rulemaking comments. In particular, the course allows for three weeks dedicated to exploring various aspects of hearing testimony because it can be one of the most often encountered types of drafting a policymaking lawyer encounters during her career. For example, students discuss and explore the purposes of testimony: both in terms of giving and receiving it. Students are encouraged to see the similarities and differences in purpose between the submission of testimony to a legislative or administrative body and the submission of a brief or motion to a court.

Significant course time is also spent studying how partisanship and politics impacts witnesses and the receipt of their testimony by the governing body. It is at this juncture in the course that students are reminded of one of the most important questions that frame the formation of policy: Why now? Students are encouraged to ask questions about testimony such as, “Who asked the witness to testify? Are they there as an expert “fact” witness or as a political representative of their organization or entity?”

This part of the course also explores the difference between testimony given and received at the state and federal level. Public hearings at any level of government are opportunities for individuals to “offer valuable knowledge to policy makers and administrators.”⁹¹ The way in which the hearings are organized (including the topics covered), the timing of those hearings, and the witnesses vary by governmental entity.⁹² Importantly, the text notes that “[l]egislative hearings are characteristically more freeform than legal hearings in the administration of justice.”⁹³ The overarching theme of this course block is the importance of witness testimony to the policymaking process because it provides witnesses with the opportunity “to talk directly with policy makers, and to make personal or professional knowledge useful for solving problems.”⁹⁴

Next, students are asked to consider the role of legal staff in preparing a witness to testify. Students are asked to watch various clips of testimony and consider how the witness or witnesses

91. SMITH, *supra* note 68, at 162.

92. *See generally id.* at 162–65 (discussing the public hearing process broadly and noting, for example, that at the federal level witnesses testify only at the request of the committee convening a hearing but at state and local levels “the witness list is more open”).

93. *Id.* at 164.

94. *Id.* at 165.

were prepared. Students examine everything from the size and capacity of the room to the cameras and recording devices being used, to the setup of the chamber itself. Students are asked about the amount of time a witness should be prepared in a mock setting, and how detailed their knowledge of the format and the questions to be asked at the hearing should be.

“Questioning [in a public hearing] is always political, and sometimes it is bluntly partisan.”⁹⁵ As such, my career in public service has demonstrated to me that a witness who is well-versed not just on the substance of the hearing but the intended outcomes, both explicit and implicit, will be better prepared for the hearing. Moreover, if staff representing a witness (or the witness herself) have good working relationships with the hearing organizers, they can work with them to direct questions and topics. This provides witnesses with better insight into the hearing and better information on which to base their testimony.⁹⁶

As such, students explore the differences between a witness who has advance knowledge of the hearing’s explicit and implicit purposes and questions that will be asked (whether they are designed to be fact-finding or to score points, for example), and those witnesses who receive little advance information about a hearing’s expected outcomes.⁹⁷ Students also explore the differences between hearing participants who are well-versed on a particular topic and those who are not. Again, students are asked to compare this level of preparation with that given to oral argument preparation—trying to ascertain if a court will be “hot”—as in it will ask a lot of questions—or “cold”—as in it allows counsel to give their arguments with very little questioning or commentary.

Finally, with respect to testimony, students explore the difference between submitting written testimony for the record and giving oral testimony at the beginning of a proceeding. Students are given clips of hearing testimony to review, both “good” and “bad” examples, and are asked to discuss what impact their oral testimony had on the audience. Students are encouraged to ask questions about whether poorly delivered oral testimony impacts a witness’s credibility or authority on a subject. They also evaluate the efficacy of constituent testimony, particularly at the federal level. Does having a directly impacted non-professional witness

95. *Id.* at 164.

96. *See generally id.* at 166 (explaining that witnesses should know the context of a hearing, the message they intend to deliver, their role in the hearing, and the overall communication situation such as whether the hearing will be covered by the press).

97. *See id.*

help or hurt the likely resolution of an issue? Does the average person's testimony tell the story that you want delivered or does it hurt that story? By exploring these many questions, students learn not only what makes an efficient and useful witness, but also what makes an efficient and useful hearing. Thus, they are prepared both to help their principals testify before a governmental body and set up a hearing for that body.⁹⁸

The last two class sessions are devoted to rulemaking. Students are (re)introduced to the administrative side of policymaking⁹⁹ and the importance of the notice and comment process. During this block of the course, students examine the goals of providing a notice and comment period for regulatory action and what makes for effective comments.¹⁰⁰ In addition to the material provided in the Smith text, students are instructed to visit the Regulations.gov website,¹⁰¹ and review the tips provided on submitting effective comments.¹⁰² This section of the course also includes exploration of the differences between state and federal rulemaking, the effectiveness, or ineffectiveness, of commentary at the state level, and the impact of "narrowly interested groups" on the rulemaking process.¹⁰³

Students are provided examples of materials across the spectrum of local, state, and federal rulemaking commentary. They

98. Part of the fourth exercise described more fully below requires students to examine and comment on staff action throughout a hearing. See *infra* Part III(A)(3). Students are told to observe whether staff engaged with those presiding over the hearing, listened to the testimony or spent time on their electronic devices, or took notes during the proceeding. *Id.*

99. Again, students at Texas A&M School of Law, at a minimum, already have been exposed to the regulatory side of policy through their first year Legislation and Regulation course.

100. For example, a significant portion of the discussion is devoted to the effectiveness of "carefully prepared comments" and "mass emails or letters." SMITH, *supra* note 68, at 184. Smith indicates accurately that substantive, well-drafted commentary is often more effective than mass mailings in influencing change in a regulation. *Id.* Students are taught, however, that mass communications can also have an impact in policymaking and are another possible tool in the commentary arena. See, e.g., Stokols, *supra* note 11 (discussing the power of Twitter on the 2016 election and the formation and implementation of policy under President Trump); see also SMITH, *supra* note 68, at 166 (discussing the importance of knowing how a hearing will be covered).

101. REGULATIONS.GOV, <https://www.regulations.gov> (last visited Oct. 23, 2016).

102. *Tips for Submitting Effective Comments*, REGULATIONS.GOV, https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf (last visited Oct. 23, 2016). The information provided on submitting effective commentary is excellent for reinforcing the need for clarity and cohesion in policy drafting that permeates this course. The suggestion that commentary be "constructive" and "information-rich" is included in the grading rubric and instructions for the final assignment in the course. *Id.*

103. SMITH, *supra* note 68, at 186. Smith notes correctly that public participation in the rulemaking process, particularly at the state level, can be minimal. *Id.* As a result, the comment process often is dominated by special interest groups resulting in policy that may not accurately reflect the impact it will have on the larger constituency. *Id.*

are asked to review the material and note substantive variations, as well as the effectiveness of the organization, word choice, and the material included. They are reminded that implicit and explicit messages can assist in the effectiveness of commentary and that, as lawyers, they should be cognizant of that.

2. *The Timing of the Assignments*

The course includes submission of six graded assignments,¹⁰⁴ averaging an assignment every other week after the first two weeks of the course. The longest assignment given is the last one, for which a page suggestion is given but not required. The relative brevity of these assignments serves several purposes, the most important of which is to give students a sense of the time constraints public policy players often face. A close second to that is stressing the importance of brief, impactful materials over long policy discourse. A law school graduate entering the public policy workforce will find out pretty quickly that, while an issue may be kicked around the legislature for months or years, there are always spikes of activity where a seemingly calm Monday suddenly becomes the equivalent of a Category 5 hurricane. As such, students are generally given no more than a week to complete an assignment.

Students are instructed that, unlike expectations in a more traditional legal writing class, the time given for a particular assignment is not necessarily the time it takes to substantively draft the document. Instead, students should focus on the editing, strategy, and application of “thinking like a lawyer” to the project. As highlighted throughout this article and the Drafting for Public Policy course, the emphasis is on every word, every detail, and the delivery of message. Attention to tone, message, and audience is critical so students are told to spend time on refinement, as much as (if not even more so) content development.¹⁰⁵

104. One of the purposes behind the course’s structure is to provide students with a complete “public policy portfolio” that can be shared with potential employers. See, e.g., Elizabeth Keller et al., *What Legal Employers Want . . . and Really Need: Report from a Conference at Boston College Law School*, 25 *THE SECOND DRAFT* 4, 4 (2011) (noting that a panel of legal employers indicated that law school graduates should be able to, among other things, “evaluate their own work critically; and deliver a precise and concise analysis both orally and in writing, regardless of the type of document”).

105. Likewise, a good portion of the grade for each assignment comes from tone, audience awareness, and word choice. See *infra* Part IV.

3. *The Assignments*

The basic assignments listed below do not change from year to year; however, the topics covered in each are changed to reflect current topics of interest and relevance. For example, in 2015, criminal justice reform at the national level was being widely discussed. Bipartisan legislation, the Sentencing Reform and Corrections Act of 2015, was introduced and cosponsored by a bipartisan group of senators led by Senator Charles Grassley of Iowa.¹⁰⁶ Among other things, the bill reformed federal drug trafficking penalties and reduced the application of statutory mandatory minimum penalties for certain nonviolent, low-level offenders.¹⁰⁷ As such, many of our assignments and class discussions covered aspects of criminal justice advocacy and policy.¹⁰⁸

In 2016, in preparation for the 85th Session of the Texas Legislature opening in January 2017, topics covered included issues with a state and federal nexus. The course covered such diverse topics as agriculture and drought, oilfield theft, the growing craft brewing industry, the heroin and opioid epidemic, and the use of cannabis oil to treat intractable epilepsy in children.

The assignments cover multiple topics and issues for a number of reasons. First, by switching topics students must engage, at least minimally, in the Eightfold Path for each assignment, thus enforcing their learning transfer. Second, new topics allow students to engage in issues they may enjoy (or not dislike)—not every student will enjoy criminal justice or energy policy so this lets the course demonstrate its applicability regardless of topic. Third, this structure allows for more integration of both professional identity and cultural competency.¹⁰⁹ If successful, students will

106. The Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

107. *Id.* §§ 101–109 (2015). Also being discussed during this time was President Obama's clemency efforts on behalf of federal drug offenders. During his presidency, President Obama pardoned 212 people and commuted the sentences, mostly those for federal drug trafficking offenses, in 1,715 cases. *Clemency Statistics*, U.S. DEP'T OF JUSTICE (May 12, 2017), <https://www.justice.gov/pardon/clemency-statistics>.

108. In particular, the course covered mental health and substance abuse issues, including the opioid epidemic and explored how the messaging of bills like S. 2123 and testimony about the opioid epidemic focused more on treatment and addiction than criminal activity.

109. See Banuelos et al., *supra* note 38, at 5. According to the ABA, “[c]ultural competency requires the lawyer to take the affirmative step to acquire the sensitivity and understanding of what is the ‘other,’ and learn the means to bridge the differences in order to competently represent a client’s interest, regardless of whether the ‘other’ is the lawyer’s client or adversary.” *Id.* Thus, each of these assignments builds on the course’s desire to ensure that an issue or problem is viewed from multiple facets. The assignments also are designed to bring in minority communities and client views to ensure students “become culturally competent in order to become the diligent, competent, and zealous advocate that is expected of him or her to be.” *Id.*

begin to view the news and current events through the multi-tiered system of policy analysis, political analysis, and government, with the sharpness of a lawyer.¹¹⁰ Throughout each exercise (as well as the corresponding class discussion), however, students are encouraged to think about “alternative solutions as well as appropriate grounds for choosing among them”¹¹¹ even if it means the client does not get everything he or she hoped for at the outset. Thus, the assignments also help reinforce the notion of the lawyer-statesperson.¹¹²

Assignment One—The Overview Memorandum

The first project is an overview memorandum to a supervisor that focuses students on the concepts of identifying an issue, framing an issue (problem), and proposing possible solutions and areas of further exploration. The assignment also is designed to give the students something that is familiar to them—a memorandum—so that they are gradually introduced to the world of drafting for public policy and can see its commonalities with other legal drafting they have done throughout law school. The assignment is given a short recommended page limit to force students to think about clarity, cohesion, and conciseness in the drafting of these types of materials for busier-than-usual policymakers and stakeholders. They also are encouraged to write the document so that it could be “passed up the chain” and not require further explanation by the time it reaches the principal.

Assignment Two—Updated Initial Overview Memorandum

Building on the materials from the previous assignment, this assignment provides students with more material “from the record.” They conduct additional research on the topic from assignment one, identify additional stakeholders and coalitions, suggest

110. The course could work easily as well if the assignments covered a single topic from the moment an issue arises to the moment it is enacted through regulation.

111. Rakoff & Minow, *supra* note 31 at 604. In a course such as this, the “legal, normative, and practical considerations” of our actions are discussed so that students can begin to see a policy issue in these terms without having to stop and think about it. *Id.*

112. KRONMAN, *supra* note 3, at 147 (discussing the notion that lawyers acting in an advocacy capacity, including lobbyists, are seen as “hired guns” and this is far too narrow a view). Thus, being a good lawyer and counselor means that the ends are not always the primary focus. *Id.*

witnesses for hearings, and include a recommendation on whether a policy solution should be pursued with respect to the problem.¹¹³

Assignment Three—Position Paper

The third assignment takes students into new territory. This assignment culminates in the drafting of a two- to three-page position paper for a client. The purpose of this assignment is to have students employ all of their analytic skills and newly-found drafting skills in a more creative fashion. The assignment requires issue understanding, framing, synthesis, and advocacy.

Assignment Four—Note-taking and Hearing Summary

This assignment is included to begin to introduce students to the impact of hearing testimony. It also requires them to practice sitting in one place for extended periods of time while exercising powers of observation.¹¹⁴ The assignment requires students to provide the notes they took during the hearing so that the instructor can see how they viewed the hearing and what they took away from it. They also are asked to provide observations in their memorandum about the effectiveness of witness testimony and make suggestions about what their future witnesses should or should not do when testifying. These observations help them prepare for the next assignment, which requires them to draft and deliver their own testimony.

113. In 2016, the issue for assignments one and two was oilfield theft in Texas, a state and federal issue with significant impacts on the energy sector—particularly in west Texas. Legislation was introduced to address it during the 84th Legislative Session but Governor Abbott vetoed it as being overly-broad in application. In advance of the 85th Legislature, new language is being considered and students were required to provide information on the scope of that language and its potential impact on the stakeholders. *See, e.g., Jim Malewitz, Texas Lawmakers Seek Abbott's Blessing on Oil Theft Crackdown*, THE TEX. TRIBUNE (Nov. 29, 2015), <https://www.texastribune.org/2015/11/29/texas-lawmakers-seek-abbotts-blessing-oil-theft-cr/>.

114. *See, e.g., Donna F. Howard, Learning to Listen, Learning to Be Heard*, GPSOLO MAGAZINE, Apr./May 2006 (“The ability to focus, attend, and truly listen to what is being communicated, and then respond appropriately, is essential in interactions with office staff, clients, and other lawyers. These skills may be the difference between good lawyers and great lawyers.”). This assignment also fits within the Lasswell and McDougal model by emphasizing observation:

Throughout the length and breadth of modern society decisions are modified on the basis of what is revealed by means of intensive or extensive observation of human life, the procedures varying all the way from the prolonged interviews of a psychoanalytic psychiatrist to the brief questions of the maker of an opinion poll.

Lasswell & McDougal, *supra* note 1, at 215.

Assignment Five—Oral Testimony and Accompanying One-Pager

This assignment allows students the opportunity to draft testimony—but in shortened form. The assignment focuses on skills of communication, persuasion, and the creation and delivery of impactful testimony. The inclusion of the one-pager allows students to see how advocacy works both in oral presentation and in supporting documentation. Students present their oral testimony in class and critique one another on delivery.¹¹⁵

Assignment Six—Comments to Rulemaking

The final and most extensive assignment during the course is to provide comment on a rule. The introduction to this section of the course provides students with a broad survey of administrative law and where the comment process falls within it. It is not designed in any way to supplant the Administrative Law course offered at the school, but it bridges the gap between the first year Legislation and Regulation course and the more advanced Administrative Law. It also recognizes the importance of the regulatory scheme in society and its broad application in substantive fields such as “environmental law, securities law, and a variety of other courses on specific regulatory regimes.”¹¹⁶

IV. CONCLUSION

As demonstrated by the vast array of courses and programs discussed at this very important symposium, law schools have taken the challenge to provide a “sense of purpose” and offer training, skills, and information “common to all policy-makers” so that their graduates “cannot escape becoming a better lawyer.”¹¹⁷ The Drafting for Public Policy course developed at Texas A&M University School of Law is an important part of that challenge. The course

115. For purposes of this assignment, students are instructed to draft oral testimony to fill a five-minute window.

116. Rubin, *supra* note 63, at 659. As envisioned by Rubin in his article on restructuring the law school curriculum, this assignment and portion of the course provides, if not comprehensive, at least solid, coverage of the field of general administrative law “for students who have no interest in it and do not choose to take any upper-class courses in that field.” *Id.*

117. Lasswell & McDougal, *supra* note 1, at 216.

endeavors to ensure that students can contribute positively to the field of public policy and act as leaders in the field.

The course does so in a multitude of ways, such as providing multidimensional focus on current events, incorporating cultural awareness, cultural context, and concepts of professional identity at a pedagogical and substantive level, and encouraging students to think of themselves as lawyer-statespeople. In so doing the course attempts to vest students with a sense of purpose, mission, and “care[] about the public good.”¹¹⁸ This hopefully allows them to see their impending legal careers not simply as one of end results but as a continuum of learning and civic engagement.

118. KRONMAN, *supra* note 3, at 14.

APPENDIX A

SAMPLE SYLLABUS

The following syllabus, including reading assignments and projects, is based on a fourteen-week course schedule. As described above, it can be adapted to reflect current issues in local, state, and federal policymaking. It also leaves plenty of room for the development and discussion of professional identity issues, leadership, and cultural context. The course can also be modified to allow for the progression of a single policy issue throughout each assignment rather than the different topics/clients approach that I employ in the course.

Drafting for Public Policy
Course Overview

Welcome to drafting for public policy! According to the American Bar Association, one-in-eight lawyers practice in the government or public sectors and, even if a lawyer does not practice solely in the public sector, his or her work is impacted by public policy at every turn.

This course introduces students to the various forms of written (and oral) communication encountered in the public policymaking process. In addition to gaining an overview of “public policy,” students will learn about the various communication strategies and skills necessary to participate effectively in the policymaking process.

Students will learn specifically about the components of written communication in public policymaking and also will participate in various public policymaking exercises to gain familiarity with the process. Students will demonstrate the skills learned through a series of written exercises that will culminate in a portfolio of work demonstrating the student’s skill in drafting various public policy documents.

Course Objectives

At the end of this course, students should have—

- A basic understanding of public policy and what those terms mean;

- Competency in articulating problems and solutions in a clear, comprehensive, and cohesive manner—both orally and in writing;
- A solid understanding about the various types of written and oral communication strategies and techniques in which public policy stakeholders engage;
- A solid understanding of legislative and rulemaking processes; how those processes shape public policy; and how this course builds upon what they already have learned in their Legislation and Regulation and Administrative Law courses;
- A portfolio of written work product that demonstrates their skill level and proficiency in drafting various types of “public policy” documents; and
- A solid understanding of the role a lawyer plays in the public policy arena and the pressures and expectations that such a lawyer may face in his or her career.

Textbook

Catherine F. Smith, *Writing Public Policy: A Practical Guide to Communicating in the Policy Making Process* (4th ed.)

Teaching Method

This course involves a number of teaching methods including the Socratic method, lecture, problem-based discussions, group and individual work, written and oral exercises, and broad discussion of the material covered. The professor expects students to be prepared for class, including having completed a meaningful review of **all** material assigned prior to class.

Grades

This course follows the grading scale and grading policies outline in Academic Standards 8.1–8.54, which may be found in the 2016–2017 Student Handbook available on the Law School’s website. More detailed explanations of the types of assignments completed in this course follow this section. Grades in this course are weighted as follows:

Project 1–	5 %
Project 2–	10 %

Project 3—	15 %
Project 4—	5 %
Project 5—	25 %
Project 6—	30 %
Class Participation—	10 %

Please note that this class requires interaction and engagement among students and the professor in order to be the most beneficial. Class participation, therefore, is essential. The professor will include in the participation consideration your preparation for class, your engagement in the discussion, your attentiveness to the discussion, and your willingness to engage in the topic being discussed.

Reading Assignments

The professor reserves the right to change or supplement the reading assignments listed below.

For each week of class, read the material assigned carefully and in the context of the theme questions. The theme questions will frame the class discussion, in-class exercises, and written assignments completed throughout the semester. Students are expected to have completed the reading and engage actively in the class discussions.

Class	Topic & Theme Questions	Reading Assignment
1	Public Policy— <i>What is it?</i> <i>What are the dynamics of the policy-making process?</i> <i>What skills and strategies are needed for successful public policymaking?</i> <i>What is “public interest” and how does it relate to public policy?</i>	Smith Preface; pp.1–16; Appendix A

2	<p>Framing the Problem— <i>How does policy get formed?</i> <i>Why is defining the “problem” critical to policymaking?</i> <i>How does stakeholder viewpoint and interest impact the framing of the problem?</i> <i>How does the definition of the problem impact the formulation of the solution?</i> <i>How is policy advocacy and the framing of the “problem” different (or the same) from your traditional legal analysis?</i></p>	Smith pp. 36–61
3	<p>Communicating in the Process— <i>What are the purposes of policymaking communication?</i> <i>What are the different viewpoints that impact policy communication?</i> <i>How do stakeholders communicate and to whom?</i> <i>How does policymaking writing differ from other types of written communication? How is it the same?</i> <i>What does policy communication require?</i></p> <p>Communication, Persuasion & Public Policy: Evaluating What Works— <i>What makes good writing?</i> <i>What words best communicate a position?</i> <i>What words best communicate core concepts?</i> <i>How do you maximize brevity and impact?</i> <i>How does your written communication support and promote your oral communication and vice versa?</i></p>	Smith pp. 18–35; Appendix A

4	<p>Special Guest: Jim Tramonte will speak to the class about “Public Policy: What Works, What Doesn’t.”</p>	<p>More information on this class will be provided during our first class meeting.</p>
5	<p>Briefing Memoranda & Opinion Statements—</p> <p><i>What are the purposes of a briefing memorandum?</i></p> <p><i>What kinds of information are necessary to a policymaker/stakeholder?</i></p> <p><i>How does your target audience impact the content of a briefing memorandum?</i></p> <p><i>How do briefing memoranda and opinion statements differ?</i></p> <p><i>How does tone impact the readability of a document?</i></p>	<p>Smith pp. 148–161</p>
6	<p>Evaluation: Analysis & Advice—</p> <p><i>As public policy lawyers, what role do you play in communication?</i></p> <p><i>What critical thinking and critical awareness skills do you need to communicate effectively?</i></p> <p><i>What is policy discourse and how is it shaped?</i></p> <p><i>How does critical thinking interact with perception?</i></p>	<p>Smith pp. 62–87; Appendix B</p>
7	<p>Knowing the Record—</p> <p><i>What is the “record” with respect to public policy?</i></p> <p><i>Who creates “the record”?</i></p> <p><i>Why is good public policy and communication thereof formed by “knowing the record”?</i></p> <p><i>How does your understanding of statutory interpretation impact your knowledge of the record and its use in policy formation?</i></p>	<p>Smith pp. 88–107</p>

8	<p>Position Papers: Knowing & Articulating the Issues—</p> <p><i>What is a position paper?</i></p> <p><i>What is the <u>purpose</u> of a position paper?</i></p> <p><i>What considerations go into the drafting of a position paper?</i></p> <p><i>What types of arguments go into a position paper?</i></p> <p><i>How do position papers incorporate skills learned throughout the legal writing curriculum?</i></p> <p><i>Are position papers the same as “white papers” and reports? If not, why not?</i></p> <p><i>How do you craft a “white paper”?</i></p>	Smith pp.108–120
9 & 10	<p>Testimony: Preparing Impactful Hearing Testimony—</p> <p><i>What are the purposes served by receiving testimony in a hearing setting?</i></p> <p><i>What are the procedures associated with testifying before a governmental body?</i></p> <p><i>If a body is split among political parties, how does that impact your role as a witness?</i></p> <p><i>As a witness, what types of testimony must be prepared?</i></p> <p><i>How do you prepare yourself or your principal for the Q&A portion of the hearing?</i></p>	Smith pp. 162–183
11	<p>Testimony: Presentations—</p> <p><i>Students will present their oral testimony and we will discuss impact.</i></p>	Have oral testimony and accompanying one-pagers ready at the beginning of class.

12 & 13	<p>The APA & Agency Rulemaking Process—</p> <p><i>What is the APA?</i></p> <p><i>Who/what is covered by the APA's requirements?</i></p> <p><i>How does the APA interact and impact policymaking?</i></p> <p><i>What are the purposes and machinations of the "notice and comment process"?</i></p> <p><i>What types of "comments" can be made to agencies with respect to their rule-making?</i></p> <p><i>What are the goals of written communication in the APA setting?</i></p>	Smith pp. 184–205
14	You As a Policymaker: Reflections on the Course	Smith Conclusion

Projects

The various written assignments completed throughout this course follow the material covered in the textbook and result in students having a binder of material that tracks the formation and implementation of public policy. The assignments are frequent, but they are short and designed to track the pace and output expected of most policymaking staff.

Project due dates are listed below but the professor reserves the right to change assignments and due dates depending on the flow of the course.

Unless otherwise indicated, all projects will be due via TWEN upload **no later than 10:00 p.m.** on the date assigned.

Project 1: Overview Memorandum To Supervisor (2 pages)

Students will prepare a concise memorandum to a supervisor about an assigned policy issue that outlines (frames) the issue and explains why implementing policy to address the issue is appro-

priate. This assignment will be accompanied by a “bibliography” of sources cited and a list of follow-up questions you have.¹¹⁹

Concepts covered: Framing the Issue
Identifying the Problem
Proposing Possible Policy Solution

Date Assigned: September 20, 2016¹²⁰

Date Due: September 26, 2016

Project 2: Updated Initial Memorandum (5 pages)

Update of the initial memorandum to supervisor that includes research about the topic, identifies other stakeholders and interest groups, including their positions, identifies next steps in the research process, identifies potential witnesses on the topic, and makes a recommendation about the shape of the proposed policy solution. This project will be accompanied by an email to the supervisor.

Concepts covered: Evaluating the Issue
Knowing the Record

Date Assigned: October 4, 2016

Date Due: October 10, 2016

Project 3: Draft Position Paper (2–3 pages)

Students will prepare a draft position paper based on an assigned issue and facts that demonstrates their ability to identify a problem, synthesize information, and propose a public policy solution in a clear, concise, and cohesive fashion.

Concepts covered: Those from Projects 1 & 2
Knowing and Articulating the Issues

Date Assigned: October 11, 2016

Date Due: October 17, 2016

119. These questions will become part of your next assignment so be sure to hang on to them.

120. Dates are included for the projects listed to give guidance on how long each assignment is expected to take. Generally, students received a new assignment every other week during the course.

Project 4: Note Taking and Hearing Memo to Supervisor
(no page limit)

Students will watch a legislative hearing of their choice taking notes on what they see, including paying attention to all aspects of the hearing from opening statement to witness responses in Q&A and prepare a hearing summary for their supervisor on the hearing based on the notes taken (notes will also be submitted). This project will be accompanied by an email to the supervisor.

Concepts covered: How to Listen
 How to Read Body Language
 Understanding the Format and Formalities
 of Legislative & Rulemaking Hearings

Date Assigned: October 18, 2016

Date Due: October 24, 2016

Project 5: “One Pager” & Hearing Testimony—Preparation for
a Hearing (recommended 5 pages for Oral State-
ment; all caps/double-spaced! PLUS YOUR ONE-
PAGER)

Students will prepare a written oral statement that properly—and with impact—summarizes what would be included in full written hearing testimony. In addition, students will prepare “one-pagers” focused on their topic that further summarize the positions and points they wish to make on behalf of their client. **Students may be asked to present their oral statements and/or share their one-pagers in class.**

Concepts covered: Communication/Persuasion
 Preparing Impactful Testimony

Date Assigned: October 18, 2016

Date Due: November 1, 2016

* This project will be due in hard copy at the beginning of class*

Project 6: Rulemaking Comment (10–15 pages)

Students will prepare a comment on a rule that demonstrates their understanding of the rulemaking process and the role of public comments in that process.

Concepts covered: Understanding the APA
Communicating Effectively in a Rulemaking
Setting

Date Assigned: November 22, 2016

Date Due: Last Day of Finals 2016

Capital Lawyering & Legislative Clinic

Rex D. Frazier*

ABSTRACT

This article outlines an approach for teaching law students about advocacy beyond the judicial branch, with particular emphasis on legislative advocacy. Given the long and well-documented shift away from the judicial branch as the primary source of original public law, it is critical to teach law students that legislative advocacy is more than just an “alternative” or “non-traditional” legal career option and, instead, is one which regularly involves “real lawyering.” Just as law students learn practical trial skills through moot court, shouldn’t they learn practical legislative advocacy skills through simulated legislative hearings? Further, can law students move beyond traditional approaches for drafting legislative proposals in a classroom setting to vetting and advancing student-developed legislative proposals in a legislative body? This article outlines an effort to determine the limits of how far, and under what circumstances, law students can both develop original legislation and engage in actual legislative advocacy.

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* Rex Frazier is an Adjunct Professor at University of the Pacific, McGeorge School of Law, and teaches courses in California state legislative advocacy. The author thanks Duquesne University School of Law for hosting “The Fifth Colonial Frontier Legal Writing Conference” on December 3, 2016, and for providing a forum to discuss experiences in, and the possibilities for, training students in the fundamentals of legislative advocacy.

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I. INTRODUCTION

This article outlines one law school's ongoing effort to update its curriculum to train law school students for careers in public policy development and advocacy, particularly California state legislative advocacy. To meet the needs of a society increasingly defined by statutes and regulations¹—as opposed to common law—it is necessary to elevate training in public policy advocacy to a regular career path for law school graduates, instead of such a subject being viewed as a lesser, non-doctrinal offering.

Calling it the “Capital Lawyering Concentration,” McGeorge School of Law (“McGeorge”) provides required and elective coursework, experiential courses, and clinics designed to help graduates succeed in legislative and executive branch work that is not typically within the definition of the licensed practice of law. It approaches such work as an everyday complement to developing public law through licensed practice in the judicial branch. The approach trains students to develop strategies for public policy change regardless of the branch of government, while realizing that each branch of government has venue-specific rules and tools for advocacy that merit both theoretical and practical focus. Ultimately, the goal of the program is to develop lawyers who can advocate among

1. See, e.g., Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545 (2007).

different branches of government, respecting the traditions, cultures, and purposes of each, and, when necessary, act in one branch to achieve or ameliorate a result in another.²

Part II of this article will provide an overview of the components of the Capital Lawyering Concentration. The choices McGeorge faced when constructing the concentration will be familiar to many educators. How much time should we allocate to statutory interpretation and administrative law in an introductory course? Should such a course include material on the mechanics of government, such as legislative process? How do we illustrate when an issue can have dimensions which are debated in each branch of government and, possibly, up through all levels of our federalist system? How do we incorporate practical skills, such as drafting legislation and executive branch rules? When is it appropriate to focus on advocacy skills training, such as simulated legislative committee hearings, as distinct from theory? How should we teach the skills necessary to work for the government versus the skills needed to petition the government? How far can a law school go to encourage and aid students in the development and pursuit of actual legislative proposals, while managing important reputational, ethical, and legal considerations? Part II argues that it is possible to go beyond traditional common-law curriculum and teach students the fundamentals of being multi-branch public policy advocates, but that it is much more difficult to fashion a curriculum for practical legislative skills development without, first, addressing specific issues.

Part III explores in greater depth the concentration's programs to train students to conduct actual legislative advocacy. Part III provides an overview and discussion of a recently-developed sequence of three upper-level courses at McGeorge focused on, first, classroom training on legislative process and advocacy and, second, on a legislative and public policy clinic for students to identify deficiencies in California state law, draft responsive legislation and, most critically, execute a strategy for personally advocating for this legislation in the California State Legislature. Part IV outlines several issues that McGeorge had to address in order to launch and execute the courses, including collaboration between full-time faculty and adjunct professors, who are either retired or active government officials, government affairs professionals, or lobbyists. This section also outlines the struggles and successes faced in these courses and, in the end, the author argues that these courses

2. See *Capital Lawyering Concentration*, U. OF THE PAC.: MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Students/Academics/Areas_of_Specialty/Concentrations/Capital_Lawyering_Concentration.htm (last visited Apr. 19, 2017).

thrived in a specific set of circumstances that have facilitated student performance of public policy advocacy on par with fully-employed junior legislative staff or lobbyists.

II. CAPITAL LAWYERING CONCENTRATION

Located in downtown Sacramento, “only a bike ride away”³ from the California State Capitol building and a myriad number of state executive branch offices, McGeorge is dramatically impacted by, and impacts, the California state government. While most McGeorge graduates practice in a traditional transactional or litigation environment, a substantial number of students gain post-graduation employment either in or around the legislative or executive branches in Sacramento. Many graduates, such as the author, worked in state government capacities while they were also evening division students at McGeorge; the students were involved with complex legal considerations during the day and were finally able to understand them at night.

Despite this close proximity to the levers of California state government power, and an alumni network represented throughout, McGeorge has resembled other law schools in the pace of modifying its traditional common law focus to reflect the rise of the modern administrative and legislative state noted by legal commentators.⁴ This is understandable in the absence of evidence that significant numbers of full-time law school faculty have practical experience working in state government or lobbying and the scholarship opportunities are more heavily-focused on traditional doctrinal areas.

So, how does a law school develop sufficient internal pressure to develop legislative and administrative law programs with a focus on advocacy training, particularly if the courses require reallocating some required units or devoting limited resources to new types of courses? Obviously, it is difficult and can lead to faculty friction. There is not an easily-understood vocabulary for “legislative lawyering,” particularly when so many duties of legislative lawyers do not trigger licensure by a state bar association.⁵ But, persistent

3. Maura Dolan, *Legal clinic immerses aspiring lawyers in the political process*, L.A. TIMES (Feb. 8, 2015, 7:12 PM), <http://www.latimes.com/local/politics/la-me-law-school-politics-20150209-story.html>.

4. See, e.g., Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 11 (2003).

5. California statute does not define the “practice of law,” but the commonly-accepted definition is set forth in a California Supreme Court case, *People v. Merchants Protective Corp.*, 209 P. 363, 365 (1922) (quoting *Eley v. Miller*, 34 N.E. 836 (1893)):

administrators, faculty, and alumni can help build this pressure and, over time, things can change. Such was the case at McGeorge.⁶

After many fits and starts, and various attempts to develop new language for “public policy lawyering” or “legislative lawyering,” McGeorge adopted the notion of “Capital Lawyering.” As McGeorge conceived it:

Capital Lawyering Concentration students complete a series of required and elective courses specially designed to train them to work in and around the California legislature in committees, in private firms that specialize in political law or lobbying, in nonprofit agencies that engage in issue advocacy, in local, state and federal agencies, and in law firms with regulatory practices in areas such as communications, energy, the environment, health and employment. The curriculum ensures that students graduate with real-life experience and on-the-job contacts within the government and public lawyering community. Students also participate in Capital Center student groups, attend Capital Center events, and network with the many Capital Alumni Chapter members in California, Washington, D.C., and elsewhere who work in government and public lawyering careers.⁷

While this concept may seem little different from many similar programs at other law schools, there are a few critical elements worth noting. First, McGeorge consciously attempted to eliminate the notion that public policy work not requiring a bar license is simply “non-traditional lawyering” or something less than “real lawyering.” Second, new vocabulary was necessary to allow the school’s

As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.

Id. Legislative lawyers routinely undertake duties outside the understood scope of these activities, including legislative bill analysis, written and oral communications with legislators and staff, and testifying in legislative proceedings.

6. Special recognition is deserved for former Dean Jerry Caplan’s leadership in spotting the importance of McGeorge’s location and creating the Capital Center for Law and Policy, and for appointing Professor Clark Kelso as the first director who ran a Capital Center program, which issued a separate “certificate,” for several years. This led to the creation of a precursor course to the current Lawmaking in California course, as well as other courses taught by full-time faculty, Professor Kelso and Professor Leslie Gielow Jacobs. This coherent program, which was innovative at the time, evolved into the current Capital Lawyering Concentration.

7. U. OF THE PAC.: MCGEORGE SCH. OF LAW, *supra* note 2.

career placement services to adequately describe a material career path for graduates as something more than an aberration.

So, what, exactly, is Capital Lawyering? The coursework is a blend of traditional concepts found at many schools and new courses for which there are no casebooks and few fully-relevant textbooks. The traditional concepts will be familiar. The courses, which are part of the Capital Lawyering Concentration and have a California state legislative focus, are newly-developed. Students apply for admission to the Capital Lawyering Concentration, with a required student statement of purpose and proposed coursework path.

A. *Required Courses for the Concentration*

1. *Statutes and Regulations*

In 2015, McGeorge, after surveying other law schools, for the first time, required all students, not just those enrolled in the Capital Lawyering Concentration, to take a traditional three-unit, single semester Statutes and Regulations course. The course uses the familiar Manning and Stephenson text⁸ to provide an introduction to the law governing administrative agencies and to legislation and its interpretation. As the syllabus notes, “[i]n this age of statutory proliferation, an understanding of how courts interpret statutes and how agencies administer them is a crucial skill every attorney should possess.”⁹ The course provides an important survey of these topics, but required the school to make space at the expense of other required courses—which can trigger consternation when such a change impacts full-time, doctrinal faculty.

2. *Introduction to Capital Lawyering*

The other required course for the Capital Lawyering Concentration is a “non-traditional” course, entitled Introduction to Capital Lawyering. This two-unit, single-semester course was first developed by an adjunct professor, Professor Tom Nussbaum, who has extensive experience in California state government.¹⁰ Other adjunct faculty now teaching this course, specifically Professor Chris

8. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2nd ed. 2013).

9. Professor Brian Slocum, Syllabus, Statutes and Regulations (Spring 2016), McGeorge School of Law.

10. Tom Nussbaum worked for three decades in the California Community Colleges, including serving as both Vice Chancellor of Government Affairs and as General Counsel, and eventually serving as Chancellor of the entire system from 1996 to 2004. He became an adjunct professor with McGeorge in 2006. See *Thomas J. Nussbaum*, U. OF THE PAC.:

Micheli, also have extensive experience in California state government.¹¹

Introduction to Capital Lawyering serves a vital role in the overall Capital Lawyering Concentration. The primary learning objective of the course is to introduce and acquaint students with the fundamental knowledge and skills that are essential to lawyering in connection with California state government and with government in general.¹² The course introduces students to the lawyer's role in developing, modifying, implementing, advocating, and influencing public policy, including: legislation, regulations, executive orders, court orders, and other policy edicts. While the primary focus is devoted to the lawyer's role in the context of California state government, the course touches upon the full array of policymaking venues and processes, including: Congress, the California Legislature, California and federal agencies, California's initiative process, California and federal courts, and agencies of local government.

In the absence of a standard textbook for this material, Professor Nussbaum developed a reader to provide the students with the essential background to participate in class discussions and consider the case studies. The material in the reader includes a variety of policy analysis methodologies, including Eugene Bardach's well-known academic and theoretical approach to policy analysis.¹³ By the end of the course, the students have an analytical framework and skills for approaching public policy issues across multiple venues.¹⁴ There are graded midterm and final exams, as well as a written project that involves working on an actual current public policy

MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Thomas_J_Nussbaum.htm (last visited Apr. 19, 2017).

11. Due to high student demand, there are multiple sections of this course and, in addition to Professor Nussbaum, a new adjunct professor, Chris Micheli, has started teaching the course. Prior to establishing his current Sacramento-based contract lobbying firm, Aprea & Micheli, Professor Micheli (also a McGeorge alum) was a partner in two previous contract lobbying firms as well as General Counsel and an in-house lobbyist for the California Manufacturers Association. See *Christopher Micheli*, U. OF THE PAC.: MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Christopher_Micheli.htm (last visited Apr. 19, 2017).

12. Tom Nussbaum, Syllabus, Introduction to Capital Lawyering (Fall 2016), McGeorge School of Law.

13. See EUGENE BARDACH, *A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING* (4th ed. 2011).

14. Using Professor Micheli's sequence for illustration, in classes one and two, he introduces the class, the employment opportunities for which McGeorge is attempting to prepare students, and the Bardach policy analysis rubric. After these classes, the students should understand the difference between policy analysis and policy development and be able to perform a simple policy analysis. In classes three and four, the students are challenged with specific, thorny issues (most recently, illegal immigration, public pensions, and obesity) and asked to demonstrate how the issues could be addressed by multiple governments, across branches, and up through the federal government. Classes five through eight are devoted to the venues for lawyering in California state government (the legislative and executive

problem facing California, or the nation, where students are expected to formally apply a policy analysis methodology.

After these two required courses, Statutes and Regulations and Introduction to Capital Lawyering, McGeorge expects Capital Lawyering Concentration students to have a sufficient baseline training that allows them to tackle progressively more difficult work, including a required experiential offering.

3. Experiential Courses

The Capital Lawyering Concentration requires students to choose at least one of three experiential courses. The options for the students include: the Administrative Adjudication Clinic, a two-unit, single-semester option; a Capital Lawyering Externship, which is a field placement that can range from three to fourteen units; and the Legislative and Public Policy Clinic, which is a four-unit, two-semester clinic.

The Administrative Adjudication Clinic provides a comprehensive overview of the administrative process through classes and simulated hearings.¹⁵ It is designed to educate students on how administrative law judges make decisions and how administrative hearing systems operate. The course utilizes a variety of instructional approaches including classroom instruction, observations, simulations, and research assignments. Weekly class sessions prepare each student to be an administrative hearing officer and include a number of sessions concerning the law as it relates to parking citations. Students are required to observe an actual administrative hearing and prepare a short paper concerning the observation. All students participate in simulated administrative hearings based on actual administrative hearings. Each student is ultimately assigned to conduct a number of parking citation hearings for a local government. The course is taught by Megan Shapiro, a

branches, the Governor, state agency rulemaking, the initiative process, and the courts). These classes cover essential aspects of the Legislature, researching legislation and initiatives, and the basics of open meeting laws. They also include more detailed information, such as the Governor's involvement in legislation, the state budget, executive orders, and agency activity. Classes nine and ten tackle analogous topics in the federal government, while class eleven does so for local government. Class twelve addresses the various forces and constraints (both legal and political) that can increase government gridlock, including voting and procedural requirements, special interests, the costs of running for office, partisan politics, term limits, legislative districts, and the media. Classes thirteen and fourteen are dedicated to student skills in advocacy, negotiation, and compromise in policymaking settings.

15. See *Administrative Adjudication Clinic*, U. OF THE PAC.: MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Students/Academics/Experiential_Learning/Legal_Clinics/Administrative_Adjudication_Clinic.htm (last visited Apr. 19, 2017).

McGeorge alum and practicing attorney who has represented hundreds of clients in administrative hearings and maintains an active civil litigation practice. Enrollment in the course is limited to ten students.

McGeorge's field placement office oversees the externship program.¹⁶ Some of the options resemble the internship and field placement offerings that are typical at all law schools;¹⁷ however, a particular advantage of being located in a state capital is the many in-town placements that allow students to return to class for some portion of the day. Placements typically occur in government offices or public interest/non-profit organizations, and students must be supervised by a licensed attorney. For legislative externships, students are typically placed in committee offices, but there are instances of placement in a legislator's personal staff office. For public interest/non-profit organizations, students are typically placed with organizations that have a perceived public or civic-oriented purpose.

These placements are conscious choices and present several issues for consideration. What is the justification for requiring attorney supervision if not all Capital Lawyering jobs involve the licensed practice of law? Should the nature of the client work (e.g., for-profit versus non-profit, public interest versus corporate/labor) matter in determining whether a field placement deserves academic credit? Certainly, different law schools could arrive at reasonable, but different, answers to these questions. This author's viewpoint is that a Capital Lawyering program with faculty members talking about Capital Lawyering job opportunities should evaluate the quality of the work that would be performed but otherwise not limit externship opportunities to those supervised by attorneys or at public interest organizations, neither of which appears to be required by American Bar Association rules.¹⁸

16. *Externships*, U. OF THE PAC.: MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Stu-dents/Academics/Experiential_Learning/Externships.htm (last visited Apr. 19, 2017).

17. Evening students with day jobs that meet the requirements of the externship may receive a waiver of this requirement.

18. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014 26–27 (AM. BAR ASS'N), (Standard 305)(e). Standard 305 sets forth the rules for field placements which accredited law schools must follow. Section (e) does not explicitly limit field placements to non-profit or public interest organizations, nor does the section require a "site supervisor" for the field placement to be an attorney. While there is always room to discuss whether field placements should be limited to non-profit organizations with attorney supervisors, the ABA accreditation standards do not appear to require this and certainly were not developed with Capital Lawyering in mind, where many for-profit lobbyists could provide valuable placements as non-attorneys.

The Legislative and Public Policy Clinic is the third experiential option¹⁹ and the newest offering in this category, commencing in the 2013–2014 academic year. The clinic is a four-unit, two-semester course, with enrollment limited to twelve students. The clinic is a test of how far law students can go in the formulation and passage of original legislative proposals in the California Legislature. In the first three years of Clinic operation, students have developed on their own, or facilitated in collaboration with outside advocacy groups, fourteen bills introduced into the California Legislature, with eight bills signed into law²⁰ by Governor Brown and one bill vetoed by him.²¹ The remaining five bills failed²² at various points in the legislative process. While students in the Clinic have demonstrated the ability to conceive original legislation and execute a strategy to get their bills on the Governor's desk, it has not been without a considerable number of issues and discussions among faculty and administrators at McGeorge. Parts III and IV of this article examine these issues in greater depth and offer observations on when such a program could be viable at another school.

B. Elective Courses for the Concentration

The Capital Lawyering Concentration includes general electives and electives by governmental level of practice. In all, students must reach a combined fourteen units of required and elective classes to satisfy the Concentration requirements.

The general electives will be familiar to most law schools. There is a three-unit, one-semester course in Administrative Law that

19. Students must take two electives, Lawmaking in California and California Lobbying and Politics, prior to, or concurrent with, the Clinic. See *infra* Part IV, Sections A.2, A.3 (describing these two courses in more detail).

20. AB 1554, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Irwin; powdered alcohol); AB 2505, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Quirk; prohibits euthanasia of animals using carbon dioxide gas); SB 1064, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Hancock; commercially sexually exploited children); SB 1339, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Monning; inter-county Medi-Cal transfers); AB 2623, 2014 Leg. 2013–2014 Sess. (Cal. 2014) (introduced by Pan; peace officer training in elder law); AB 2632, 2014 Leg. 2013–2014 Sess. (Cal. 2014) (introduced by Maienschein; state dependent care facilities); AB 2643, 2014 Leg. 2013–2014 Sess. (Cal. 2014) (introduced by Wieckowski; revenge porn) (Cal. 2014); and SB 1058, 2014 Leg. 2013–2014 Leg. Sess. (Cal. 2014) (introduced by Leno; discredited expert witness testimony).

21. AB 1200, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Gordon; procurement lobbying).

22. AB 100, 2015 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Alejo; law fellowships); AB 291, 2015 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Medina; multi-county water transfers); AB 1740, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Alejo; law fellowships); AB 791, 2015 Leg. 2013–2014 Sess. (Cal. 2015) (introduced by Cooley; online advanced health care directives); AB 2452, 2014 Leg. 2013–2014 Sess. (Cal. 2014) (introduced by Pan; advanced healthcare directives).

delves into administrative law topics at a deeper level than the Statutes and Regulations required course. There is a three-unit, one-semester practicum in Legislation and Statutory Interpretation that delves into statutory interpretation topics at a deeper level than the Statutes and Regulations required course and includes several drafting exercises. Finally, there is a Negotiations and Settlements Seminar, which is a general negotiations course not specifically geared toward negotiation of legislation or regulations, but provides core lawyering skills relevant to the Concentration.

There is also a wide array of electives by governmental level of practice. The local law offerings²³ are California-specific, particularly related to land use planning and local agencies. The federal law offerings, in addition to the courses already mentioned, relate principally to traditional election law topics. It is the California state legislative electives, such as Lawmaking in California and California Lobbying and Politics, which will be covered in greater depth in Part IV of this essay. They highlight McGeorge's effort to develop new courses with both a theoretical and practical legislative advocacy focus in the Capital Lawyering Concentration, but for which there is no standard course book.

III. PREPARING FOR SUCCESS IN THE CAPITAL LAWYERING CONCENTRATION CLINIC

While McGeorge's Capital Lawyering Concentration will look familiar to other law schools in many respects, McGeorge has attempted in its California legislative practice courses to determine how far a law school can go to responsibly facilitate actual California legislative practice activities by law students. The previously-mentioned Legislative and Public Policy Clinic (the "Clinic") provides students with an opportunity to conduct actual legislative work approaching equivalency with the activities of junior legislative staff and lobbyists. While many law schools offer legislative clinics where students contribute meaningfully to the legislative process, particularly through research and drafting, the Clinic has attempted to oversee students from the initial point of identifying a deficiency in California law that is susceptible to correction through legislation; to developing, drafting and sponsoring a politically-viable bill introduced into the California legislature; to personally con-

23. The available courses are: Land Use Planning (two units); Local Agency Practice (two units); Local Government (three units); Municipal Innovation Seminar (two units); and Representing Local Agencies (one unit).

ducting effective written and oral advocacy in support of the legislation, including formal testimony in the State Capitol; and, ultimately, to petitioning the Governor for a signature. The goal is to do this in a single academic year through a two-semester sequence.

A brief overview of the Clinic process is necessary. There is an application process and students are admitted by the end of May preceding the upcoming fall semester; there is an enrollment cap of twelve students. Prior to the first Clinic meeting, each student is required to form a project group with one or two other students, resulting in a total of four to six Clinic project groups. Developing and pursuing a state policy change is an enormous amount of work and requires the efforts of more than one person. Diversity within groups is encouraged; partnering with like-minded people who simply provide an “echo chamber” of agreement will undermine group effectiveness. During the summer before fall semester, student groups are expected to meet and discuss possible ideas for state law changes. This could be a bill idea for the Legislature or a petition for rulemaking²⁴ to a state agency. Or, this could involve activities as a prelude to legislation,²⁵ such as developing factual information through public records act requests of governmental bodies or pitching stories to social or traditional media to shape the

24. While most Clinic students have a goal of getting legislation passed, not every problem needs a legislative solution or is yet ripe for a legislative solution. For example, in the 2015–2016 Clinic, a student group concerned about delays in state funding for indigent health services (particularly mental health services) when a recipient moved across county lines petitioned the California Department of Health Care Services (DHCS) to address the issue in a memo to the state’s County Welfare Directors. The director of the DHCS personally met with the students, gave them helpful suggestions, and was ultimately supportive of legislation that the students pursued after further developments, which led to the introduction and legislative passage of SB 1339, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Monning; inter-county Medi-Cal transfers). Governor Brown has signed this bill into law.

25. In cases where students identify a problem for which other, non-legislative work is appropriate, the professor attempts to guide students towards an effective strategy, whether that involves foundational research (such as public records act requests) or “softening the ground” prior to introducing a bill (such as social media campaigns or providing information to the media). An example of this approach can be found in the work of the 2013–2014 Clinic where students were concerned about the lack, as they saw it, of adequate background checks for individuals applying to work in state facilities providing care for vulnerable populations. Because the state Department of Social Services (DSS) was not interested in changing its procedures, the students did not want to pursue a bill which, if it reached the Governor, would be “veto bait,” so they commenced investigation and media activities and partnered with a local public interest lawyer who was able to share enough information with a local television investigative reporter to highlight the issue. DSS responded to the exposure by indicating that a policy change was imminent and, when that did not happen, the students and their public interest attorney partner found a legislator willing to author legislation on the topic, AB 2632, 2014 Leg. 2013–2014 Sess. (Cal. 2014) (introduced by Maienschein; state dependent care facilities), which, after significant negotiations, received legislative approval and a signature from Governor Brown.

public affairs climate. Litigation is also a possibility, but does not fit within the primary skills focus of the Clinic.

During the first Clinic meeting of the fall semester, each group provides a ten-minute overview of the ideas they are exploring. The conversation generally starts with students attempting to give a brief statement of the problem that needs to be fixed. While this may sound easy, issues get complicated quickly and true issue identification generally takes most of the fall semester. During each presentation, student groups answer questions from the rest of the class and conclude by agreeing to a list of “to do” items in preparation for the next time they present to the group. All students are expected to be engaged in these discussions. Following the first class, each time a student group presents their work progress in class, which may not be each week, they generally present for longer periods of time once the discussions advance possible and preferred solutions. During these presentations, feedback from the professor and fellow students provides an important “reality check” for the presenters and improves the student group work product.

For the fall semester, student groups work through the Bardach policy analysis methodology²⁶ and circulate written work product to the professor and students prior to each class. After students hone their problem statements, undertake legal and policy research, and develop possible policy responses, they move to additional topics. They attempt to develop public affairs strategies, such as constructing a favorable media climate, and undertake coalition-development efforts. Partnering with an existing advocacy group that will eventually “co-sponsor” the student proposal provides helpful credibility for the project. By the end of the fall semester, student groups are expected to submit a strategy memo, including actual bill or regulatory proposal language; an assessment of the prospects for passage; and a coalition, grassroots, and/or media strategy.

For the spring semester, each student group pursues adoption of its legislative or regulatory proposal. For legislation, which every Clinic group has pursued, this includes selecting and obtaining a bill author in January, who will introduce the bill, and then working the bill through the legislative process. Students discuss legislative strategy in class meetings, including plans for developing collateral materials which they will distribute to legislative staff, meeting relevant procedure deadlines, responding to committee staff and completing background sheets, writing a support letter for

26. See BARDACH, *supra* note 13.

the bill office, making office visits to advocate for passage, developing coalitions and media coverage in anticipation of a hearing, and participating in formal proceedings.

At the end of the spring semester, students are expected to memorialize their efforts in a form suitable for publication and, additionally, create a complete, detailed work file for the Clinic archives so that future students are able to build upon this work.²⁷ This work file typically includes confidential or sensitive information that is not suitable for publication.

IV. FACTORS NECESSARY FOR CLINIC SUCCESS

After three years of operations,²⁸ the overall conclusion is that, under the right set of circumstances and guidance, a law school can offer a successful state legislative advocacy clinic and law students can actually handle real-world activities.

There are, however, many considerations that a law school needs to take into account before attempting this. First, and foremost, a school must develop additional curriculum and skills development tools beyond those that exist in contemporary academic literature. Second, the school must determine what type of faculty expertise is needed to facilitate this student activity. Third, the school must determine whether the work flow and conditions exist with and within the state legislature to enable students to have a productive academic year. Fourth, the school must develop clear, attainable goals that drive student productivity and which can be evaluated fairly. Lastly, the school must analyze ethical, reputational, and legal issues associated with overseeing such student activity. An analysis of each of these considerations follows.

A. *Additional Curriculum and Skills Development Needed for the Clinic*

Three courses form a structured pathway into the Clinic. Introduction to Capital Lawyering, as its title suggests, introduces students to the broad range of types of, and venues for, policy change,

27. This archive was helpful to the 2015–2016 students who sponsored AB 1740, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Alejo; law fellowships). Their measure was a reintroduction and improvement of a bill from the 2014–2015 Clinic, AB 100, 2015 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Alejo; law fellowships), which failed in the Assembly Rules Committee.

28. Particular thanks to Professor Nussbaum for helping launch the Clinic in its first year, providing full involvement and feedback to the grateful students.

how the legislative branch fits into this picture, and includes California-specific substance and skills. The two-course sequence of Lawmaking in California and California Lobbying and Politics methodically and comprehensively teaches the subject and skills of California legislative practice. These courses are described more fully below.

1. Introduction to Capital Lawyering

The Introduction to Capital Lawyering course described in Part II is a foundational course for the Clinic, and is required for all Capital Lawyering Concentration students. It has, and continues to be, taught by adjunct faculty. The Bardach policy analysis²⁹ rubric has been adapted by the adjunct faculty to provide an essential framework for Clinic discussions. Prior to each Clinic meeting, students upload to the Clinic website an overview of their present work progress, as follows:

- 1. Definition of the Problem:** In a sentence or two, define the problem that is being addressed. The problem will generally be stated from the perspective of your client—be it a legislator, the Governor, a state agency, an interest group, etc. If possible, include a sentence or two about your client's positions and underlying interests.
- 2. Background:** In this portion of the written presentation, address the following elements:
 - a. **Evidence of the Problem:** Provide key facts, statistics and other evidence of the problem—enough to validate the problem and help the reader understand its dimensions.
 - b. **Law on the Subject:** If there is an existing body of law on the subject (statute, regulation, case law at the state or federal level), you should summarize.
 - c. **Prior Attempts to Address the Problem:** If there have been prior attempts to address the problem (legislation, regulation, litigation), you should summarize them, including whether the efforts failed or succeeded.
 - d. **Views of the Parties of Interest:** Briefly describe the positions of the various parties of interest for and

29. See BARDACH, *supra* note 13.

against, including: interest groups, legislative caucuses, and government agencies.

3. Alternative Solutions: In this portion of the written presentation, briefly summarize and evaluate the various options for addressing the problem. When evaluating the various solutions, always discuss *effectiveness* (Does it solve the problem?) and *political feasibility* (Can you get it adopted?). Additional criteria to be applied at your discretion include equity, efficiency, and administrative/legal feasibility.

4. Preferred Solution: In this portion of the presentation, you identify and justify the alternative you have chosen. As a part of this discussion, address the following elements:

- a. **Groups/Parties for and Against:** Given your preferred solution, provide a more elaborate discussion regarding the groups/parties that you anticipate to be for and against. Try to identify not only their positions, but also their underlying interests. Also consider whether the proposal will attract media/blogger interest, and whether it will be favorable or unfavorable.
- b. **Strategy:** Lay out your strategy for advancing your preferred solution. Is it possible to form a support coalition for this change? If so, under what circumstances? Do you want to meet and negotiate with likely opposing parties *before* finalizing and introducing your proposal? Should you initiate a public affairs/grassroots campaign?
- c. **Realistic Outcome:** Describe how your preferred solution and accompanying strategy provides a realistic outcome for your client.

5. Additional Documentation: In addition to the foregoing analysis, include the following in the formal written presentation:

- a. **Draft of bill language, regulatory language, or complaint:** Depending on the solution you have chosen, include draft language to effectuate the proposal. In the case of a regulation, this would also usually include a petition for rulemaking.
- b. **Collateral materials:** To execute your strategy, also include drafts of materials which could be provided to decision-makers, stakeholders, coalitions, reporters, etc.

In the first few Clinic meetings, students will not have much or any meaningful entries for the majority of the above analytical elements. However, the students must start somewhere, and that somewhere is many weeks of defining the problem and performing background research. The Legislative and Public Policy Clinic explicitly uses the material from Introduction to Capital Lawyering to guide discussion and help students organize their projects.

2. *Lawmaking in California*

The first course not required for the Capital Lawyering Concentration, but which is required for admission to the Clinic, is entitled Lawmaking in California. Like Introduction to Capital Lawyering, the course is taught by adjunct faculty.³⁰ The two co-teachers are: Professor Micheli,³¹ a contract lobbyist, and Professor Diane Boyer-Vine.³²

This course covers the fundamental components of the California legislative process, including legislative procedure, bill drafting and analysis, legislative history and intent, advocacy, relationships with the executive branch, and the powers and limits of the legislative branch. Students learn about statutory and regulatory lawmaking and will develop the important legal skills of researching, analyzing, and writing by having practical experience in drafting legislation (bills and amendments) and bill analyses. This course exposes students to numerous aspects of the legislative process and the making of statutory law.³³ The primary learning objective of the course is to help students understand lawmaking in California, particularly the legislative process.³⁴ The course includes midterm and final exams.

30. This is a continuation of a long-running course, offered from the very beginning of the Capital Center and the certificate around 1994.

31. See U. OF THE PAC.: MCGEORGE SCH. OF LAW, *supra* note 11.

32. Professor Boyer-Vine is the Legislative Counsel of California and oversees the Office of Legislative Counsel, which is the nonpartisan public agency that drafts legislative proposals, prepares legal opinions, and provides other confidential legal services to the Legislature and others. She has served in her present capacity since June 2002 and previously served as a staff lawyer in the Office of Legislative Counsel since 1988. See *Diane F. Boyer-Vine*, STATE OF CAL. OFFICE OF LEGISLATIVE COUNSEL, http://legislativecounsel.ca.gov/attorney_bio/20 (last visited Apr. 19, 2017).

33. Chris Micheli & Diane Boyer-Vine, Syllabus, Lawmaking in California (Fall 2016), McGeorge School of Law.

34. Class one begins with an overview of the powers and limits of the Legislature. Class two covers the legislative calendar, legislative leadership, and the committee system. Class three probes the powers and limits of legislative power, including constitutional provisions and case law. Class four outlines legislative floor sessions, relevant rules, and legislative publications. Class five begins an in-depth skills development related to the basic tools of

At the end of the course, the goal is that the students will understand the role of a “legislative lawyer” who, in turn, must understand the following aspects of the job:

- How is the statute or regulation being interpreted? What does the language say?
- What are the formal and informal legislative or administrative procedures?
- What should the policy be? What does the client want it to be?
- What is feasible for the client to achieve in the legislative or administrative forum?
- How will the individuals and entities involved in each forum shape the likely outcome?³⁵

The sequence of Lawmaking in California is designed to provide substantive knowledge on a time frame for use in the Clinic.³⁶ By the time Clinic students have typically gained traction in refining their problem identification and conducting background research, the Lawmaking in California class is preparing them for drafting and the assessment of political viability.

3. California Lobbying and Politics

While Lawmaking in California prepares Clinic students for activity prior to introduction of legislation, the second required course for enrollment in the Clinic, California Lobbying and Politics, prepares students for post-bill introduction activity. Taught by the author of this article, the primary learning objective of California Lobbying and Politics is to help students develop a better understand-

legislative drafting, from initial inception of an idea through working with the Office of Legislative Counsel in the preparation of the text of a measure and amendments to that measure. Class six begins training students to draft a legislative committee bill analysis. Class seven provides practical instruction on statutory research and legislative intent. Class eight introduces the role of lobbyists in the legislative process. Class nine covers ethics rules related to regulating the conduct of legislators and legislative staff. Classes ten through twelve cover discrete topics, such as the role of the media, the Governor’s administration, and the state budget in the legislative process. Class thirteen provides an overview of the administrative rulemaking process. Class fourteen concludes with a discussion of the impact of the California direct democracy process—including initiative, referendum, and recall.

35. Micheli & Boyer-Vine, *supra* note 33.

36. Due to scheduling constraints, particularly attempting to provide opportunities to both day and evening division students, students are permitted to take Lawmaking in California contemporaneously with the Clinic, although it is preferred that students take the course in the prior academic year.

ing of how California state legislators actually make voting decisions on legislation and enable students to participate in real-world legislative advocacy. The course examines the tension between “deliberation on the merits,” on the one hand, and “politics and private interest,” on the other. Throughout the course, the professor attempts to demonstrate, based upon practical experience, that neither completely explains legislative decisions, but both are highly relevant—each legislator employs a different combination of deliberation and politics from time to time, depending upon: the specific public policy issue, the legislator’s personal history and relationships with third parties, and the level and nature of interest group/media attention to the issue.

Like Introduction to Capital Lawyering and Lawmaking in California, California Lobbying and Politics relies heavily on professor-developed material. The course does selectively employ what would be considered traditional political science textbooks,³⁷ but the majority of the material is gathered in a reader for the students. The principal reason for needing a reader is that there is no standard textbook or casebook that covers the necessary material.

The course is divided into two parts. The first half teaches students the practical tools of legislative advocacy and attempts to minimize how politics can derail deliberation “on the merits.” The first half concludes with a skills assessment in the form of a simulated legislative committee hearing in the State Capitol. The second half of the course develops the theory that sometimes advocacy “on the merits” is insufficient to achieve an advocacy goal; it is important to recognize such circumstances and develop additional “non-deliberative” tools (i.e., not “on the merits”) to complement advocacy “on the merits.”

The course begins with a comparison of traditional political science theory versus actual legislator voting behavior. Students review Besette’s excellent formulation of “deliberative democracy”³⁸ and his proposition that “[i]t follows that the proper standard for evaluating the democratic character of deliberative democracy is how well the institutions of government foster the rule of informed

37. There are two required books for the course: JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT* (1994) and JAY MICHAEL, DAN WALTERS & DAN WEINTRAUB, *THE THIRD HOUSE: LOBBYISTS, POWER AND MONEY IN SACRAMENTO* (2002).

38. BESSETTE, *supra* note 37, at 13. “The task that confronted the framers was to design a governmental system that would promote informed, reasoned, and responsible policymaking while also ‘preserv[ing] the spirit and the form of popular government,’ a system, that is, that would combine deliberation and democracy.” *Id.* (quoting FEDERALIST NO. 10, at 80).

and reasoning majorities rather than the rule of uninformed, passionate, or prejudiced majorities.”³⁹ The students test the limits of this theory by reviewing California interest group legislative voting scorecards and seeing how legislative results follow various patterns, including adherence to political party, geography/region, gender, race, ethnicity, and religion. The challenge for a particular advocate, then, is how to get legislators to break from (or adhere to, depending upon client needs) these well-known patterns. Students also review Bessette’s formulation of deliberation on the merits of public policy, including the three elements of deliberation: information,⁴⁰ arguments,⁴¹ and persuasion.⁴²

At this point additional materials are needed to prepare students for actual legislative advocacy in the California State Capitol. To prepare law students to advocate in a legislative environment, they first need to know the tools of advocacy “on the merits.” Classes focus on the primary tools which legislative advocates use for “persuasion”: (1) drafting a client letter outlining a position on legislation which is suitable for delivery to legislators, legislative staff, committee staff, and other stakeholders; (2) constructing and orally delivering a client position to legislators, staff, and stakeholders in an informal, pre-hearing environment (e.g., an office visit); and (3) providing formal testimony in a legislative committee hearing. Following this skills training, students participate in a mock legislative hearing at the California State Capitol, omitting significant “political” elements which ordinarily would impact (but not necessarily determine) the results of a legislative bill hearing. By the end of this portion of the course, a student should be able to demonstrate basic legislative advocacy skills.

After a full class where students debrief about their hearing experience and relate it to the previous teaching, the next half of the course explores the non-deliberative tools which may be necessary when a legislator may not be persuaded “on the merits.” The goal is to help a legislator become “persuadable” on the merits.

39. *Id.* at 35.

40. *Id.* at 49. “[I]nformation is the weaponry, the ammunition of legislative battle.’ Reasoning on the merits of public policy requires at a minimum that serious consideration be given to pertinent substantive information on policy issues.” *Id.*

41. *Id.* at 51. “Information alone is not enough to determine appropriate courses of action; for it is necessary also to connect mere facts with desirable goals. This is the function of arguments.” *Id.*

42. *Id.* at 52–53. “Persuasion occurs when information and arguments on the merits of an issue lead a participant in the policymaking process to take a substantive position that he or she had not taken prior to engaging in the process. It thereby involves some kind of change or development in the policymaker’s understanding.” *Id.*

The sequence of this material mirrors a legislator's typical journey to his or her first vote in the state Legislature. This journey involves an accretion of relationships, alliances, commitments and education which, while not determinative of any particular vote in a given circumstance, are levers for legislative advocates and, often, predictors of voting behavior.⁴³ The course concludes with group exercises and a final examination, which requires students to meld the deliberative tools from the first half of the class with the non-deliberative tools from the second half of the class and demonstrate the ability to formulate a policy and political strategy to accomplish specific client legislative goals.

The pacing of California Lobbying and Politics is designed to equip students in the Clinic with an adequate level of skills to pursue passage of their original legislative proposal in the spring semester. The skills in the first half of the class enable students to interact with interested parties through participation in committee hearings.⁴⁴

With the training and skills developed from these three required courses, students in the Clinic have demonstrated the ability to develop and pass meaningful legislation.

43. Following the mock legislative hearing and debrief (in weeks six through eight), class nine explores appointed and elected service in local government, whether a special district, city, county, or regional body, including the type of staff and organization necessary to be such an official and the donors involved in local political races, by type of race. Class ten examines the goals and reach of state and county political parties as well as local political clubs, and includes a review of organizational and policy documents, and the identity and activities of party leadership, activists, and donors. Class eleven explores how state legislative leadership and special interests in Sacramento approach the statewide "playing field" to achieve their partisan and ideological goals in the Legislature, including a discussion of prominent election law cases, the practical realities of direct and indirect funding of campaigns, and the rise and predominance of party and independent expenditures outside the control of a candidate for state office. Class twelve delves into the peculiar subculture of Sacramento political life and legislators' interactions with institutional legislative staff and the special interest groups (broadly defined to include public and private, for-profit and non-profit, corporate and labor, and business, environmental, and consumer actors). This class includes discussions about "sponsored" bills by interested parties, fundraising, and other demands on legislators in Sacramento, and institutional forces such as term limits. Class thirteen covers the public affairs world, including grassroots; astro-turfing (i.e., grassroots activity generated by paid professionals); earned, paid, and social media; and techniques for using public affairs in legislative advocacy.

44. A notable omission is training for lobbying a House Floor. Typically, if a bill makes it out of policy and fiscal committee in its house of origin, it will move to the second house for consideration. Little is typically necessary for a Clinic bill to pass off of the house of origin Floor.

B. Faculty Expertise Needed for the Required Courses and Clinic

The faculty needs for making the Clinic students successful are as specific as the environment of a particular state capitol. For success in the California State Legislature, it would be difficult for faculty without actual work experience in and around Sacramento to guide students from bill inception to the Governor's signature. The California Capitol community has a unique culture, just as each state's capitol community would have its own unique culture. Oftentimes, the key advice students need reflects a professor's knowledge of process and personalities, as well as an assessment of how a particular proposal would be perceived by legislators, staff, and special interest groups. General practitioners from outside a particular culture certainly could succeed in guiding Clinic students, but they would likely be tremendously, and uncommonly, capable people with many other people seeking to hire them.

The struggle for McGeorge has been how to provide effective Capital Lawyering in the state legislature during law school while using full-time faculty. To date, this has been difficult, but hopefully could change if Capital Lawyering develops significant scholarship around it and tenure-track professorships. Each of the three courses required for the Clinic, and the Clinic itself, were developed and executed by adjunct faculty, with each part-time professor having at least two decades of Capital Lawyering experience in California. Fortunately, the McGeorge law school administration and full-time faculty have been supportive and committed to teaching in a deeply-practical nature by developing new course readers and lectures in the absence of established scholarship.

It should also be noted that these Capital Lawyering courses continue to evolve. Each time these courses are taught, they provide valuable insight that is incorporated the next time the course is taught. For instance, in the fourth year of teaching California Lobbying and Politics, the professor changed the sequencing of the material to cover advocacy "on the merits" and the mock legislative hearing in the first half of the course instead of previous years when it followed materials on "non-deliberative" influences.

Assembling the Capital Lawyering faculty has taken a considerable amount of time and thought. Support and funding for the concept of Capital Lawyering has changed as deans have come and gone. Full-time faculty have a range of diverse scholarship interests and must teach a number of different required and elective courses. These realities make it difficult, even in a capital city, to assemble a critical mass of full-time faculty primarily devoted to

teaching state law practice courses. At McGeorge, a full-time constitutional law professor, Professor Leslie Gielow Jacobs, has provided vision and energy to the Capital Lawyering concept and oversaw the creation of a coherent Capital Lawyering Concentration. She pursued her vision of Capital Lawyering while listening to and empowering experienced adjunct faculty. She has made, and continues to make, a wonderful Director of the Capital Center for Law & Policy, which oversees the Capital Lawyering Concentration. Other full-time faculty, particularly Professor Mary-Beth Moylan, an election law expert, and Professor Melissa Brown, Director of Legal Clinics, have been leaders and extremely supportive of these developments as well.

C. Work Flow and Conditions Within the State Legislature

The conditions necessary for the success of the Clinic exist in California for McGeorge, but each law school would need to determine whether it has similar conditions before implementing a similar program. The first, and most obvious, condition that facilitates the Clinic is its proximity to the State Capitol. McGeorge is the only accredited law school in downtown Sacramento and students can easily reach the State Capitol. This closeness enables Clinic students to meet participants in the legislative process in person, frequently, and, if necessary, on short notice.

The second favorable condition for the Clinic is that the California Legislature is a full-time institution with many professional legislators and a permanent staff in the Capitol building (as opposed to a “part time” legislature where legislators have other occupations) with a work calendar that matches the Clinic’s needs. In the fall, which is the only time of year when the Legislature is out of session, the Clinic’s problem identification, planning, drafting, and strategy phases ensue and students can interact with legislative staff and “third house” participants⁴⁵ when they have enough time for a casual talk. In the spring semester, when the Legislature is in session and very busy, the students can pitch legislators to author legislation, get a bill introduced and in print, and pursue adoption through informal and formal advocacy.⁴⁶ This calendar match

45. “[B]usinesses, labor unions, professional organizations, and government agencies . . . depend on their lobbyists—what Capitol insiders have long called ‘the third house’—to protect their interests.” MICHAEL ET AL., *supra* note 37, at 2.

46. For instance, in 2015, the first year of a two-year session, the Legislature reconvened on January 5, 2015, and was in session until September 11, 2015. The bill introduction deadline was February 21, 2015, and committee hearings ensued from March through May 2015. In 2016, the second year of a two-year session, the schedule was similar. The deadline for

is essential to the operation of the Clinic, and is similar to the planning cycles of special interest groups considering their next year's legislative agenda during the Clinic's fall semester.

The third favorable condition for the Clinic is that the California Legislature is a member-driven body, rather than a committee-driven body. Each California legislator has a right to request Legislative Counsel to draft a proposal in legislative form, pass that formal proposal to the Floor of the body for introduction, and get a proposal (no matter how silly⁴⁷ or thoughtless) published and numbered. A California legislator would be surprised if a house's Rules Committee would refuse to refer a bill to the appropriate policy committee with jurisdiction over the matter or if that committee's chair would refuse to set a bill author's proposal for a committee hearing. This means that virtually any proposal for which a bill author seeks a hearing will, in fact, be referred to a policy committee, receive an analysis by committee staff, and be entitled to a formal presentation by the author and a committee vote. This is quite unlike many states and is distinct from the United State Congress where proposals only proceed with the direct involvement of house leadership and/or committee chairs and where member-driven legislating of the kind found in California is not permitted.⁴⁸ This member system ensures that a Clinic proposal which students convince a legislator to "author" (i.e., to introduce the bill) will provide law students the ability to work towards the passage of their "sponsored" bill.

The fourth favorable factor is the incredibly large number of full-time legislative and special interest group staff residents within a few blocks of the State Capitol. Clinic students can readily interact in person with experts in virtually any policy area. These experts are sources of history about previous legislation in a particular area and generally have an acute political compass for what is "doable" by a group of politically-powerless students. They have been kind and generous to the Clinic law students.

introducing new bills was February 19, 2016, and the session went through the constitutional deadline of August 31, 2016. Committees heard legislation from March through May 2016.

47. See Jordan Rau, *Senator Burton Yields Floor to Term Limits*, L.A. TIMES, (Nov. 27, 2004) <http://articles.latimes.com/2004/nov/27/local/me-burton27> ("In the spirit of satirist Jonathan Swift, [State Senator John] Burton enjoyed using outlandish legislation for rhetorical purposes. To protest what he considered Republican political attacks on the poor, he once drafted legislation that would have made it a crime to have an income below the poverty level. Another Burton bill would have required that state orphanages serve gruel.").

48. This system takes legislators by surprise when they have previously served in Congress and are used to being insulated from regularly making difficult votes. In the California Legislature, it is difficult for legislators to make promises to conflicting interests without ultimately being held accountable with a face-to-face vote.

Law schools without these four factors would need to consider how they could construct a Capital Lawyering Clinic that allows student activity from policy analysis through legislative advocacy.⁴⁹ For part-time legislatures which only meet a few months a year (or, potentially, every other year), this may mean having limited or sporadic advocacy opportunities. Much more difficult would be finding advocacy opportunities in a state legislature that allows a reigning committee chair to refuse to hear proposals which he or she dislikes. One possible answer to these types of constraints would be to have subsequent clinic students work on a proposal from a previous year, particularly when grassroots, coalition development, and media work needs to be performed prior to bill introduction.

D. Providing Students with Clear, Attainable Goals

Success of the Clinic has been directly related to providing students with clear, attainable goals. Because the Clinic involves the development and public discussion of proposed changes in state law, care must be given in the selection of topics. Controversy can attach to a student proposal; while this is a normal part of the deliberative process, the purpose of the Clinic is for students to develop successful projects rather than just “make a statement” which feels good, but changes little.

The most important consideration for Clinic work product is whether the students demonstrate high-quality legal and policy research, careful drafting, and the ability to move a proposal during the academic year. The Clinic focuses on students demonstrating the ability to go as far as possible with a proposal, while also getting the desired change in state law. Students who develop a proposal for a large change in law with a low probability of success will be marked down. Students who develop a proposal for a small change in law with a high probability of success will similarly be marked down. The main task for student groups is to demonstrate judgment in going as far as possible with a change in state law, while having a reasonable chance of changing the law during the academic year. Finding this “sweet spot” of a meaningful, yet achievable, change is at the heart of the day-to-day business in the State Capitol—and developing these skills is the clear goal of the Clinic.

49. An additional lesson learned from Clinic activities is that students must know, up front, that it is very difficult to succeed with legislation which seeks to increase funding for a particular activity. Competing against various groups for limited public funding is very difficult, particularly for politically-powerless law students. Changes to substantive law that do not require an appropriation have the best chances. Also, legislation mandating new or modified technology projects in state agencies is a recipe for unhappiness.

E. Ethical, Reputational, and Legal Issues

There are significant institutional issues which a law school should consider before facilitating real-world legislative advocacy. These include how such a program will: address ethical issues, including the selection of topics; impact the reputation of the school, including alumni relations; and affect the legal position of the school, which requires addressing issues surrounding the regulation of lobbying activities and tax status.

1. Ethical Issues

An important issue is whether Clinic students are actually prepared for this real-world work. Are they being put in water that is “too deep” and being set up for embarrassment? Admission of students to the Clinic is an important filter. Care must be exercised in selecting students with relevant work or volunteer experience. The course prerequisites help a great deal. To date, students have received support when interacting with professional advocates and legislative staff and are generally over-prepared on the details when they talk with others.

Another issue for a law school is whether and, if so, how much, it will attempt to control the subject matter of Clinic bills. This may sound simple, but it is not and reasonable people can differ. Such issues included whether Clinic projects should be limited to specific purposes (e.g., “public interest” work) or be censored based upon content. As to the first issue, most law school clinics are focused upon “public interest” work which is typically defined as serving indigent clients. Should students receive Clinic credit if their work is identified as facilitating a “special interest” and not the “public interest?” As to the second issue, it is pretty easy in contemporary America to list off a host of “hot button” topics that will create public controversy.

To both of these questions, McGeorge has, thus far, permitted Clinic students to develop any bill idea they wish. The Clinic rules are clear that neither McGeorge nor the professor selects topics for the students or, in any way, grants approval or disapproval of topics. No student should feel pressure to conform to any particular ideology and the professor will certainly not bar development of a student proposal because of its content. Any topic is permissible, whether it is “left” or “right.” Badgering or bullying fellow students to conform to a particular viewpoint is not well-received in class; each student is expected to provide helpful, supportive feedback

during class discussions, even if they personally disagree with the views expressed by other students. The Clinic is not a “debating society,” but rather it is teaching legislative advocacy as a discipline in itself, regardless of ideology. In the real world, legislators, staff, and lobbyists regularly encounter people of goodwill who, nonetheless, represent different (and, sometimes, offensive) perspectives; the inability to co-exist and be polite to such people is a certain sign that public policy advocacy is not a good fit for the student.

Regarding “public” or “special” interest legislation, the Clinic students have produced a wide variety of both. With clear expectations, the students have been understanding of how others do not share their belief systems, and the students have playfully cringed when they have had to provide helpful input on legislation that they expressly stated they did not like.

As far as “hot button” issues, the three years of the Clinic have not produced anything more than lukewarm items. The author suspects this to be the case because of the evaluation mechanism for the course. As noted earlier, Clinic student groups receive a grade based upon the judgment they displayed in crafting a meaningful, yet attainable, bill through the legislative process. Getting a legislator who courts controversy by regularly introducing deeply offensive or controversial bills will not be well-received in the Clinic, not because of the professor’s personal ideology, but because that bill will most certainly die in the first policy committee. The Clinic is focused upon the day-to-day business of successful legislative advocates, which is to pursue incremental changes in state law for clients who rarely need sweeping changes.

2. Reputational Issues

Even with this “agnostic” approach towards selection of topics, there is a risk that the Clinic could produce reputational issues for the school if a student group selects a “controversial” issue. Schools considering such a clinic should realize that a critic of a student group’s legislation will look for any means of creating adverse pressure, including, if possible, creating pressure against the law school.⁵⁰

50. Such an example is AB 1200, 2016 Leg. 2015–2016 Sess. (Cal. 2016) (introduced by Gordon; procurement lobbying), from the 2014–2015 Clinic. This measure added to the definition of regulated lobbying activities the work of paid professionals who help clients obtain contracts from the California state government. Two of the three students had previously had a field placement with the Fair Political Practices Commission (FPPC), which is the government “political watchdog” in California, and the students believed this change in law was necessary but that the FPPC would not vote to seek this change in law on its own. So, the

3. Legal Issues

Prior to the introduction of any legislation in the State Capitol, McGeorge had to assess whether the Clinic activities would subject the school or the students to any legal issues surrounding the regulation of lobbying. If lobbying thresholds would, in some way, be triggered, this could impact the school's tax status and, potentially, arouse the state agency responsible for regulating lobbying activity, the Fair Political Practices Commission (FPPC).⁵¹ The school concluded that the Clinic would not trigger lobbying rules. Several sections of California's Political Reform Act⁵² govern lobbying.⁵³ Under these statutes and rules, an individual is a "lobbyist" if he or she has "direct communication" with a "qualifying official"⁵⁴ in order to influence legislation or administrative rules and who also meets one of the following two criteria:

- is acting on behalf of an employer and spends one-third or more of compensated time in any calendar month on lobbying;⁵⁵ or
- is acting on behalf of someone other than an employer and receives or is entitled to receive \$2000 in compensation in any calendar month for lobbying.⁵⁶

No Clinic students are employed to pursue their legislation and none are receiving compensation through a lobbying contract.

While Clinic students are not "lobbyists" under California law, McGeorge adopted a few best practices in order to avoid any confusion between the activities of the students and the legal position of

students worked in tandem with a former enforcement lawyer for the FPPC and developed a proposal which Assembly Member Gordon, a well-staffed and thoughtful legislator who was also the powerful Chair of the Assembly Rules Committee, agreed to author. The school received inquiries from concerned members of the public about the bill, and the students worked diligently with stakeholders to craft amendments which removed all public opposition. Despite the successful amendment exercise and zero "no" votes in the Legislature, Governor Brown vetoed the measure, demonstrating just how talented these "procurement lobbyists" really are. See Melanie Mason, *Law students propose bill to close lucrative Capitol lobbying loophole*, L.A. TIMES (June 2, 2015, 5:58 PM), <http://www.latimes.com/local/politics/la-me-pol-lobbying-20150603-story.html>.

51. See Kevin Barry & Marcy Karin, *Law Clinics and Lobbying Restrictions*, 84 U. COLO. L. REV. 985 (2013).

52. Political Reform Act of 1974, CAL. GOV'T CODE §§ 81000–91015.

53. The FPPC enforces these laws and has issued regulations in Title 2 of the California Code of Regulations, CAL. CODE REGS. tit. 2, §§ 18600–18640.

54. CAL. CODE REGS. tit. 2, § 18239(a)(1).

55. *Id.* § 18239(c).

56. *Id.* § 18239(b).

the school. First, each advocacy letter from the Clinic can be on McGeorge letterhead, but has to have a standard opening:

We, [Student Names], are students enrolled in the McGeorge Legislative and Public Policy Clinic (McGeorge Clinic) and we support [Senate/Assembly] Bill [Number], authored by [Formal Legislator Title and Name]. This bill would [describe in one sentence the general purpose of the bill].

To date, these letters have not generated concern about official school sponsorship of a particular student proposal or position, but that day could certainly come.⁵⁷

In the third year of the Clinic, the students received Clinic business cards. By far, the largest complaint from students enrolled in the first two Clinics was that they were unable to look professional without a business card. After considerable internal school review of the issue, the school permitted student business cards with an official logo, but with a disclaimer on the bottom stating: "Institutional affiliation is for identification purposes only and does not represent the views of the institution." The students were grateful for the business cards and could walk confidently around the State Capitol when visiting offices.

V. CONCLUSION

Getting to the point of operating a successful California legislative practice clinic took many steps, any of which could have derailed the endeavor. Institutional support is critical and it is not guaranteed that administrators and full-time faculty will view such a program as equivalent to traditional legal instruction. Developing practical curricula as a prelude to actual legislative advocacy is critical. Unfortunately, that material does not currently exist in casebooks and must be cobbled together by professors.

Finding actual legislative practitioners is also essential; imagine a professor teaching trial advocacy without ever being in a courtroom. Many knowledgeable professors can guide their students through the development of a legislative proposal, but experience teaches us that such measures are just the "opening bid" that often fail to reflect unpredictable political realities that are only learned

57. The students who developed the "procurement lobbying" proposal, AB 1200, which was formally opposed by the FPPC, did hear rumors that the FPPC was asking questions about the operation of the Clinic but, to the author's knowledge, there was no informal or formal communication between the FPPC and University of the Pacific regarding Clinic operations.

following introduction of the measure and analysis and feedback from experts and stakeholders. Bills are amended many times during the process for good reason: They were drafted without the benefits of the deliberative process refining them. Clinic directors, while not advocates for a particular bill, have a large role to play in helping students identify issues that need resolution, using their own knowledge to suggest strategy and tactics, and providing direction and introduction to key actors who should be engaged in dialogue at a point before those actors have decided to kill that legislation.

As a final point, the author hopes that not only McGeorge, but law schools across the country, conclude that training programs for legislative advocacy are as important as training programs for trial and appellate advocacy. While policy analysis is an important part of legislative advocacy, it is only a part and must be augmented by training on how to advocate, both in written and oral form. There are strong reasons that successful lobbyists continue to be successful. While they certainly have good clients and a lot of political resources, they, without fail, know how to analyze issues, make arguments and display all the hallmarks of the mastery of legislative procedure, relationship-building and, advocacy, all of which are crucial skills for students to learn when considering this career path.

Adjusting the Bright-Line Age of Accountability within the Criminal Justice System: Raising the Age of Majority to Age 21 based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders

*Carly Loomis-Gustafson**

ABSTRACT

The criminal justice system determines a criminal actor's liability based primarily on the age of the actor at the time of the offense, adhering to a rule instituted by arbitrary designation of adulthood at the age of eighteen. Solely, this line determines the degree of treatment a criminal defendant will receive within the system, with more punitive measures being reserved for adult offenders and greater rehabilitative efforts made for juvenile offenders. Despite the many concessions made within the criminal system, this rule is concrete and rarely questioned.

However, studies of neurological development show that the part of the brain directly related to the ability to understand choices and consequences, playing a direct role in culpability, does not fully develop until the mid-twenties, three to five years after a person is deemed capable of making mature decisions. This leads to a discrepancy within the criminal system, with youthful adults being forced within the adult system to face potentially negative influences and life-long consequences, though, mentally, they are not any more blameworthy than youthful offenders in the decisions they make.

This article argues that the age of majority within the criminal system should be raised to the age of twenty-one, at a minimum,

* 2017 J.D. Candidate at Duquesne University School of Law; B.S. in Political Science, 2010, *cum laude*, Sam Houston State University. I would like to thank my faculty advisor and mentor, Professor Jan M. Levine, for his invaluable guidance during this project. I would also like to thank my husband, Kevin Gustafson, for his endless support, and my parents, Doug and Gena Loomis, for raising me with a passion and love for the most helpless among us.

based on strong scientific evidence that indicates there is no significant difference in the brain functioning of young adults between late adolescence and early adulthood. This adjustment is necessary for a developing society concerned with utilizing the receptiveness of young adults to deter further criminal behaviors, reduce recidivism, prevent further victimization, and create more productive members of society.

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I. INTRODUCTION

Currently, the criminal justice system is divided into two parts: the juvenile justice system and the adult criminal justice system.¹ The degree of culpability attached to a criminal defendant is generally determined by the age of majority—age eighteen in most states.

1. See J. Hirby, *Difference Between Juvenile and Adult Justice Systems*, THE LAW DICTIONARY, <http://thelawdictionary.org/article/difference-between-juvenile-and-adult-justice-systems/> (last visited Apr. 2, 2016) (providing a description of the differences between the two systems).

On which side of this bright-line a criminal defendant falls dramatically affects the degree of accountability attributed to the defendant, how he or she is treated within the justice system, and the potential damaging effects of a criminal record. This Article proposes an adjustment to the current age of majority to encompass young adults between the ages of eighteen and twenty-one based on scientific evidence that indicates that a person's decision-making capabilities do not dramatically, or even marginally, change at the age of eighteen. This conclusion is principally due to the wealth of neurological evidence that shows little substantive difference in the brain development of a seventeen-year-old versus an eighteen- or even twenty-year-old.² Moreover, neurological studies show that the area of the brain that allows adults to make responsible, rational decisions is not fully developed until early adulthood, usually around the twenty-two- to twenty-five-year-old age range.³ Therefore, the justice system should view criminal culpability for young adult offenders the same as it does for juvenile offenders, focusing more on rehabilitative efforts with an emphasis on creating responsible adults, rather than punitive measures and retribution. Raising the age of majority as it relates to criminal matters to encompass all adults with limited decision-making capabilities is the most effective way to accomplish this goal.

II. THE CRIMINAL JUSTICE SYSTEM

The criminal justice system is a seldom-shifting monolith; with three main functions divided between the police, the courts, and corrections,⁴ and with each local unit making up a piece of a whole within the United States. Each system attempts to maintain consistency with the others, while also acting separately. Within this system, the age of majority is the rule least likely to fluctuate over time.⁵ What is the purpose of this system of power? The founders

2. See generally Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766 (2006). Perhaps the most dramatic evidence of how the brain continues to develop into adulthood is the onset of certain mental health disorders that do not generally occur until early adulthood, usually between ages eighteen and twenty-one. *Id.* at 775.

3. See generally Beatriz Luna et al., *Maturation of Cognitive Processes from Late Childhood to Adulthood*, 75 CHILD DEV. 1357, 1362–70 (2004).

4. See Off. of Just. Programs, *The Justice System*, BUREAU OF JUST. STAT., <http://www.bjs.gov/content/justsys.cfm> (last visited Apr. 5, 2016) (providing a thorough description of the three functions, and many sub-functions, of the criminal system).

5. See Jeffrey F. Gent, Annotation, *Statutory Change of Age of Majority as Affecting Pre-existing Status or Rights*, 75 A.L.R. 3d 228 (1977). At common law, the age of majority was set at twenty-one. See *id.* at § 2(a). Over time, states have legislatively lowered the age, but remain generally consistent in keeping the age between seventeen and eighteen. See *id.*

of the United States of America declared that each of us, as citizens, possess a right to “life, liberty, and the pursuit of happiness[;]”⁶ unalienable rights within the government’s duty to protect.⁷ Thus, the creation of a criminal system designed to shield us from the poor decisions made by each other and by ourselves. The system cannot be static to be effective, but instead must be dynamic, adjusting to fit the needs of society; working to balance the needs of the victims, through punishment and retribution, with the needs of the criminal defendant, through rehabilitation and recovery.⁸ This is a difficult balance to maintain as societal attitudes fluctuate throughout generations.⁹ Punishment is easy; our laws allow us to imprison a citizen for the duration of his or her life, providing all of the essentials to sustain within the four walls of the prison system.¹⁰ The more difficult route is rehabilitation; specifically in determining when it is worth the time and money to attempt to remold a destructive member of society into a productive one.¹¹

A. *The Beginnings of Criminal Justice in America*

Early criminal justice in America was a construct of the English common law, blended with religious-based principles, and adapted to suit the needs of colonial America.¹² Punishment was a means for stamping out the evils of society, a carry-over of the long-time

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

7. *Id.* (“That to secure the rights, governments are instituted among men, deriving their just powers from the consent of the governed.”).

8. See Etienne Benson, *Rehabilitate or Punish?*, 34 MONITOR ON PSYCHOL. 46, 46 (2003). See also Peter D. Hart Research Assoc., Inc., *Changing Public Attitudes toward the Criminal Justice System: Summary of Findings*, OPEN SOC’Y INST. (2002) for a current analysis of the variations in societal attitudes toward crime and punishment.

9. Peter D. Hart, Research Assoc., Inc., *supra* note 8, at 1.

10. See Jean Chung & Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, THE SENTENCING PROJECT: RESEARCH & ADVOCACY FOR REFORM (2013) for a thorough analysis of the rise in long-term prison sentences in the United States. The stated mission of the Federal Bureau of Prisons is: “[T]o protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.” *BOP: Agency Pillars*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited Apr. 8, 2016).

11. See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013) for an analysis of the current push for “the rehabilitation of rehabilitation” in the prison system, using “evidence-based programming and predictive tools to create a rehabilitative model that ‘works.’” *Id.* at 189.

12. See James A. Cox, *Bilboes, Brands, and Branks: Colonial Crimes and Punishments*, COLONIAL WILLIAMSBURG, <http://www.history.org/foundation/journal/spring03/branks.cfm> (last visited May 9, 2017).

“eye for an eye” principle found in ancient legal and biblical texts.¹³ Justice was generally swift and public; often painful or deadly, and involving branding, nailing, beating, and hanging.¹⁴ As society evolved, so did the methods for dealing with criminal behaviors, with imprisonment quickly becoming the preferred approach, rapidly creating the “revolving door of punishment” that exists today.¹⁵

Initially, there was no real deviation in how offenders were treated based on age and maturity; children and adults received identical punishments for identical crimes.¹⁶ However, during the nineteenth and twentieth centuries, as children began to be viewed as “persons at a unique stage of human development instead of smaller versions of adults with equal cognitive and moral capacities[,]”¹⁷ society began to recognize a need for treating child offenders differently than adult offenders.¹⁸

This early evolution of the juvenile justice system was the first recognized move toward rehabilitation within the system, focusing more on the “why” of the offender’s poor decisions than on the “what” of the particular criminal behaviors.¹⁹ As early as 1825, administrators and policymakers took up the cry of reform begun by the Society for the Prevention of Juvenile Delinquency, creating facilities exclusively for juveniles in most major cities.²⁰ Leading up to the mid-twentieth century, the juvenile system flourished, with

13. This principle is attributed to a number of legal and spiritual texts, the first being the Code of Hammurabi, an ancient set of laws dating back to the Mesopotamian civilization and said to be the foundation of all criminal punishment principles. *Hammurabi’s Code: An Eye for an Eye*, USHISTORY.ORG, <http://www.ushistory.org/civ/4c.asp> (last visited May 9, 2017). The oft referred to passage states:

If a man has destroyed the eye of a man of the gentleman class, they shall destroy his eye. . . . If he has destroyed the eye of a commoner. . . he shall pay one mina of silver. If he has destroyed the eye of a gentleman’s slave. . . he shall pay half the slave’s price.

Id. The same principle is found in the law of the Old Testament, a subsequent text of laws, in the book of Leviticus: “And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him *again*.” *Leviticus* 24:19–20 (King James).

14. See Cox, *supra* note 12.

15. Rachel O’Connor, *The United States Prison System: A Comparative Analysis 2* (Mar. 19, 2014) (unpublished Graduate Thesis and Dissertation, University of South Florida) (on file with University of South Florida Scholar Commons, <http://scholarcommons.usf.edu/etd/5086>).

16. Office of Juvenile Justice & Delinquency Prevention, *Chapter 2: Jurisdictional and Program Self-Assessment: Historical Overview of the Juvenile Justice System*, JURISDICTIONAL TECH. ASSISTANCE PACKAGE FOR JUVENILE CORR. 1 (Dec. 2000), https://www.ncjrs.gov/html/ojjdp/juris_tap_report/ch2_01.html.

17. *Id.*

18. *Id.*

19. See *Bulletin: Juvenile Justice: A Century of Change*, NAT’L REPORT SERIES, JUVENILE JUSTICE (Dec. 1999), https://www.ncjrs.gov/html/ojjdp/9912_2/juv1.html.

20. *Id.* at 1.

the primary mission being the desire to help children in need, and which led to the formation of substantive differences between the juvenile and adult criminal systems.²¹

B. *The Rise of the “Justice Model”*

Preceded by a sharp rise in the national crime rate in the 1960s, the mid-1970s led to an overhaul of the criminal system, juvenile and adult alike.²² Following public outcry for harsher sanctions driven by the fear of potential victimization, the focus turned from the seemingly ineffective rehabilitative model to a system of punishment and retribution.²³ This new system, commonly known as the “justice model,” limited the discretion of correctional officials in adjusting the necessary punishment for individual offenders and instead instituted determinate sentencing.²⁴ This push was initiated by some social scientists and analysts who warned of a coming of juvenile “superpredators” they predicted would become a “new breed” of cold-blooded murderers.²⁵ Though it is not evident that such superpredatory juveniles ever materialized, the move toward a more punitive juvenile system did, with the threat of transfer to the adult system being the ultimatum in the tug-of-war between juvenile and adult sanctions.²⁶ A series of decisions based on a perceived need for a harsher juvenile method led to a formalization of the juvenile system, meant to parallel the adult criminal system by using the threat of sanctions as a means of deterrence.²⁷

21. *Id.*

22. *Id.*

23. *Id.*

24. See James C. Howell et al., *Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)*, U.S. DEP'T OF JUST. 242935, 1 (2013). Determinate sentencing is “[a] jail or prison sentence that is definite and not subject to review by a parole board or other agency.” *Determinate Sentence*, NOLO, <http://www.nolo.com/dictionary/determinate-sentence-term.html> (last visited May 9, 2017).

25. *Id.* at 3. “Superpredator” was a term coined by a prevalent political scientist and professor of the time, John J. Delulio, who often wrote about what he predicted to be a likely increase in the juvenile crime rate based on a prevalence of moral depravity within society and juveniles’ homes. See John J. Delulio, Jr., *Arresting Ideas*, POL’Y REV. 74 (1996); John J. Delulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD 23 (Nov. 27, 1995).

26. See Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1261 (1996).

27. *Bulletin: Juvenile Justice: A Century of Change*, *supra* note 19, at 3–4.

III. THE RETURN OF THE REHABILITATIVE MODEL

Over time, the pendulum has slowly moved away from the extreme call for harsh punishment for all, juveniles and adults alike, founded in a pessimistic “nothing works” mentality concerning the justice system.²⁸ Policymakers and practitioners have begun to embrace evidence-based corrections and professionalism, with a focus on reducing recidivism and changing behaviors, specifically in youthful offenders.²⁹ However, opinions still vary concerning how the criminal justice system can effectively handle juveniles and young adults with criminal behaviors.³⁰ Though the current dominant policies are agreeable to more rehabilitation-focused methods for all offenders,³¹ a strong line continues to separate late adolescence, typically drawn at the age of eighteen,³² and adulthood when determining a criminal actor’s culpability. Although what constitutes proper treatment within the justice system is regularly debated, especially as it relates to juvenile offenders,³³ the bright-line age of accountability that qualifies a juvenile offender is rarely considered.³⁴ However, studies related to brain development—specifically cognitive development and the maturing processes of the juvenile brain—create a means for calling into question this age of

28. See Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 300 (2013). This idea was pioneered by Robert Martinson, who was best known for his 1974 essay published in *The Public Interest* that was “widely understood to show that ‘nothing works’ in correctional programming to reform offenders.” *Id.* Interestingly, Martinson later recanted his position after he conducted a subsequent study, which showed rehabilitation does work in some instances. *Id.* at 328.

29. See *Evidence-Based Practices*, NAT’L INST. OF CORR., <http://nicic.gov/evidencebasedpractices> (last visited May 9, 2017) (“In corrections, Evidence-Based Practice is the breadth of research and knowledge around processes and tools which can improve correctional outcomes, such as reduced recidivism. Tools and best practices are provided with a focus on both decision making and implementation.”).

30. See generally Cullen, *supra* note 28, for an example of the available scholarship related to the differing professional opinions of how juveniles with criminal behaviors should be treated within the criminal system.

31. *Id.* at 307–08.

32. Some states, such as New York, draw the line as young as thirteen years of age for certain offenses, but other states generally set the standard at sixteen years of age. See N.Y. INFANCY LAW § 30.00 (McKinney 2015). Some states, like Alabama, raise the bar to the age of nineteen. See ALA. CODE § 26–1–1 (2015). See also Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000) for an analysis on the constructs of adolescents through the use of the legal system.

33. See generally Steven A. Drizin & Thomas F. Geraghty, *The Debate over the Future of Juvenile Courts: Can We Reach Consensus*, 88 J. CRIM. L. & CRIMINOLOGY 1 (1997).

34. Although courts in recent years have addressed the need to prohibit mandatory sentencing and transfer laws for juveniles, see *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005), there has been little to no discussion considering the possibility of changing the legal definition of an infant or juvenile within the system.

majority standard, with convincing evidence that indicates the human brain does not fully develop until early adulthood.³⁵ This casts doubt on the criminal boundaries used to determine degrees of culpability with youthful offenders.³⁶ To be fair, these studies do not indicate a teenager or young adult is not capable of possessing logical reasoning abilities, as the evidence illustrates these competencies are more or less fully developed by the age of fifteen.³⁷ However, they do indicate that the area of the brain affecting impulse control, emotion regulation, delayed gratification, and the effect of peer influences continues to develop for several years after the age of eighteen, well past the legal boundary of adulthood.³⁸

The consensus among neurologists and social scientists, who focus their studies on brain maturation, is that, due to this delay in development, young adults, like juveniles, may have a lesser degree of culpability than older adults, and the criminal justice system should, therefore, treat them differently.³⁹ One example of this developmental delay is in how the preventative measures and deterrence programs used within our communities geared toward youth and young adults have been shown to lead to an increased awareness of risky behaviors, but cause no real behavioral changes, and, in fact, may exacerbate the troublesome behaviors.⁴⁰ The juvenile justice system has incorporated these ideas in recent years, taking baby steps through legislative and judicial actions to reconcile the lack of decision-making skills in juvenile offenders with the degree of adjudication, in an attempt to circumvent the juvenile's path to life-long criminality.⁴¹ Administrators within the juvenile system

35. See generally Luna et al., *supra* note 3.

36. *Id.*

37. See Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55, 55 (2007).

38. *Id.* at 56.

39. See generally Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

40. Steinberg, *supra* note 37, at 55 ("Efforts to provide adolescents with information about the risks of substance use, reckless driving, and unprotected sex typically result in improvements in young people's thinking about these phenomena but seldom change their actual behavior.")

41. For example, the juvenile justice system has increased the use of risk/needs assessments as an attempt to develop individualized programing for offenders. See Dev. Servs. Grp., Inc., *Risk/Needs Assessments for Youths*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION 1, 2 (Jan. 2015), <http://www.ojjdp.gov/mpg/litreviews/RiskandNeeds.pdf>.

have embraced a new mantra, believing that, with appropriate rehabilitative methods, and “given time to deliberate with guidance from mature adults, adolescents can make responsible decisions.”⁴²

Despite the changes in the juvenile system, there has been little significant change within the adult criminal system related to young adult offenders, notwithstanding consensus within the scientific community that the behaviors and decision-making skills of a young adult—typically those between the ages of eighteen and twenty-five—more closely align with those of juvenile offenders than of adult offenders.⁴³ Studies addressing criminal behaviors of young adults parallel this understanding, showing the age of seventeen to twenty to be the peak of the poor-decision-making bell curve, known within the community as the “age-crime curve.”⁴⁴ This effect demonstrates that the prevalence of offending increases from late childhood, peaking directly on the boundary of the bright-line age of adulthood (seventeen to nineteen) before beginning to decline in the early twenties.⁴⁵ Subsequently, a study focusing on the likelihood of the continuation of criminal behaviors of youth found that more than fifty percent of juvenile offenders would continue their criminal behavior during early adulthood (ages twenty to twenty-five), but that percentage drops dramatically, by two-thirds, between ages twenty-five and thirty.⁴⁶

This Article aims to accomplish two main objectives: (1) call into question the continued adherence to the age of majority as it relates to criminal behaviors, despite the abundance of scientific information indicating the need for a shift of this bright-line rule; and (2) propose changes within the system to reconcile this information with the public policy reasoning behind appropriate sanctions.

IV. RECONCILING THE NEED FOR PUNISHMENT WITH THE DESIRE FOR REHABILITATION

The two methods utilized within the criminal justice system, punishment and rehabilitation, are dynamic, fluctuating over time. Though rehabilitation is favorable to the public when it is most effective, rarely does it take precedence over the desire to compensate

42. Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 HASTINGS L.J. 1469, 1469 (2012).

43. See Rolf Loeber, David P. Farrington & David Petechuk, *Bulletin 1: From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)*, U.S. DEPT OF JUST. 242931 (2013).

44. *Id.* at 3.

45. *Id.*

46. *Id.* at 5. The study also indicated that the persistence of criminal behavior changes depending on the type of offense, with the highest likelihood being for drug offenses. *Id.*

the victim, whether through retributive or pecuniary measures.⁴⁷ Perhaps this is due to a fear of failure in balancing the needs and desires of the community with the potential, but not guaranteed, positive result of rehabilitation of the offender, leading to an overabundance of caution in determining the appropriate methodology. The separation of the juvenile and adult systems was the first real step taken in finding a comfortable balance.⁴⁸ The intention driving this separation, based on the understanding that juveniles do not have the decision-making capabilities of adults, helped manifest a juvenile system designed to serve the needs of the perpetrators, theoretically making them productive, law-abiding adults.⁴⁹ Society is seemingly more open to rehabilitative methods within the juvenile system because of the innate understanding that children are not adults, with some underlying cause driving their poor behaviors, and therefore they should be treated differently. Naturally, a line needs to be drawn in order to distinguish between less blameworthy juveniles and culpable adults, but that line was originally drawn based on the common law and statutory practices of the state, not behavioral and neurological science, when determining the age of majority.

A. *The Bright-Line Age of Majority*

At common law, courts set the age of majority at twenty-one following court decisions related to parental custody and financial support.⁵⁰ The age of majority eventually began to change statutorily, intended to coincide with the age most children were no longer in school, and, thus, able to begin working, start families, join the military, and vote.⁵¹ That transition has led to a presumptive age of majority settling at or around the age of eighteen, a time when adolescents are usually defined as being at one of two ends of a maturity spectrum—either as an undeveloped child or a mature adult—“depending upon the desired classification.”⁵² Though it

47. See generally Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in the U.S. Prison System*, 45 LAW & SOC'Y REV. 1, 33–68 (Mar. 2011).

48. See Drizin & Geraghty, *supra* note 33, at 1–2.

49. See Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 388 (2003).

50. See, e.g., *Stanton v. Stanton*, 429 U.S. 501, 503–04 (1977) (holding that a statutory distinction between males and females related to the age of majority violated the Equal Protection Clause of the United States Constitution).

51. See Gent, *supra* note 5, at 2; see also Sen. Birch Bayh, S. COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92–96 (1971).

52. Scott, *supra* note 32, at 556, 559.

seems evident based on current neurological science that there is no significant difference in the neurological development of a person who falls directly on either side of this bright-line age of eighteen, both advocates and lawmakers tend to ignore the realities of adolescence “and endorse fictional accounts in which adolescents are either immature children . . . or mature adults.”⁵³ Adjusting the age of majority is more likely to occur through a decrease in the age of majority, as occurred with the voting age in the twenty-sixth amendment to the United States Constitution,⁵⁴ because it is a seemingly more comfortable prospect. It seems that society has been more willing to accept stricter sanctions for older youth in the hope of safeguarding the community, even potentially at the expense of turning a rehabilitative youth into a lifetime criminal offender.

1. *Neurological Sciences*

The field of neurology provides a wealth of information concerning the decision-making capabilities of juveniles and young adults, demonstrated through studies focusing on the development of the brain as it relates to maturity. These studies ultimately conclude adolescent brain development may be linked to late maturation of the prefrontal cortex.⁵⁵ For example, a study conducted out of the University of Pittsburgh assessed processing speeds, voluntary response suppression, and spatial working memory, all of which are

53. *Id.* at 557. One instance is the juvenile to criminal transfer laws. After the push for harsher punishments, the laws were changed to allow for juvenile transfer to adult courts, typically according to the degree of the offense, to ensure the punishment would fit the crime. See Danziger, *supra* note 49, at 383–84.

54. See Sen. Birch Bayh, *supra* note 51. The greatest factor in the push to reduce the voting age was the discrepancy between the voting age and the draft age during the Vietnam War. *Id.* at 6. But, even at this time, the age of eighteen had long been regarded as the presumed age of majority. As Montana Senator Michael J. Mansfield noted, the age of eighteen had long been regarded as the age at which young people assume economic and social responsibilities of adults. *Id.*

55. Luna et al., *supra* note 3, at 1368. These studies focus primarily on two processes: brain maturation, such as synaptic pruning, which is described as “the selective elimination of unnecessary neuronal connections . . . [that] can speed and enhance the precision of information processing[,]” and myelination, which “allows for faster responses and for superior integration of widely distributed circuitry necessary for the top-down modulation of behavior.” *Id.* at 1358, 1369. Synaptic pruning occurs in order to eliminate unused synaptic connections created through childhood and into adolescence, allowing the brain “to most optimally adjust to the individual’s environment.” Luna, *supra* note 42, at 1475. Synaptic pruning and myelination, when viewed as a parallel process, indicate that adolescence is “marked by refinements across the brain that support integration of information and thereby foster higher-order cognitive processes.” *Id.* at 1477.

essential for cognitive control of behavior.⁵⁶ The clinicians concluded that adult level, mature performance typically *begins* at approximately age fourteen to nineteen and plateaus between late adolescence and early adulthood, though it is still unknown when exactly it reaches peak maturation.⁵⁷ The same study noted that neuroimaging results also indicate that the period of development for reaching adult levels of performance is characterized by improvements in existing processes via progressively more efficient use of brain circuitry.⁵⁸ This indicates a correlation between the performance levels of the brain circuitry, especially in the prefrontal cortex, with maturity in behavioral control.⁵⁹ Researchers from Harvard Medical School, the National Institute of Mental Health, and the University of California, Los Angeles School of Medicine, conducted studies and found evidence contrary to that which is commonly understood about the maturity of older youth; that the brain is fully mature by early adolescence.⁶⁰ These studies focused on the prefrontal cortex, the “chief executive officer” of advanced cerebral activities.⁶¹ The results indicate that rather than the essential wiring being complete in early childhood, as was the current understanding, the brain develops in spurts throughout childhood and adolescence, meaning the teenage brain is not a “finished product,” but rather a “work in progress” continuing well into early adulthood.⁶²

Laurence Steinberg, a lead researcher of the juvenile brain and its processes,⁶³ not only recognizes the legitimacy of the synaptic pruning and myelination results,⁶⁴ but also attributes the problem to an enlarged nucleus accumbens, which is the reward circuit of

56. Luna et al., *supra* note 3, at 1358.

57. *Id.* at 1366. These results were based on the use of 245 participants ranging from age eight to age thirty. *Id.* at 1359.

58. *Id.* at 1369.

59. *Id.*

60. Howell et al., *supra* note 24, at 17. This research was conducted using magnetic resonance imaging (MRI) to measure brain development. *Id.*

61. *Id.* at 18.

62. *Id.* at 17.

63. Elizabeth Kolbert, *The Terrible Teens: What's Wrong with Them?*, NEW YORKER (Aug. 31, 2015), <http://www.newyorker.com/magazine/2015/08/31/the-terrible-teens> (discussing Steinberg's work in neurological studies of the adolescent brain). Steinberg is a professor of psychology at Temple University and the author of *Age of Opportunity: Lessons from the New Science of Adolescence*. Department of Psychology: Laurence Steinberg, TEMPLE UNIV., <http://www.cla.temple.edu/psychology/faculty/laurence-steinberg/> (last visited Jan. 22, 2015).

64. See *supra* text accompanying note 55 for a brief explanation of these processes.

the brain involved in motivation, reward, motor function, and learning.⁶⁵ Steinberg attributes two processes as contributing to reward-seeking behaviors in youth: (1) the growth of the nucleus accumbens, at its largest during adolescence before shrinking in early adulthood; and (2) an increase in dopamine⁶⁶—the chemical in the brain that allows a person to seek rewards and take actions to attain them—levels which also peak in adolescence and do not decrease until adulthood.⁶⁷ Moreover, the same peak in dopamine that makes dangerous behaviors so appealing also increases an adolescent's ability to learn and to rehabilitate, with the peak in the production of dopamine meeting exactly with the age of majority.⁶⁸ This indicates that the deficiency in the youthful brain that makes a child more destructive also makes him or her more amenable to treatment, and possibly long-term behavioral change, which makes adolescence and young adulthood the ideal time for rehabilitation.

Explaining why adolescents do so many “stupid things,” Steinberg emphasizes that the problem behavior does not lie with a lack of knowledge, finding this idea “ludicrous,” but instead that the effects of pleasure-seeking behavior far outweigh the brain's solidly present warning signals.⁶⁹ Steinberg sees evidence of this discrepancy through mortality rates, in a phenomenon called the “accident hump.”⁷⁰ The accident hump shows that adolescents, who are healthier mentally and physically than younger children, have a higher death rate attributed to accidental deaths.⁷¹ For example, the mortality rate of fifteen- to nineteen-year-old Americans is “nearly twice” that of those between ages five and fourteen.⁷² Steinberg and others seem to recognize this as evidence of the young mind's consistent inability to make the right decision at the right time, even when the youth has the knowledge to do so.⁷³

65. See generally Yukihiko Shirayama & Shigeyuki Chaki, *Neurochemistry of the Nucleus Accumbens and its Relevance to Depression and Antidepressant Action in Rodents*, 4 CURRENT NEUROPHARMACOLOGY 277 (2006).

66. “Dopamine is a neurotransmitter that acts on synapses in the frontal cortex and the ventral striatum, a nucleus in the limbic system of the brain that plays a crucial role in motivated behavior.” Luna, *supra* note 42, at 1477.

67. Kolbert, *supra* note 63, at 3–4; see also Luna, *supra* note 42, at 1477.

68. Luna, *supra* note 42, at 1477.

69. Kolbert, *supra* note 63, at 4.

70. *Id.*

71. *Id.*

72. *Id.* For an extensive analysis on the accident hump, see The Human Mortality Database (HMD), which was created “to provide detailed mortality and population data to researchers, students, journalists, policy analysts, and others interested in the history of human longevity.” *The Human Mortality Database*, MORTALITY, <http://www.mortality.org> (last visited Dec. 28, 2015).

73. See generally Kolbert, *supra* note 63.

2. Behavioral Sciences

Studies in the field of behavioral sciences tend to come to similar conclusions, consistently showing that adolescents differ from adults in three important ways: (1) they lack the mature capacity of self-regulation in emotionally charged contexts; (2) they have a heightened sensitivity to proximal external influences; and (3) they show less ability to make judgments and decisions that require future orientation.⁷⁴ As a result, these differences lead to a prevalence of risky behaviors, rising by a third until the age of sixteen, and declining by a half of standard deviation by age twenty-six.⁷⁵ Moreover, these risky behaviors dramatically increase in the presence of other peers, with the most substantial increase among teenagers, but also a moderate increase among college-age individuals.⁷⁶ Based on this information, it is evident that the cognitive development of a juvenile is not complete in late adolescence, or even into early adulthood. It is a natural conclusion then, based on the ever-increasing available information, that one does not flip a switch and turn on mature thinking and behaviors at the age of eighteen, or even twenty-one. This is not to say that adolescents and young adults cannot make mature decisions; rather, they “might be mature enough to make some decisions[,] but not others.”⁷⁷

Some studies observing developmental improvements in executive function, or the ability to generate planned voluntary responses to stimuli, indicate that basic cognitive abilities are available early in life, but “sophisticated use” of these abilities continues to improve through adulthood.⁷⁸ Specifically, the ability to perform complex tasks continues to develop, become more precise, and control distractions, like the distraction of encouragement by peers.⁷⁹ What makes this information relevant is that intent, as an element of culpability, requires the demonstration of executive control for a willful act, engaging multiple behavioral and cognitive processes.⁸⁰ Can a youth, being incapable of having full executive control over

74. See RICHARD BONNIE ET AL., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 95, 97 (2012).

75. *Id.* at 91.

76. See Steinberg, *supra* note 37, at 57.

77. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 ISSUES SCI. & TECH. 67, 71 (2012).

78. Luna, *supra* note 42, at 1474.

79. *Id.*

80. *Id.* at 1470.

his or her decision-making capabilities, paired with increased vulnerability to sensation-seeking, ever be truly culpable?⁸¹ The prevalent scientific evidence calls this idea into question.

B. Systematic Adjustments for Youthful Offenders

The United States Supreme Court recognized the differences in the culpability of youthful and adult offenders as early as the 1980s.⁸² Relying on the prevalence of emerging studies like those previously mentioned, the Supreme Court began making adjustments to the boundaries in the disposition of juvenile offenders transferred into the adult system.⁸³ First, the Supreme Court took the greatest step toward eliminating unconstitutionally harsh sanctions of youthful offenders by holding that an offender who was under the age of eighteen at the time of the criminal act could not receive a death sentence.⁸⁴ The Court then quickly extended these protections to include mandatory life sentences, for violent and non-violent offenders, holding these sentences to be “grossly disproportionate” to the offense committed, and, thus, a violation of the Eighth amendment.⁸⁵ For example, in *Roper v. Simmons*, a seventeen-year-old male committed capital murder and was sentenced to death.⁸⁶ The Court, finding the sentence unconstitutional, rationalized the ruling by pointing out the Court’s previous acknowledgement of the low likelihood that offenders under sixteen engaged in “the kind of cost-benefit analysis that attaches any weight to the possibility of execution” made the death penalty ineffective as a means of deterrence.⁸⁷ Subsequently, the Court noted that the

81. *Id.* at 1470–72.

82. *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (determining that standards of decency did not permit the execution of an offender who was under the age of sixteen during the commission of the crime).

83. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). In its discussion of precedent regarding the societal changes in attitudes toward harsh sanctions, such as life imprisonment, for juveniles, the Court referred to its decision in *Roper v. Simmons*, and acknowledged these studies by stating: “Our decisions rested not only on common sense—on what ‘any parent knows’—but on science and social science as well.” *Id.* at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

84. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005). The Supreme Court’s reasoning behind the decision paralleled that of the cognitive behavioral studies: an underdeveloped sense of responsibility, susceptibility to outside influences, and a poorly formed character. *Id.* at 569–70.

85. *See U.S. CONST. amend. VIII; Miller*, 132 S. Ct. at 2464 (relying on the rationale from *Roper*, and determining that the imposition of a life sentence without the possibility of parole for juvenile homicide offenders violated the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding mandatory sentences of life imprisonment for non-homicidal offenses violates the Eighth Amendment).

86. *Roper*, 543 U.S. at 551.

87. *Id.* at 561–62 (quoting *Thompson*, 487 U.S. at 836–38).

same rationale applied equally to all juvenile age offenders.⁸⁸ This was a clear recognition by the Court that the use of extreme sanctions as deterrence, specifically the threat of the death penalty or life in prison, does not consistently work with young offenders.⁸⁹

It is evident through these rulings that the Supreme Court takes into great consideration the deficiencies of the youthful brain as it relates to proper decision-making, and more so, that a youthful mind has a greater potential for rehabilitation and redemption. Despite whether or not it was the intention of the Court, these ideas, as supported by neurological and behavioral studies, indicate a desire to give young offenders every opportunity to redeem themselves, en route to becoming productive members of society. On the surface, this is what the criminal justice system claims to be about. However, it should be noted that these rulings only apply to the most extreme sentences and only prohibit *mandatory* sentencing, meaning some juveniles can and do spend the majority of their lives serving sentences for crimes committed as children.⁹⁰

Despite the judicial changes made to juvenile sentencing, the same cannot be said for offenders over the age of majority, even as it relates to juvenile offenses.⁹¹ As the Supreme Court first recognized in *Atkins v. Virginia*, concessions are made for adults who are classified as “mentally retarded,” as the courts appreciate that the mentally challenged have a lesser degree of culpability based on their mental disabilities.⁹² In *Atkins*, the Court held that committing a mentally challenged individual to death, even when only mildly disabled, was a violation of the Eighth Amendment as cruel

88. *Id.* at 568 (“A majority of States have rejected the imposition of the death penalty on juvenile offenders under [eighteen], and we now hold this is required by the Eighth Amendment.”).

89. The evidence is somewhat conflicting in this area. Two studies conducted in the 1980s show no deterrent effect, while the bulk of studies conducted from the 1970s through the 1990s show that criminal sanctions in general have a moderate deterrent effect on juvenile crime. However, the bulk of empirical studies show that transfer laws specifically have little to no effect on juvenile crime rates. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION 2 (2010).

90. Some states still require judges to sentence individuals, juvenile and adult, without consideration of any factors relating to age or life circumstances, as well as requiring that all juveniles charged with homicide be tried in the adult system. See Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT 3 (2012).

91. See generally *United States v. Coleman*, 563 F. App'x. 740 (11th Cir. 2014) (allowing juvenile adjudications as qualifying convictions for disposition purposes).

92. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

and unusual punishment.⁹³ As the ruling in *Atkins* shows, the Supreme Court mirrors the progression of public opinion regarding how certain individuals should be treated, embracing a “consistency of the direction of change.”⁹⁴ Interestingly, the *Atkins* rationale was also used in *Roper*, where the court made a correlation between the culpability of the mentally retarded and juvenile offenders as similarly not on par with the average adult.⁹⁵

As the *Atkins* Court indicated, mental disability does not eliminate the need for accountability; however, greater consideration should be taken because “by definition, [the mentally disabled] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. Their deficiencies . . . diminish their personal culpability.”⁹⁶ Though the similarities are clear, it is not my intention to suggest that the mental capabilities of an 18-year-old young adult are equivalent to the mentally disabled, but instead to attempt to draw attention to the willingness of the court system to be amenable to changes in the criminal system due to reduced personal culpability based on documented diminished capacities. Although there may be a difference between the mentally disabled and the youthful offender’s capacity to mature and respond positively to rehabilitation, this potential for change does not negate the similarities between the two at the critical moment of decision making related to possible criminal activity.

The juvenile brain’s sensitivity to social influences makes the focus on rehabilitation in these years the key to encouraging substantive behavioral changes.⁹⁷ The current criminal justice system dramatically shifts the focus from determent and rehabilitation to punishment and retribution at the age of eighteen, the exact age when, as some studies show, there is a peak in sensitivity to peer influences; both negative and positive.⁹⁸ It is clear that the current

93. *Id.* at 318–19. The Court in *Atkins* made it a point to note that being able to distinguish right from wrong was not a consideration in determining culpability because the mentally disabled can usually determine right from wrong, but they often have other difficulties, such as faulty logical reasoning skills and impulse control, which direct the limitation. *Id.* at 317–19.

94. *Id.* at 315.

95. *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (citing *Atkins*, 536 U.S. at 316) (“As in *Atkins*, the objective indicia of national consensus here . . . provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as ‘categorically less culpable than the average criminal[.]’”).

96. *Atkins*, 536 U.S. at 318.

97. *BONNIE ET AL.*, *supra* note 74, at 93–94.

98. *Id.* at 94.

structure of the criminal justice system requires moving highly susceptible brains into an extremely negative, adult-driven environment, leaving young adults even less likely to have a positively motivated experience that encourages behavior modification. In fact, studies focused on the effects of the transfer of juveniles to the criminal system report that transferred juveniles not only have higher rates of reoffending, but also committed more serious offenses than their peers who remained in the juvenile system.⁹⁹ This finding does not indicate that rehabilitative efforts are not made with young adults in the criminal system, but it is widely understood within the criminal justice community that rehabilitation does not take priority over a punitive corrections philosophy.¹⁰⁰

1. *Use of Rehabilitation within the Juvenile System*

Rehabilitation was a key part of the prison system from the early 1900s until the mid-1970s.¹⁰¹ However, the focus shifted within the United States following the crime-rate increase of the 1960s, and the prison system became primarily concerned with punishment, leading to a dramatic increase in incarceration rates.¹⁰² In the years following this shift, there has been a battle of opposing ideas, with one side moving toward a return to the rehabilitative model, relying on studies that show cognitive-behavioral based systems tend to have the greatest success in reducing recidivism.¹⁰³ The juvenile justice system has seized upon this understanding, using the prevalent scientific knowledge of the underdeveloped mind to take a different approach in adjudication of juveniles, focusing on reducing exposure to the criminal system by weeding out low-risk youth through the use of risk/needs assessments.¹⁰⁴ The premise behind the assessment process is that high-risk youths need greater involvement and intervention, while low-risk youths need minimal intervention in an attempt to prevent further criminalization through exposure to the criminal system.¹⁰⁵

99. See Emily Ray, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317, 344 (2010). This article relied on information from the Center for Disease Control and Prevention, where studies reported that transferred juveniles were thirty-four percent more likely to be rearrested for violent or other crimes. *Id.*

100. Benson, *supra* note 8, at 46.

101. See Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 CRIM. JUST. 109, 109 (2000).

102. Benson, *supra* note 8, at 46.

103. Cullen & Gendreau, *supra* note 101, at 110.

104. Dev. Servs. Grp., Inc., *supra* note 41, at 1.

105. *Id.* at 4.

The same scientific evidence that demonstrates that juveniles are still moldable and susceptible to outside influences also shows that this development does not end at the age of eighteen, so the same approach taken with juveniles—cognitive-based rehabilitation and individualized consideration in punishment—could be extended to young adult offenders. That said, why is the current system of rehabilitation through incarceration, as is implemented in the adult system, not sufficient for young adult offenders? The alternative mirrors our current criminal system; because the brain is still highly susceptible to outside influences, the bad influences through involvement in the adult criminal system will potentially outweigh the good that is done through the moderate rehabilitation efforts. Ultimately, the susceptibility of the juvenile brain to peer influences that makes rehabilitation so effective may backfire when the youth is placed in a negative environment, such as the adult prison system.

2. *Impact of Prison on a Youthful Mind*

Studies related to the effect of prison on young adults over the age of eighteen are scarce. Therefore, we must rely on studies of the effects of criminal prosecution on juvenile offenders and make a correlation with the outcome to young adults. These statistics, comparing juveniles transferred to criminal courts with those who remain in juvenile court, generally show that the recidivism rate of this age range in the juvenile system is much lower than the same age range in the adult system. Some studies show the success rate is as high as eighty percent for youth who remain in the juvenile system, while the recidivism rate of young adults in the criminal system becomes dramatically higher the closer a person is to the age of eighteen at the time he or she becomes involved in the system.¹⁰⁶

For example, a study conducted on a population in the Texas prison system subdivided male age groups within the adult system, rather than the standard lumping together of juveniles and adults into two categories.¹⁰⁷ This study noted several interesting observations, namely the significant proof that the youngest age group, eighteen to twenty-four, had higher parole failure rates than older

106. See *Uniform Crime Reports: Crime in the US 2010: By Age Table 38*, FED. BUREAU OF INVEST., <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls> (last visited Sept. 19, 2015).

107. Kyung Yon Jhi & Hee-Jong Joo, *Predictors of Recidivism Across Major Groups of Parolees in Texas*, 6 JUST. POL'Y J. 1, 10 (2009) (analyzing recidivism rates by age range).

adult categories.¹⁰⁸ This study also found a relationship between history of revocations, prior incarceration, employment history, commitment offense, education or training in prison, and offense severity.¹⁰⁹ Of these variables, education or training in prison was a significant predictor of reduced recidivism only for the age group composed of eighteen- to twenty-four-year-olds.¹¹⁰ Through these findings, the authors inferred that educational programs in prison are not typically beneficial, with the only exception being younger inmates.¹¹¹ These results make sense when paired with the knowledge we now have about the youthful mind's susceptibility to outside influences. Through the use of this study, the argument can be made that young adult offenders, like juvenile offenders, are affected by the atmosphere of incarceration in similar ways, developing "distorted views of their identities" and "learning anti-social behaviors from the inmates around them,"¹¹² having the opposite effect of that which is intended—deterrence.

Other studies show that juveniles in the adult prison system have limited exposure to social norms and are limited in their ability to develop a diverse behavioral toolkit from the wider social networks of family, school or work, and community.¹¹³ "Instead, juveniles incarcerated with adults may learn social behavior that legitimizes 'domination, exploitation, and retaliation.'"¹¹⁴ Additionally, these juveniles have an increased rate of suicide, being thirty-six percent more likely to commit suicide in an adult prison versus a juvenile facility,¹¹⁵ and are at a greater risk of post-traumatic stress disorder and depression.¹¹⁶ As these findings indicate, there are far greater concerns than just recidivism with young offenders placed in a correctional environment, specifically concerns related to long-term mental and emotional health.

108. *Id.* at 15; the adult-age offender age categories and parole failure rates are as follows: ages 18–24 at 58%; ages 25–34 at 49.1%; ages 35–44 at 56.5%; and ages 45+ at 43.7%. *Id.* at 11.

109. *Id.* at 15.

110. *Id.* at 19.

111. *Id.* The researchers also inferred that education and training might be more effective for younger individuals because they have a smaller criminal record, but this was not directly tested. *Id.*

112. Ray, *supra* note 99, at 320.

113. *Id.* at 347.

114. *Id.* (citing Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 184 (2007)).

115. *Id.* at 343.

116. See Carly B. Dierkhising, Andrea Eastman & Misaki N. Natsuaki, *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCHOL. PUB. POL'Y & L. 181, 183 (2014).

One of the greatest long-term benefits of the juvenile system is the impact, or lack thereof, of a juvenile record compared to that of a criminal record. A juvenile record is not readily available to the public in most instances, and is not a legal mandatory disclosure for job applications.¹¹⁷ Rehabilitation and reduced recidivism means very little if the long-term impact of the criminal behavior can never be mitigated. In a three-year study conducted by the Arizona State University School of Criminology and Criminal Justice on the impact of a prison record on employment, the conclusion was disheartening, to say the least.¹¹⁸ The researchers concluded that a prison record has a “dampening effect on job prospects,” particularly in the low-skill food service sector, where ex-prisoners are more likely to seek employment after release.¹¹⁹ Unsurprisingly, most employers in the study expressed a preference for hiring individuals with no prior criminal history.¹²⁰ Employers also associated employees who had served prior prison time with “a number of negative work-related characteristics” including tardiness and the inability to get along with co-workers, demonstrating that the stigma surrounding a person with a criminal record is not easily diminished, regardless of the specific details surrounding each offender’s individual situation.¹²¹

We could apply these findings to young adults who are placed in criminal facilities based solely on the age of majority rule. The public policy reasons for reducing the transfer of youthful offenders to the criminal system, coupled with the need to guard the youth of our society while they grow and mature for the purpose of molding more productive members of society, should apply equally to the element of society caught between youth and adulthood, specifically the eighteen- to twenty-one-year range, when the exposure is likely to have an equal disparate impact.

C. *The Opposing View*

As public policy consistently straddles the line between retribution and rehabilitation, administrators and legislators take baby

117. 18 U.S.C. § 5038(a) (2012) (“Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an *application for employment*, license, bonding, or any civil right or privilege.”) (emphasis added).

118. See generally Scott H. Decker et al., *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*, U.S. DEP’T OF JUSTICE, 244756 (2010).

119. *Id.* at 1–2.

120. *Id.* at 2.

121. *Id.*

steps in correcting the system, responding to public outcry or reaction to public events. To propose a giant step, such as raising the age of majority for criminal prosecution, would likely result in backlash. This opposition derives from the idea that society still prefers the “justice model,” with a focus on punitive measures before rehabilitative approaches.¹²² It appears that much of society wants justice at any cost, making it difficult to persuasively push for an increase in rehabilitative efforts as the key to societal change. Though it is evident that the pendulum is slowly returning from the pessimistic “nothing works” mentality about the justice system to the use of rehabilitation and correctional intervention in an attempt to reduce recidivism, there are certain steps we may still be unwilling to take.¹²³ Admittedly, some research shows a small percentage of young offenders become “life-course” defendants regardless of the nature of intervention, justifying, in some, the belief that an overly-aggressive approach is the best approach.¹²⁴

From an economic standpoint, a popular argument for the current structure of the criminal system is connected to the higher cost of keeping young adults in the juvenile system for a longer period of time.¹²⁵ The estimated cost of detaining a juvenile for one year is four times higher than keeping an adult in prison for the same amount of time.¹²⁶ This cost analysis has led to double the number of states with statutory transfer laws.¹²⁷ Understandably, the excess cost is due to the primary purpose of the juvenile system: to provide educational, therapeutic, and rehabilitative services, ultimately requiring a greater number of staff to offer a safer, more therapeutic environment.¹²⁸ This cost discrepancy is the primary consideration in the benefit-cost analysis, designed to “help policy-makers understand which policies generate benefits to society that are large enough to justify a program’s costs.”¹²⁹ Courts frequently use this benefit-cost analysis, alongside other non-economic factors, in determining whether or not a juvenile should be transferred to the adult system.¹³⁰ Society may often find it difficult to justify spending additional tax dollars on a program that may not benefit

122. Howell et al., *supra* note 24, at 1.

123. Cullen, *supra* note 28, at 299.

124. Loeber, *supra* note 43, at 1–2.

125. See Jens Ludwig, Roseanna Ander & Laura Brinkman, Conducting Benefit-Cost Analysis of Juvenile Court Jurisdiction and Other Juvenile Justice Policies 2 (Dec. 21, 2009) (University of Chicago).

126. *Id.*

127. *Id.* at 2–3.

128. *Id.*

129. *Id.* at 6.

130. *Id.*

society as a whole. The expense of incarceration and rehabilitation is easier to quantify than the possible outcome of a positive correctional environment on an individual, making it a more attractive consideration when justifying criminal policies.

However, in a study conducted in Texas, where the age of majority for criminal activity is seventeen, researchers analyzed the potential cost of raising the age of majority by one year, and indicated a financial benefit in the long run.¹³¹ In this study, researchers considered short- and long-term effects on the juveniles, victims, and taxpayers, estimating an eventual net benefit of \$88.9 million for every cohort moved into the juvenile system.¹³² But, the researchers noted that this policy change would require an initial investment of \$50.9 million per cohort,¹³³ making it a bit less convincing in the short-term. The researchers also noted that, though this change would mean total additional costs to the Texas juvenile system, estimated to be approximately \$160 million for one year of arrest and adjudication of all seventeen-year-olds in the system,¹³⁴ it would also mean an approximate savings of \$104 million in the adult system after *removing* all seventeen-year-old offenders to the juvenile system.¹³⁵ An additional long-term benefit would come with the reduction of the recidivism rate, a potential savings of an additional \$4 million.¹³⁶ With incarceration being a predictor of future behavior, a reduction in recidivism offers not only a financial reward, but also a potential reduction in future victimization.

D. Proposal

Various options exist for reconciling these noted discrepancies, most requiring extensive adjustments and some requiring a complete overhaul of the criminal justice system. The two most realistic and promising options are to: (1) raise the age of majority for criminal offenses to, at a minimum, age twenty-one, and at a maximum, age twenty-five; or (2) create a separate court for young adult offenders, including special correctional facilities similar to current youth facilities. If, as neurological studies seem to show, there is

131. Michele Dietch, Rebecca Breeden & Ross Weingarten, *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 AM. J. CRIM. L. 1, 2 (2012).

132. *Id.*

133. *Id.*

134. *Id.* at 46. This estimate was based on the costs of arrest, court involvement, juvenile probation, and Texas Juvenile Justice Department commitment. *Id.*

135. *Id.* at 48. The study also noted other significant benefits besides financial, such as a reduction in the number of individuals entering the adult system. *Id.* at 50.

136. *Id.* at 51–52.

no significant difference in the decision-making capabilities of a seventeen-year-old and a twenty-one-year-old, then there should be no policy differences in how they are viewed by, and handled within, the criminal system. If the age of majority is changed, young adults would be given the same opportunity for rehabilitation and behavioral adjustments without the damage of a criminal record, as the juvenile system presently provides. Compared to the creation of a new court, this is the most practical solution because it would only require the absorption of an additional age group into an existing system.

The alternative, creating a separate court system, would require a greater overhaul of the current system, establishing a new set of rules, new court dockets, etc. Though likely to be expensive in the beginning, this method leaves the opportunity to create rules and guidelines designed to serve the needs of this specific age classification, rather than applying identical standards as those applied to younger juveniles. This new system would also have the possibility of absorbing part of the current juvenile docket, likely juveniles who currently qualify for transfer to criminal court, creating a court system narrowly tailored to serve the specific needs of maturing young adults. These ideas are obviously not revolutionary, or even new, as other countries have taken similar approaches.

1. *Actions Taken by Other Countries*

The United Kingdom is currently working on addressing the issue of young adult offenders and the impact of criminalization, establishing a commission to report on the effects of the criminal system on young adults and promote changes within the system.¹³⁷ Germany has taken it a step further. In Germany, all young adults aged eighteen to twenty-one are transferred to the juvenile courts, and the courts have the discretion to choose sentencing according to juvenile or adult laws based on the apparent maturity level of each offender.¹³⁸ Generally, the more serious cases, with a potential for a more severe outcome, are handled in the juvenile courts, while minor offenses are transferred to the adult system.¹³⁹

137. See *U.K. Transition to Adulthood*, T2A ALLIANCE, <http://www.t2a.org.uk/t2a-alliance/> (last visited May 12, 2017). The Transition to Adulthood Alliance is a London-based organization established in 2008 to “raise awareness of the distinct needs of young adults, aged 18–24, in the criminal justice system.” *Id.*

138. See T2A, *YOUNG ADULTS AND CRIMINAL JUSTICE: INTERNATIONAL NORMS AND PRACTICES*, KING’S COLL. LONDON INT. CTR. FOR PRISON STUDIES 3 (2010).

139. *Id.*

In 2001, Austria and Lithuania became more flexible with sentencing young adults, also allowing the court discretion in sentencing based on the perceived personality and maturity of the offender.¹⁴⁰ Both of these methods have managed to straddle the line between juvenile and adult offenders, but have not officially taken the step to extend the juvenile age of majority completely. However, in New South Wales, Australia, the legislature has recently taken steps to create a specific community-based order for young adults, with a focus on dealing with the specific rehabilitative needs of those in the program.¹⁴¹ The order is targeting young adults with a moderate to high potential for recidivism and would carry shorter sentencing terms, recognizing that “shorter interventions are generally more useful for young people in terms of promoting their rehabilitation.”¹⁴² Being a new initiative, I was unable to find any real data available showing the immediate success of this program.

2. *Recent State Actions*

In the United States, some states and private organizations have taken steps to deal specifically with the needs of young adults charged with certain offenses, typically substance abuse-related, where diversion is proven more effective than prosecution. For example, New Hampshire police have joined forces with the courts in implementing a diversion program for drug and alcohol related-offenses, focusing on young adults between the ages of sixteen and twenty, attempting to prevent these young adults from the burden of a criminal record.¹⁴³ Michigan uses a “wraparound model,” utilizing personal assessments to design “packages of support” for individual offenders, and creating specific programs designed to assist young adult offenders transitioning out of the court system.¹⁴⁴ One groundbreaking community-based program in Oregon,¹⁴⁵ whose mission is to address the reintegration of young adult offenders from prison back into society, using education, drug treatment,

140. *Id.*

141. *Id.* at 4.

142. *Id.*

143. *Id.* at 5. See also *Valley Court Diversion Programs offers Alternative Programs for Youth and Adults*, VALLEY COURT DIVERSION PROGRAMS, <http://www.vcdp.org> (last visited Jan. 2, 2016), for a list of available programs.

144. T2A, *supra* note 138, at 5; see also *Michigan Youth Reentry Model*, MICH. COUNCIL ON CRIME & DELINQUENCY (Sept. 2011), https://www.michigan.gov/documents/dhs/Michigan_Youth_Re-entry_Model_420255_7.pdf.

145. The program is a partnership composed of the Multnomah Court Sheriff's Office, the Department of Community Justice, and Volunteers of America Oregon. Community Partners Reinvestment Project (CPR), *The CPR Jail Program*, VOLUNTEERS OF AMERICA—OREGON, http://www.voar.org/pdf_files/cpr-jail-program-report (last visited Dec. 28, 2015).

and job skill development, demonstrated reduced recidivism rates; reduction in severity of addiction; and improvement in education, employment, and housing situation.¹⁴⁶ These individual state actions show an understanding within the system that changes need to be made for the criminal justice system to better serve the needs of the community. The next step is analyzing these changes to determine what is most effective and implementing them throughout the United States.

V. CONCLUSION

Public policy demands a criminal system that effectively balances the needs of victims with the potential for offender rehabilitation. This requires a willingness within society to make adjustments in light of ever-changing scientific and psychological advancements. The difficulty lies in determining where to draw the line. Based on the results of current scientific and behavioral studies, there is adequate reasoning for adjusting the age of majority beyond the strict bright-line age of eighteen when it means a greater potential for remolding criminal young adults into productive members of society. Admittedly, this transformation would require significant modifications in both the juvenile and adult criminal systems, the greatest burden being a financial one. Though the rehabilitation model is slowly making its way back into the criminal system, it is not enough to influence significant change. Rehabilitation means nothing if we also saddle the offender with the label of an ex-convict or criminal. Rather, making the necessary adjustments to the dividing line between youth and young adult by raising the age of majority would not only mitigate the possibility of turning young adults into criminals, but it also provides a greater opportunity to work with moldable young adults to change the poor-decision-making processes, ultimately reducing recidivism and additional victimization.

146. *Id.* at 5, 7. The CPR Jail Program's self evaluation of program participants after five years has seen as much as a seventy-five percent reduction in reconviction for a felony offense, and sixty-one percent were employed as of 2010. *Id.* at 5.

Don't Go Near the Water: Following the Fate of the Clean Water Rule

*Elizabeth R. Mylin**

ABSTRACT

On August 28, 2015, the United States Environmental Protection Agency and the Army Corps of Engineers released their hotly debated Clean Water Rule (the Rule) redefining what are federally protected jurisdictional “waters of the United States.” The Rule clarifies, and attempts to resolve, years of different interpretation and confusing rulings by the Supreme Court on which waterways are under the jurisdiction of the federal government and therefore subject to regulations under the Clean Water Act. This article addresses which waters are explicitly covered under the Rule and how opponents of this definition are distorting the plain language of the Rule. After facing more than a dozen lawsuits across the country, the United States Supreme Court granted a petition for certiorari in January 2017 to determine the fate of the Rule. The issues posed by the Rule arising under the CWA will likely be settled soon by the Supreme Court, and will hopefully be implemented, as the Rule seeks to provide greater predictability, clarity, and consistency on how Clean Water Act jurisdictional determinations are made.

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* Elizabeth Mylin is a 2017 Juris Doctor candidate at Duquesne University School of Law. She graduated summa cum laude from Virginia Tech with a Bachelor's Degree in Political Science and National Security Policy Studies. The author would like to thank Dean Nancy Perkins for her helpful insights. All errors and opinions expressed herein are the author's own.

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I. INTRODUCTION

Water does not respect state boundaries. It can move downstream, bringing with it excess nutrients from surface runoff from lawns and agricultural fields and can cause algae blooms, which reduce dissolved oxygen levels and increase turbidity in lakes, rivers, and territorial seas.¹ Water low in dissolved oxygen cannot support aquatic life.² The Susquehanna River is one of the longest rivers on the Atlantic seaboard, flowing 444 miles from New York through Pennsylvania and Maryland into the Chesapeake Bay.³ It is a river that does not respect state lines and poses potential problems for regulating interstate waters that present great pollution problems.⁴ The 27,500-square-mile watershed drains through 67 counties and comprises 43 percent of the Chesapeake Bay's drainage area.⁵ In 2016, the Susquehanna River was named the third most endangered river due to the increasing threat of pollution and being imperiled by a hydropower dam, which affects river flow and water quality.⁶ In 2005, it was named America's most endangered river due to inadequate water treatment in many communities that allow millions of gallons of industrial wastewater, stormwater, and other pollutants to flow into its channel each year.⁷ One of the greatest

1. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1792: Part I*, 22 STAN. ENVTL. L.J. 145, 172 (2003).

2. *Id.* at 191.

3. JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 144 (2010) (discussing the history of the Susquehanna River, the channels it flows through, and geological and geographical features).

4. See, e.g., Erin Fitzsimmons, *Resources Protecting Resources*, 41 MD. B.J. 18, 19 (2008).

5. NAGLE, *supra* note 3, at 144.

6. See, e.g., *America's Most Endangered Rivers for 2016*, AMERICAN RIVERS, <https://www.americanrivers.org/threats-solutions/endangered-rivers> (last visited Feb. 17, 2017) (identifying the threat of pollution from the Conowingo Hydroelectric Dam, "which alters river flow, blocks fish and impacts water quality").

7. See *America's Most Endangered Rivers of 2005*, AMERICAN RIVERS, <https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/24220916/2005-mer-report.pdf> (last visited Apr. 10, 2017).

concerns in recent years has not been with the direct effect on the Susquehanna River, but rather on the Chesapeake Bay, which the river flows into.⁸

In 1972, Congress responded to the water pollution problem illustrated by the Susquehanna River, along with hundreds of other endangered waters in the United States, by adopting the Federal Water Pollution Act,⁹ now known as the Clean Water Act (CWA).¹⁰ Its original and current goal is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹¹ To achieve this objective, the Act established the goal of eliminating “the discharge of pollutants into surface waters.”¹² Although these objectives and policies are not legal mandates, the Environmental Protection Agency (the EPA) and the courts rely on them to interpret Congress’ intent regarding CWA issues.¹³

The CWA generally prohibits the “discharge of any pollutant” into navigable waters without a permit, under threat of steep civil fines and harsh criminal liability.¹⁴ Navigable waters, in turn, are defined to mean “the waters of the United States, including the territorial seas” (WOTUS).¹⁵ This single definition of jurisdictional boundaries applies to all regulatory provisions of the Act, including permit programs for discharges of dredged or fill material,¹⁶ other polluting discharges,¹⁷ water quality standards,¹⁸ and oil spill prevention and clean up.¹⁹ After the CWA was amended in 1972, the

8. See AMERICAN RIVERS, *supra* note 6. The Susquehanna River delivers over half of the freshwater supply into the Chesapeake Bay. In addition, “[t]he river contributes 41 percent of the bay’s nitrogen, 25 percent of its phosphorus and 27 percent of its sediment load.” *Id.*

9. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

10. In 1977, Congress renamed the Federal Water Pollution Control Act of 1972 to the Clean Water Act. Pub. L. No. 95–217, 91 Stat. 1566 (1977).

11. 33 U.S.C. § 1311(a) (2015). The Act originally intended to curb water pollution by 1985. *See id.* § 1251.

12. Another goal is the “achievement of a level of water quality which provides for the protection and propagation of fish, shellfish and wildlife” and “for recreation in and on the water.” *Id.* § 1251(a)(1)–(2).

13. *See generally* Rapanos v. United States, 547 U.S. 715, 722–23 (2006).

14. 33 U.S.C. §§ 1311(a), 1362(12)(A). The 1972 Amendment also granted Congress authority to regulate interstate waters and navigable waters through the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The legal issues surrounding the Commerce Clause and the Clean Water Rule will not be discussed in this article.

15. 33 U.S.C. § 1362(7). While the term “territorial seas” is defined in the statute, the term “waters of the United States” is not.

16. *Id.* § 1344.

17. *Id.* § 1342.

18. *Id.* § 1313.

19. *Id.* § 1321. Congress left it to the EPA and the Corps to define the term “waters of the United States.” *Id.*

Army Corps of Engineers (the Corps)²⁰ and EPA (collectively referred to as the Agencies) promulgated a regulatory definition of the term “waters of the United States” to include seven categories of bodies of water.²¹ Because Congress did not further define “waters of the United States,” the Agencies created regulations with their own interpretation.²² The Agencies further defined “navigable waters” as “waters that are subject to the ebb and flow of the tide and/or presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”²³ These definitions were originally interpreted to include essentially all bodies of water, in part due to the assumed hydrologic connection between most national waters.²⁴

The determination of whether an interstate water falls within this definition of “waters of the United States” is controversial.²⁵ The CWA gives the federal government jurisdiction over “navigable” waters, but a series of Supreme Court cases over the past few decades have caused confusion over what “navigable” and “waters of the United States” mean.²⁶ In the wake of these cases, there has

20. See generally *id.* §1342(a). Congress has charged the EPA and the Corps with implementing and enforcing the CWA.

21. 33 C.F.R. § 328.3(a)(1)–(7) (2015). These waters include: (1) All waters which are currently used, or were used in the past, or may be susceptible to use; (2) All interstate waters; (3) All interstate waters including interstate wetlands; (4) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; (5) Tributaries of waters identified [above]; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands). *Id.*

22. U.S. EPA & U.S. ARMY CORPS OF ENG'RS, Draft Guidance on Identifying Waters Protected by the Clean Water Act (2011), http://nafsma.org/sites/default/files/shared-files/documents/stormwater-committee/wous_guidance_4-2011.pdf.

23. 33 C.F.R. § 329.4.

24. See THEODORE ROOSEVELT CONSERVATION P'SHIP, THE CLEAN WATER ACT GUIDANCE: WHAT IT DOES AND DOES NOT DO 1, http://www.trcp.org/assets/pdf/Clean_Water_Act_Guidance_Explanation.pdf (last visited Oct. 17, 2015) (quoting Tennessee Senator Howard Baker in a 1977 floor statement). Hydrologic connection refers to the water-mediated transport of matter, energy, and organisms within or between elements of the hydrologic cycle. See Clean Water Rule, 80 Fed. Reg. 37,056 (June 29, 2015) (preamble) (to be codified at 33 C.F.R. pt. 328) (Clean Water Rule).

25. Though, the EPA and the Corps have generally supported the broadest possible interpretation of the scope of the CWA's coverage that would be allowed under the Commerce Clause of the United States Constitution. See *Leslie Salt Co. v. U.S.*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (holding that seasonal ponding in pits formerly used for salt production has also been held to be within the scope of waters of the United States).

26. The Supreme Court addressed the scope of “waters of the United States” protected under the CWA in three cases. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes (Riverside)*, Inc. 474 U.S. 121 (1985).

been confusion as to which non-navigable waters and wetlands are subject to the Act's authority.²⁷

On August 28, 2015, the Agencies released the Clean Water Rule (the Rule) articulating and redefining what are federally protected jurisdictional "waters of the United States."²⁸ The Rule demarcates the limit of federal jurisdiction over waters and wetlands for purposes of the CWA.²⁹ The Rule clarifies, and attempts to resolve, years of different interpretation and confusing rulings by the Supreme Court on what waterways are under the jurisdiction of the federal government and therefore subject to regulations under the CWA.³⁰ The Rule is now facing more than a dozen lawsuits across the country and has been attacked for allegedly being overly broad and harming businesses and landowners.³¹ This article will address which waters are explicitly covered under the Rule and how opponents of this definition are distorting the plain language of the Rule.

Part II summarizes the larger issues and events relating to the history of "waters of the United States"—namely three United States Supreme Court opinions which brought more confusion than clarity to the definition of what waters are covered by the CWA. Part III concentrates on the recent court developments surrounding the Rule and considers the procedural and substantive challenges. Part IV examines the language of the Rule and discusses how opponents are misconstruing the statutory language as overly broad and unconstitutional.

II. THE SUPREME COURT LIMITING THE SCOPE OF "WATERS OF THE UNITED STATES"

Three Supreme Court cases—*Riverside*, *SWANCC*, and *Rapanos*³² attempted to clarify the Rule for deciding which wetlands were considered waters of the United States but instead created confusion and uncertainty over the scope of waters protected by the

27. See Kristen Clark, Note, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 306 (2014).

28. The agencies proposed the 370-page rule on April 21, 2014. See Clean Water Rule at 37,054.

29. *Id.*

30. *Id.*

31. See, e.g., *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015). Opponents of the Rule claim that it improperly grants the EPA and the Corps broad new authority. *Id.*

32. See *Rapanos v. United States*, 547 U.S. 715, 738–39 (2006) (plurality opinion); *SWANCC*, 531 U.S. 159, 172–74 (2001); *Riverside*, 474 U.S. 121,134 (1985).

CWA.³³ The United States Supreme Court first addressed the scope of waters of the United States under the CWA in *United States v. Riverside Bayview Homes, Inc.*, a 1985 decision addressing the Agencies' jurisdiction over adjacent wetlands.³⁴ In a unanimous decision, the Court deferred to the Agencies' ecological judgment that adjacent wetlands are "inseparably bound up" with the water to which they are adjacent, and upheld the provision that included adjacent wetlands in the regulatory definition of "waters of the United States."³⁵ According to the Court, Congress chose a broad definition of "waters," as evidenced by Congressional findings that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the sources."³⁶

The Supreme Court next weighed in on CWA jurisdiction in 2001.³⁷ In *SWANCC*, the Court narrowly eliminated CWA jurisdiction over non-navigable waters, where jurisdiction is asserted on the basis of the use of the waters as habitats for migratory birds that cross state lines.³⁸ Since this decision, the agencies have not relied exclusively on the presence of migratory birds to establish jurisdiction.³⁹ While the *SWANCC* decision did not invalidate the Agencies' regulations, it emphasized that some type of relationship with waters that are navigable is necessary for jurisdiction.⁴⁰ This decision introduced the concept of significant nexus.⁴¹

Five years later, in 2006, the Supreme Court failed again to resolve the dispute over the meaning of "waters of the United States" in regard to jurisdiction over wetlands located near man-made ditches, which eventually drain into navigable waters.⁴² In *Rapanos v. United States*, the Justices were divided so sharply over both the results and rationales that they managed to author five

33. Clark, *supra* note 27, at 306.

34. This case is often viewed as the Supreme Court acknowledging that waters do not have to be navigable to be considered jurisdictional under the CWA. *Riverside*, 474 U.S. at 125.

35. *Id.* at 134.

36. *Id.* at 133–34 (citing S. REP. NO. 92–414, at 75 (1972)).

37. *SWANCC*, 531 U.S. at 159.

38. *Id.* at 170–71.

39. U.S. EPA & U.S. ARMY CORPS OF ENGINEERS, Memorandum on Coordination on Jurisdictional Determinations under Clean Water Act Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions (June 5, 2007), <https://www.epa.gov/sites/production/files/2016-04/documents/rapanosmoa6507.pdf>.

40. *SWANCC*, 531 U.S. at 168.

41. *Id.* at 167.

42. *Rapanos* concerned the issue of whether four Michigan wetlands lying near ditches or man-made drains that eventually empty into navigable waters constituted "waters of the United States." *Rapanos v. United States*, 547 U.S. 715, 715–16 (2006) (plurality opinion).

separate opinions.⁴³ However, all nine Justices reaffirmed the Court's prior holdings in *Riverside* and *SWANCC* that "the Act's term 'navigable waters' includes something more than traditional navigable waters."⁴⁴ The Court offered two primary tests for determining jurisdiction over wetlands adjacent to non-navigable waters.⁴⁵ Justice Antonin Scalia's opinion of the court supported CWA jurisdiction in situations where a wetland is both adjacent to, and has a continuous surface connection with, a "relatively permanent" body of water.⁴⁶ Justice Kennedy's concurring opinion determined that CWA jurisdiction extends to wetlands that have a "significant nexus" to traditional navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁴⁷ The four dissenting Justices, in an opinion authored by Justice John Paul Stevens, held that the waters were jurisdictional.⁴⁸ Chief Justice John Roberts and Justice Stephen Breyer each wrote separately, urging the EPA and the Corps to conduct a rulemaking process to define "waters of the United States."⁴⁹ The Court thereby created a jurisdictional debate by failing to specify to lower courts and regulatory authorities which test to apply to determine which waters may be regulated under the CWA.⁵⁰

Today, no consensus exists as to which test prevails.⁵¹ Yet, *Rapanos* provides the most recent Supreme Court opinion of when wetlands are to be considered "waters of the United States" under the CWA.⁵² These three Supreme Court decisions restricted the Agencies' regulatory authority over wetlands under the CWA and

43. *Id.* at 733 (determining that the CWA did not extend to "transitory puddle or ephemeral flows of water").

44. *Id.* at 731.

45. *Id.* at 717. Neither the plurality opinion nor the Justice Kennedy concurrence invalidated any of the regulatory provisions defining waters of the United States.

46. *Id.* at 716.

47. Justice Kennedy determined that the Agencies had not shown the requisite nexus. *Id.* at 717–18 (Kennedy, J., concurring).

48. *Id.* at 787–88 (Stevens, J., dissenting).

49. *Id.* at 757 (Roberts, J., concurring); *Id.* at 811 (Breyer, J., dissenting). Since there is no majority opinion in *Rapanos*, controlling legal rules may be drawn from principles championed by five or more Justices. See EPA & ARMY CORPS OF ENGRS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* 3 (2008) [hereinafter CWA JURISDICTION FOLLOWING *RAPANOS*].

50. Compare *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) with *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).

(applying the significant nexus test and the test iterated in the plurality opinion).

51. Clark, *supra* note 27, at 306.

52. CWA JURISDICTION FOLLOWING *RAPANOS*, *supra* note 49.

did so in ambiguous language, leaving how to treat many bodies of water that are used by communities across the country unresolved.⁵³ As a result of the ambiguity that existed under the old Rule and practices, almost all wetlands across the country theoretically could be subject to a case-by-case jurisdictional determination.⁵⁴ Business owners, members of Congress, developers, farmers, and local governments requested new regulations to make the process of identifying waters protected under the CWA clearer and simpler.⁵⁵

III. REDEFINING WHICH WATERS WARRANT FEDERAL PROTECTION UNDER THE CWA

The scope of federal jurisdiction under the CWA involves the interplay of many factors, including the text and history of the Act, rulings of the Supreme Court, and actions taken by the Corps and the EPA. On May 27, 2015, the Agencies issued a proposed Rule that defines “waters of the United States,”⁵⁶ a threshold term that determines the CWA’s scope and application.⁵⁷ The Rule, which became effective on August 28, 2015, has broad application as it defines jurisdictional water for many CWA programs.⁵⁸ The Rule seeks to provide greater predictability, clarity, and consistency on how the CWA jurisdictional determinations are made.⁵⁹

A. Procedural and Substantive Challenges

The manner in which the Rule was released raised serious questions about its legal validity.⁶⁰ Unfortunately, the Rule has muddied the waters, and its future is uncertain.⁶¹ As soon as the Rule

53. Clark, *supra* note 27, at 319.

54. *Id.*

55. Kimberly Bick, *Untangling ‘Waters of the US’ Web in 6th Circ.*, LAW360, (Oct. 15, 2015), <https://www.law360.com/articles/714760/untangling-waters-of-the-us-web-in-6th-circ>.

56. The agencies proposed the 370-page rule on April 21, 2014. See Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

57. Under the jurisdiction of the Clean Water Act, 33 U.S.C. § 1252 (2015).

58. Clean Water Rule, 80 Fed. Reg. 37,054.

59. See Robert Daguillard, *Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy*, U.S. ENVTL. PROT. AGENCY (May 27, 2015), <https://www.epa.gov/newsreleases/clean-water-rule-protects-streams-and-wetlands-critical-public-health-communities-and>.

60. One judge found that the EPA did not give the public a “fair chance” to comment on the rule. There are also jurisdictional issues over which court can hear cases challenging the rule. See *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015).

61. The Sixth Circuit issued a nationwide stay blocking the new Rule pending the Circuit’s decision on whether it has original jurisdiction. See, e.g., *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015).

was promulgated, procedural and substantive challenges were filed across the country in federal district courts as well as courts of appeal.⁶² The central procedural challenge alleges that the Rule violates the Administrative Procedure Act because the Agencies made significant changes from the proposed rule to the final Rule, thereby failing to provide commenters with adequate notice of the framework for the final Rule.⁶³ The major substantive challenge alleges the Rule exceeds the Supreme Court's jurisdictional limits of the CWA as set forth in *Rapanos*.⁶⁴ However, before these issues can be determined, the courts will have to decide whether jurisdiction lies with the district courts or courts of appeal, an issue that requires interpretation of the CWA's grant of jurisdiction.⁶⁵

The jurisdictional question posed by the Rule is to determine which court has the jurisdiction to hear the substantive issues posed by the rule.⁶⁶ The CWA vests jurisdiction in the federal courts of appeal for review of agency action "approving or promulgating any *effluent limitation or other limitation* under Section 1311, 1312 or 1316 or 1345 of this title . . . [and] . . . in issuing or denying any permit under Section 1342 of this title . . ."⁶⁷ If the Rule constitutes an "effluent limitation" or "other limitation," then the CWA authorizes the cases to proceed straight to appeals courts, bypassing district courts.⁶⁸ The Agencies contend that the Rule acts as an "other limitation" under judicial precedent interpreting "other limitations" as used in §1369(b), thereby vesting jurisdiction in the federal courts of appeal.⁶⁹ Parties who oppose the Rule claim jurisdiction is not proper in the courts of appeal, but rather in the district courts under 28 U.S.C. § 1331.⁷⁰ In the district court cases challenging the Rule, the plaintiffs argue that the Rule does not concern issuing or denying permits and does not approve or promulgate any "other limitation."⁷¹

62. See, e.g., *Georgia ex rel Olens v. McCarthy*, No. CV-215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), *appeal held in abeyance*, 833 F.3d 1317, 1320, 1321 (11th Cir. 2016); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1051-52 (D.N.D. 2015); *Murray Energy Corp. v. U.S. EPA*, No. 1:15CV110, 2015 WL 5062506, at *2 (N.D. W. Va. Aug. 26, 2015).

63. See *North Dakota v. U.S. EPA*, 127 F. Supp. 3d at 1051.

64. *Id.* at 1055.

65. See *In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015) (Keith, J., dissenting).

66. *Id.*

67. 33 U.S.C. § 1369(b)(1)(E)-(F) (emphasis added).

68. *Id.* § 1369(b)(1)(E)-(G).

69. Clean Water Rule, 80 Fed. Reg. 37,082 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

70. See, e.g., *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015).

71. See *Georgia v. McCarthy*, No. CV-215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. U.S. EPA*, No. 1:15CV110, 2015 WL 5062506, at *3 (N.D. W. Va. Aug. 26, 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d at 1051-52.

B. Sixth Circuit Stays the Rule

On October 9, 2015, the U.S. Circuit Court of Appeals for the Sixth Circuit issued a nationwide stay blocking the Rule pending the Circuit's decision on whether it has original jurisdiction.⁷² In a 2–1 ruling, the court concluded that: “[a] stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new rule and whether they will survive legal testing.”⁷³ The court found that the Rule's treatment of tributaries, adjacent waters, and waters having a significant nexus to navigable waters is at odds with *Rapanos*, a decision holding that jurisdiction is limited to those waters that have a significant nexus to downstream navigable water, not just any hydrologic connection.⁷⁴

The court also relied on 33 U.S.C. § 1369(b)(1)(F) in its holding, finding that the section grants circuit courts original jurisdiction over actions challenging the Agencies' issuance or denial of any permit under the CWA.⁷⁵ The court relied on *National Cotton Council of America v. U.S. EPA*, where the court previously held that subsection (F) allows for direct circuit court review of actions issuing or denying a permit and regulations governing the issuance of permits.⁷⁶ Therefore, under *National Cotton*, the courts of appeals have jurisdiction under subsection (F) to review a regulation that imposes no restriction or limitation, if its affects or is related to permitting requirements.⁷⁷

Procedurally, the court noted the rulemaking process by which the distance limitations were adopted was “facially suspect” because the proposed rule did not include any distance limitations in its use of terms like “adjacent waters” and “significant nexus,” which are included in the Rule.⁷⁸ The dissenting judge argued that it is not prudent for a court to act before it determines that it has

72. *In re EPA*, 803 F.3d 804, 806–07 (6th Cir. 2015). The Sixth Circuit stayed the Rule's implementation nationwide based on twelve petitions challenging it in eight different appellate courts, including the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. These petitions were consolidated by the Judicial Panel on Multidistrict Litigation (JMPL). JMPL randomly selected the Sixth Circuit to hear the consolidated cases. *Id.*

73. *Id.* at 808. There are two parts to the decision made by the Sixth Circuit: (1) to decide if the court has the subject matter jurisdiction to hear the case and (2) to decide the validity of the Rule based on its merits. *Id.* at 806. This means that the Rule will not be implemented across the United States until the Sixth Circuit determines that it does not have jurisdiction to hear the petitioners' case or it determine that the Rule is valid. *Id.* at 808.

74. *Id.* at 807.

75. *Id.* (citing *Nat'l Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927, 933 (6th Cir. 2009)).

76. *Id.*

77. *Id.*

78. *Id.*

subject matter jurisdiction.⁷⁹ In fact, if a court lacks “jurisdiction to review the rule, then [it] lack[s] jurisdiction to grant a stay.”⁸⁰

One central issue the Sixth Circuit faced was whether it will take control over the litigation, as the Agencies would prefer, or whether to let the several district courts in which challenges have been filed hear the cases and let appeals trickle up at a later time.⁸¹ During oral arguments held by the Sixth Circuit in regard to the jurisdictional issues posed by the Rule on December 8, 2015, the Agencies argued that giving district courts jurisdiction would waste judicial resources and result in substantial delays in resolving challenges to the Rule.⁸² Opponents of the Rule argue that jurisdiction is proper at the district court level, and not with the courts of appeal.⁸³

C. Conflicting District Court Rulings

The Sixth Circuit ruling came after three federal judges ruled in the same week in August 2015 on states' challenges to the Rule, with two holding⁸⁴ that they had no jurisdiction and the third issuing an injunction to halt the implementation of the Rule.⁸⁵ Similar to the Sixth Circuit's decision, the U.S. District Court for the Southeastern District of North Dakota Court opined it “appears likely” that the agencies violated their grant of authority in promulgating the rule and that the agencies also failed to comply with the Administrative Procedures Act.⁸⁶ The North Dakota District Court held that the Rule expanded the federal government's role beyond that granted by Congress per the CWA, 33 U.S.C. § 1331, because the Rule could allow the EPA to regulate waters such as streams that are far from any navigable waters.⁸⁷ Specifically, in *North Dakota v. EPA*, the district court judge granted the injunction against the Rule, determining that the thirteen states that filed in his court are likely to succeed on their claims.⁸⁸

79. *Id.* at 809 (Keith, J., dissenting).

80. *Id.*

81. *Id.* at 806 (majority opinion).

82. Amena H. Saiyid, *Sixth Circuit to Hear Oral Arguments on Water Rule*, BLOOMBERG BNA (Dec. 7, 2015), <https://www.bna.com/sixth-circuit-hear-n57982064688/>.

83. *Id.*

84. See *Georgia v. McCarthy*, No. CV–215–79, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. U.S. EPA*, No. 1:15CV110, 2015 WL 5062506, at *6 (N.D. W. Va. Aug. 26, 2015).

85. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015).

86. *Id.* at 1051.

87. *Id.* at 1056.

88. *Id.* at 1051, n.1. (Staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico).

The rulings from judges in Georgia and West Virginia squarely conflict with the North Dakota judge on the issue of which court has jurisdiction to hear challenges to the Rule.⁸⁹ Contrary to its sister districts, the North Dakota Court for the Southeastern District found that the Rule was not an “other limitation” and, accordingly, the CWA did not require direct appellate jurisdiction.⁹⁰ The court for the U.S. Court for the Southern District of Georgia rejected the reasoning used by the court in North Dakota, finding that “its undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the Clean Water Act’s permit program.”⁹¹ The decisions by the Sixth Circuit, the Southeastern District of North Dakota, the Southern District of Georgia, and the Northern District of West Virginia are far from the end of the story, but their harsh critiques suggest that the Rule will eventually be clarified.⁹²

Congress has also been involved in quashing the Rule. On June 10, 2015, the U.S. Senate Environment and Public Works Committee advanced a bill to halt implementation of the Rule and limit which waterways the EPA can regulate.⁹³ This measure is similar to a bill the U.S. House of Representatives passed in May 2015 that would require the EPA to withdraw its regulation and draft a new one based on consultation with state and local officials.⁹⁴ Also on June 10, 2015, the U.S. House Interior Subcommittee passed an appropriations bill that would cut EPA funding by \$718 million, or 9 percent, and cap the agency’s staffing levels.⁹⁵ However, the spending provisions attacking the Rule had not passed when Congress

89. See *McCarthy*, 2015 WL 5092568, at *2; *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d at 1051; *Murray Energy Corp.*, 2015 WL 5062506, at *6.

90. *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d at 1052.

91. *McCarthy*, 2015 WL 5092568, at *2. The court in West Virginia used similar reasoning—in rejecting an injunction request by Murray Energy Corporation. See *Murray Energy Corp.*, 2015 WL 5062506, at *2.

92. The Rule may be clarified in the future because on January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit. *In re U.S. Dep’t of Def. & U.S. E.P.A. Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* 817 F.3d 261 (6th Cir. 2016), *cert. granted sub nom.* Nat’l Ass’n of Mfrs. v. Dep’t of Def., 137 S. Ct. 811 (Mem) (2017).

93. Federal Water Quality Protection Act, S. RES. 1140, 114th Cong. (2015). However, the Obama administration indicated that it would veto the resolution and Congress would need a supermajority for the resolution to pass. James McClammer, *Up the Creek Without a Paddle: Navigating New Clean Water Rule*, THE LEGAL INTELLIGENCER (Nov. 13, 2015), <http://www.thelegalintelligencer.com/id=1202742303002/Up-the-Creek-Without-a-Paddle-Navigating-New-Clean-Water-Rule?slreturn=20151131123145>.

94. Waters of the United States Regulatory Overreach Protection Act of 2015, H.R. RES. 594, 114th Cong. (2015).

95. See Regulatory Integrity Protection Act of 2015, H.R. RES. 1732, 114th Cong. (2015). There were more than 100 anti-environmental provisions Republican leaders tried to attach to spending bills during the 114th session of Congress. Some of the proposals would have

recessed for the year.⁹⁶ Congress decided not to derail funding for the Rule in its 114th session, which may allow the agencies to better decide what is, and what is not, a water afforded protection by the CWA.⁹⁷

D. Was the Sixth Circuit's Ruling Proper?

The Sixth Circuit and the North Dakota Court for the Southeastern District correctly halted the implementation of the Rule; however the outcome was reached by relying on unsupported authority in order to grant the stay. Opponents of the Rule prefer jurisdiction to be at the district court level, not the appellate level.⁹⁸ However, in order to maintain consistency and to avoid fragmented district court rulings on the Rule, the Agencies have a good chance of winning jurisdiction in the appellate courts—as evidenced by the Supreme Court agreeing to hear the case.⁹⁹

While the jurisdictional question was still in the process of briefing before the Sixth Circuit, it nonetheless held that it has the jurisdiction and authority to stay the Rule.¹⁰⁰ The dissenting judge argued that the court should not grant the stay because the question of jurisdiction—which is a threshold matter—had not been decided, stating that if the court lacks “jurisdiction to review the rule, then [it] lack[s] jurisdiction to grant a stay.”¹⁰¹ The court went through two analyses before evaluating the merits of enjoining the Rule.¹⁰² First, the court decided to preserve “the status quo as it existed before the Rule went into effect.”¹⁰³ However, the court does not cite any authority for its decision, and relies on *Rapanos* to indicate which definition it refers to for the status quo.¹⁰⁴ Second, the Sixth Circuit held that it had the authority to stay the implementation of the Rule pending the determination of its own jurisdiction

blocked action on climate, clean air, clean water, land preservation, wildlife protection, and stripped essential programs of needed resources. *Id.*

96. See *id.*

97. *Id.*

98. Saiyid, *supra* note 83.

99. On January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit. *In re* Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” No. 15–3751, (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance).

100. *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

101. *Id.* at 809.

102. *Id.* at 806–07.

103. *Id.* at 806.

104. *Id.*

to review it.¹⁰⁵ The majority relied on a Supreme Court case allowing a stay to “preserve the existing conditions and the subject of the petition,” when the parties were properly before the court.¹⁰⁶ Here, the propriety of the subject matter of the suit and parties before the court were indeterminate. It seems illogical for a court that allegedly does not have jurisdiction to then possess jurisdiction to temporarily decide the outcome of the case.¹⁰⁷ The dissenting judge takes issue with this point, arguing that when exclusive review is available in one court, action by a different court is not valid.¹⁰⁸

The Sixth Circuit also correctly validated its stay by relying on “public interest.”¹⁰⁹ However, in this part of the opinion the judges speculated and substituted their judgment for the expertise of two federal agencies and thousands of stakeholders.¹¹⁰ The court does acknowledge that the “clarification that the new Rule strives to achieve is long overdue . . . [and] respondent [A]gencies have conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality.”¹¹¹ Despite this acknowledgement and bypassing deference to the Agencies’ decision, the court stated that the “sheer breadth of ripple effects” mandates the stay of the Rule.¹¹²

The Sixth Circuit wrongly halted the implementation of the Rule by relying on the possible inconsistencies that it has with the *Rapanos* decision. The Court went too far by holding that *Rapanos* is solely limited to waters that have a significant nexus to downstream navigable water, not just any hydrologic connection.¹¹³ The Rule, Technical Support documents, and the science literature review all contain evidence that even “remote wetlands,” such as intermittent streams, do have a significant nexus to water quality in navigable-in-fact waterways.¹¹⁴ In addition, the Court in *Rapanos* addressed only the construction of the CWA language “navigable waters” and “waters of the United States.”¹¹⁵ The Supreme Court

105. *Id.* at 807.

106. *Id.* (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947)).

107. *See id.* at 809.

108. *Id.*

109. *Id.* at 806.

110. *See id.* at 808.

111. *Id.*

112. *Id.*

113. *Id.* at 804, 807. For example, intermittent streams process nutrients, process carbon, provide the basis for food chains throughout river systems, and provide a host of other water quality benefits through river systems. Clean Water Rule, 80 Fed. Reg. 37,057 (June 29, 2015) (preamble) (to be codified at 33 C.F.R. pt. 328).

114. *See, e.g.*, Clean Water Rule, 80 Fed. Reg. at 37,076 (preamble).

115. *See Rapanos v. United States*, 547 U.S. 715, 723–24 (2006).

did not address interstate waters in that case, nor did it overrule prior precedent, which discussed the interaction between the CWA and federal law to address pollution of interstate waters.¹¹⁶ Therefore, the Rule, in light of *Rapanos*, does not impose the additional requirement that interstate waters be water that is navigable or connected to water that is navigable for purposes of federal regulation under the CWA.¹¹⁷

E. Continued Litigation and the Rule's Path to the Supreme Court

Shortly after the Sixth Circuit's decision, the U.S. District Court for the Northern District of Oklahoma sua sponte dismissed two challenges to the Rule.¹¹⁸ Former Oklahoma Attorney General, and now EPA Administrator, Scott Pruitt told the court that the challenge should stay in his state, regardless of the Sixth Circuit decision.¹¹⁹ Likewise, the U.S. District Court for the Southern District of Ohio dismissed a similar complaint filed in that court.¹²⁰ Several other motions to dismiss have been filed in district court challenging the Rule.¹²¹

In addition to the various district court cases challenging the Rule, eleven state plaintiffs filed an appeal before the Eleventh Circuit, identifying the same jurisdictional question that was before the Sixth Circuit. On August 16, 2016, the Eleventh Circuit found that identical litigation in the federal courts should be avoided.¹²² Specifically:

116. *Id.* at 719–21 (addressing whether wetlands adjacent to ditches or man-made drains that eventually empty into traditional navigable waters are within CWA jurisdiction).

117. Clean Water Rule, 80 Fed. Reg. at 37,061 (preamble).

118. See *Oklahoma ex rel. Pruitt v. U.S. Env'tl. Prot. Agency*, Nos. 15–CV–0381–CVE–FHM, 15–CV–0386–CVE–PJC, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016).

119. Pruitt stated: “[t]he Sixth Circuit’s decision does not control the outcome of this case, and the district court erred in holding that it does.” Juan Carlos Rodriguez, *Okla. Urges 10th Circ. To Hear EPA Water Rule Challenge*, LAW360 (July 6, 2016, 7:19 PM), <https://www.law360.com/articles/814326/okla-urges-10th-circ-to-hear-epa-water-rule-challenge>

120. See *Ohio v. EPA*, No. 2:15–cv–02467 (S.D. Ohio Apr. 25, 2016), *appeal docketed*, No. 16–3564 (6th Cir. May 27, 2016).

121. Specifically: one case in the District of Minnesota, one case in the District of North Dakota, and four cases in the Southern District of Texas. To date, five district courts have concluded that they lack jurisdiction to review the Rule because jurisdiction is vested in the courts of appeal. See *Washington Cattlemen's Ass'n v. United States EPA*, No. 15–3058, 2016 WL6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio v. EPA*, 15–cv–02467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt v. United States EPA*, No. 15–cv–0381, 2016 WL 3189807, at *2; *Georgia v. McCarthy*, No. CV 215–79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v U.S. EPA*, No. 15CV110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015).

122. *Georgia v. McCarthy*, 833 F.3d 1317, 1321 (11th Cir. 2016).

If there were an exhibition hall for prudential restraint on the exercise of judicial authority, this case could be an exemplar in the duplicative litigation wing. The case before us and the case before the Sixth Circuit involve the same parties on each side, the same jurisdictional and merits issues, and the same requested relief It would be a colossal waste of judicial resources for both this Court and the Sixth Circuit to undertake to decide the same issues about the same rule presented by the same parties.¹²³

In addition, the Eleventh Circuit noted that the decision by the Sixth Circuit “involve[s] the same parties on each side, the same jurisdictional and merits issues, and the same requested relief.”¹²⁴

After the Sixth Circuit’s decision, various petitions for rehearing en banc were filed.¹²⁵ The Sixth Circuit directed the Agencies to file a response, and on April 21, 2016, the court issued an order denying the petitions for rehearing, noting that “although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule . . . subject to direct circuit court review under § 1369(b)(1)(E).”¹²⁶

Thereafter, the National Association of Manufacturers (NAM), one of the parties in the Sixth Circuit proceedings, subsequently filed a petition for writ of certiorari in the United States Supreme Court.¹²⁷ NAM argued that the continued litigation of the suit’s merits would be tremendously burdensome if the Supreme Court determines the Sixth Circuit lacks jurisdiction.¹²⁸ On January 25, 2017, the United States Supreme Court granted a petition for certiorari challenging the decision of the divided Sixth Circuit.¹²⁹

123. *Id.* at 1321.

124. *Id.*

125. *See, e.g.*, Order Denying Petitions for En Banc Rehearing, *In re* Dep’t of Def. & EPA Final Rule, 817 F.3d 261 (6th Cir. 2016).

126. *Id.* at 270.

127. *See* Petition for Writ of Certiorari, *In re* U.S. Dep’t of Def., U.S. Env’tl. Prot. Agency Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261 (6th Cir. 2016) (No. 16–299). The movant seeks interlocutory review of the Sixth Circuit panel’s decision that jurisdiction lies with the court of appeals. *Id.* at *3.

128. Petition for Writ of Certiorari, *National Ass’n of Mfrs. v. Department of Defense*, 137 U.S. 811 (2017) (No. 16–299). The movants include seventeen petitioners and intervenor National Association of Manufacturers. *Id.*

129. *In re* Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” No. 15–3751, (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance). The sole contention in the petition for certiorari challenges the Sixth Circuit panel’s holding that jurisdiction existed in the Court of Appeals under § 1369(b)(1)(F). *Id.*

IV. DISTORTING THE LANGUAGE OF THE RULE

A precise definition of navigable waters is needed to protect wetlands.¹³⁰ This clarification of the Rule is crucial to maintain healthy waterways across the nation and to ensure a bright future for all citizens of the United States. The Rule is based on solid science¹³¹ and it aligns with Supreme Court precedent.¹³² It's timely. It's relevant. It is needed both to restore and maintain one of our most vital resources: an abundance of clean water.

A. *Statutory Language*

By changing the regulatory definition of “waters of the United States,” there may be situations in which the CWA applies categorically for the first time, and there may also be instances in which the CWA no longer applies.¹³³ For example, compared to the old regulations and historical practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease, as would the costs of CWA programs.¹³⁴ In an economic analysis document accompanying the Rule, the Agencies estimate the revised Rule will result in 2.84 to 4.65% more positive assertion of jurisdiction over United States water, compared with the practice under the old statutory language.¹³⁵ In addition, the new definition of “waters of the United States,” by itself, imposes no direct costs.¹³⁶

Under prior CWA authority, the term “waters of the United States” includes seven categories of bodies of water.¹³⁷ Six of these categories are retained by the Rule in paragraph (a), and fall under the jurisdiction of the CWA with no additional required analysis.¹³⁸ These waters include: traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, and adjacent

130. Clark, *supra* note 27, at 319.

131. See U.S. ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (2015).

132. See *What the Clean Water Rule Does*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does> (last visited Apr. 11, 2017). The EPA and Corps relied on a science report summarizing findings from over 1,200 peer-reviewed and published scientific studies on water systems. *Id.*

133. As a result of exemptions and exclusions listed in the Rule. See Clean Water Rule, 80 Fed. Reg. 37,073 (preamble) (to be codified at 33 C.F.R. pt. 328).

134. *Id.* at 37,101.

135. *Id.*

136. The potential costs and benefits incurred as a result of the Rule are considered indirect, because the Rule involves a definitional change to a term that is used in the implementation of CWA programs. *Id.*

137. 33 C.F.R. § 328.3(a).

138. Clean Water Rule, 80 Fed. Reg. at 37,073.

waters.¹³⁹ There is no change from the old statutory language for waters that are susceptible to interstate commerce, known as traditional navigable waters.¹⁴⁰ Likewise, all interstate waters, the territorial seas, and impoundments of the above waters or a tributary are also considered jurisdictional under both the old statutory language and the new Rule.¹⁴¹ All waters that are considered adjacent, including wetlands, ponds, lakes, oxbows, and similar waters, are considered jurisdictional under the Rule because the Agencies conclude they have a significant nexus to traditional navigable water.¹⁴²

Similar to past guidance and rulemaking, the Rule identifies categories of water that are and are not jurisdictional, as well as categories of water that require a case-specific determination.¹⁴³ In paragraph (a), the Rule abandons the “other waters” designations and replaces it with two different mechanisms for evaluating them.¹⁴⁴ These two sets of waters are identified for purposes of conducting a case-specific significant nexus analysis to determine if CWA jurisdiction applies, narrowing the scope of waters that could be assessed under a case-specific significant analysis compared with the old statutory language.¹⁴⁵ The first waters subject to a significant nexus analysis are five regional waters that are identified in the rule: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.¹⁴⁶ These waters are subject to this analysis only when they impact downstream waters.¹⁴⁷ The second category of waters subject to a significant nexus analysis are those within the 100-year flood plain of traditional navigable waters, interstate water of the territorial seas, as well as waters with a significant nexus within 4,000 feet of each jurisdictional water.¹⁴⁸

In paragraph (b), the Rule maintains and expands the exclusion from the old Rule to the new, including those for the waste treatment systems and prior converted cropland, but it also adds three types of ditches: groundwater, gullies and rills, and non-wetland swales to the list as excluded.¹⁴⁹ The Rule focuses on streams, not

139. 33 C.F.R. § 328.3(a)(1)–(6).

140. *Id.* § 328.3(a)(1).

141. *Id.* § 328.3(a)(2)–(4).

142. *Id.* § 328.3(a)(6).

143. *See, e.g., id.* § 328.3(a)(7)–(8).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* § 328.3(a)(7).

148. *Id.* § 328.3(a)(8).

149. *Id.* § 328.3(b)(1)–(3).

ditches.¹⁵⁰ It provides protections to ditches that are constructed out of streams or function like streams and can carry pollution downstream.¹⁵¹ In addition, the Rule significantly limits the use of case-specific analysis by demarcating and limiting the number of similarly situated waters.¹⁵² The Rule excludes constructed components, water delivery/reuse, and erosional features.¹⁵³ Finally, other constructed features such as stock ponds, cooling ponds, and settling basins are excluded from CWA jurisdiction.¹⁵⁴

In paragraph (c) the Rule provides a revised definition for the first time that sets limits on what will be considered “adjacent.”¹⁵⁵ In addition, tributaries of the above waters are jurisdictional if they meet the definition of “tributary.”¹⁵⁶ Specifically, these waters are jurisdictional under the old rule, but the term “tributary” is newly defined in the Rule.¹⁵⁷ One crucial change in the Rule is that it makes “tributaries” and “adjacent waters” that share a “significant nexus” to the “waters of the United States” jurisdictional by rule.¹⁵⁸ In the Rule, the EPA and the Corps responded to comments that had requested some limits on the definition of adjacent waters.¹⁵⁹ Under the Rule, water that is adjacent to jurisdictional water is itself jurisdictional if it meets the related definition of neighboring.¹⁶⁰ The Rule establishes maximum distances, or specific boundaries from jurisdictional waters, for purposes of defining “neighboring.”¹⁶¹

The term “neighboring” has now been defined to include waters located, in whole or in part: within 100 feet of the ordinary high water mark (OHWM) of a jurisdictional water; within the 100-year floodplain that are not more than 1,500 feet from the OHWM of a jurisdictional water; and all waters located within 1,500 feet of the high tide line of a jurisdictional water and within 1,500 feet of the OHWM of the Great Lakes.¹⁶² The water is considered “neighboring” if a portion of it is located within these specific boundaries.¹⁶³ In addition, there has been a change from prior law, which referred

150. *See id.* § 328.3(b)(3)(i)–(iii). The Rule also redefines excluded ditches. *Id.*

151. *Id.* § 328.3(b)(3)(i).

152. *See id.* § 328.3(b)(4)(i)–(vii).

153. *Id.* § 328.3(b)(4).

154. *Id.* § 328.3(b)(4)(ii).

155. *Id.* § 328.3(c)(1).

156. *Id.* § 328.3(c)(3).

157. *Id.*

158. Clean Water Rule, 80 Fed. Reg. 37,058 (to be codified at 33 C.F.R. pt. 328).

159. *See generally* ENVTL. PROT. AGENCY, CLEAN WATER RULE RESPONSE TO COMMENTS, CLEAN WATER RULE COMMENT COMPENDIUM TOPIC 3: ADJACENT WATERS (2015).

160. 33 C.F.R. § 328.3(c)(2)(i)–(iii).

161. *Id.*

162. *Id.*

163. *Id.*

to “adjacent wetlands” and left much of the jurisdictional analysis to case-by-case determinations.¹⁶⁴ The term “adjacent” as in “adjacent waters” is defined to mean, “bordering, contiguous or neighboring,” and thus remains unchanged from past statutory language.¹⁶⁵

Under old statutory language, tributaries were considered jurisdictional without any specific qualification and were not defined. The Rule now defines “tributaries” as those that impact the health of downstream waters.¹⁶⁶ Tributary status is indicated by physical features of flowing water and can be natural or constructed, but must have a bed, a bank, and an ordinary high-water mark in order to warrant protection.¹⁶⁷ A tributary as defined by the Rule does not lose its jurisdictional status even if there are one or more natural breaks (e.g., a debris pile) or constructed/man-made breaks such as a bridge or a dam.¹⁶⁸

The term “significant nexus,” which originated from Justice Anthony Kennedy’s concurring opinion in *Rapanos*, is defined for the first time by a regulatory definition in paragraph (c).¹⁶⁹ The Rule defines “significant nexus” as the water at issue which significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea.¹⁷⁰ “Significant effects” must be “more than speculative or insubstantial.”¹⁷¹ The Rule also adds a list of factors that must be considered in deciding whether a significant nexus exists.¹⁷²

B. Explanation and Implementation

The Rule explicitly recognizes the interrelatedness of water bodies and codifies jurisdiction over upstream sources to “traditional

164. *Id.* § 328.3(c)(1).

165. *Id.*

166. *Id.* § 328.3(c)(3) (defining tributaries as small, intermittent and ephemeral tributaries, tributary lakes, ponds and wetlands, man-made and man-altered tributaries).

167. *Id.* In the Technical Support documents accompanying the Rule, the science advisory board found that all tributary streams, regardless of size or flow regime, are physically, chemically, and biologically connected to downstream rivers by channels and associated alluvial deposits where water and other materials are concentrated. U.S. ENVTL. PROT. AGENCY & U.S. DEP’T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 1, 71 (2015) [hereinafter TECHNICAL SUPPORT DOCUMENT].

168. 33 C.F.R. § 328.3(c)(3).

169. *Id.* § 328.3(c)(5); see also *Rapanos v. United States*, 547 U.S. 715, 759, 767 (2006) (Kennedy, J., concurring).

170. 33 C.F.R. § 328.3(c)(5).

171. *Id.*

172. *Id.* The factors for significant nexus evaluation include: sediment trapping; nutrient recycling; pollutant trapping; transformation; filtering and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle-dependent aquatic habitat. *Id.* § (5)(i)–(ix).

navigable waters” protected by the CWA.¹⁷³ The Rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions.¹⁷⁴ There are additional exclusions for features like artificial lakes and ponds and water-filled depressions.¹⁷⁵ As before, a CWA permit is only needed if a waterway is going to be polluted or destroyed.¹⁷⁶ The Rule only protects waters historically covered under the CWA.¹⁷⁷ It also maintains the exclusion of previously converted cropland—meaning that over 50 million acres of land are still not subject to CWA permitting.¹⁷⁸ It does not interfere with private property rights, and it only covers water, not land, use.¹⁷⁹ The Rule also does not regulate most ditches, does not regulate groundwater or shallow subsurface flows, and does not change policy on irrigation or water transfers.¹⁸⁰ The Rule explicitly states that the CWA does not apply to ground water.¹⁸¹

Recognition of the need for federal oversight of source waters, including small or temporary streams and wetlands, is not new to policy. For example, in the debates about the scope of the CWA in the Senate and Environment Public Works Committee in 1977, former Senator Howard Baker (Republican, Tennessee) said that “the once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.”¹⁸² Despite such arguments, legal challenges to the CWA have continued, and despite repeated attempts at resolution by the Agencies, regulators, and Congress, confusion about the CWA has persisted.¹⁸³

Within the language and preamble of the Rule itself, the EPA and the Corps explain in great detail why tributaries, including ephem-

173. Clean Water Rule, 80 Fed. Reg. 37,069 (preamble) (to be codified at 33 C.F.R. pt. 328).

174. *Id.* at 37,054.

175. 33 C.F.R. §328.3(B)(4)(i)–(iii).

176. And all exemptions for agriculture stay in place. Clean Water Rule, 80 Fed. Reg. at 37,054 (preamble).

177. *Id.* at 37,079.

178. See U.S. DEPT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERV. 8, *Wetlands Programs and Partnerships: RCA Issue Brief #8* (Jan. 1996), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/dma/?cid=nrcs143_014214.

179. See Clean Water Rule, 80 Fed. Reg. at 37,059.

180. 33 C.F.R. § 328.3(b)(4)(i)–(iii) (2015).

181. 33 C.F.R. § 328.3(b)(5) (2015).

182. See THEODORE ROOSEVELT CONSERVATION P'SHIP, *supra* note 24 (quoting Tennessee Senator Howard Baker in a 1977 floor statement).

183. See *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

eral tributaries, have a significant nexus to water quality in traditionally navigable waters.¹⁸⁴ The Agencies included specific numerical requirements to provide more simplified jurisdictional determinations for adjacent waters, neighboring waters, and some waters subject to the significant nexus analysis.¹⁸⁵ These numerical requirements included in the statutory language are exactly what opponents claim the Rule lacks.¹⁸⁶ The Rule also cites a Technical Support document, which explains those connections in even greater depth.¹⁸⁷ Notwithstanding the legal history of the CWA, science has also informed the evolution of which waters are considered to be “waters of the United States.”¹⁸⁸ The supporting documents were also vetted by an independent science advisory board, which also agreed that key terms in the Rule need clarification and better definitions, including the terms “significant,” “adjacent,” “floodplain,” and “similarly situated.”¹⁸⁹ The science advisory board also concluded “[t]here is strong scientific evidence to support the EPA’s proposal to include all tributaries within the jurisdiction of the Clean Water Act.”¹⁹⁰ However, science cannot in all cases provide “bright lines” to interpret and implement policy. In the preamble to the Rule, the Agencies recognize this point:

The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during

184. Clean Water Rule, 80 Fed. Reg. at 37,065 (preamble).

185. See, e.g., 33 C.F.R. § 328.3(c)(2)(i)–(iii); (c)(5).

186. See *In re EPA*, 803 F.3d at 807. The Sixth Circuit noted the rulemaking process by which the distance limitations were adopted was “facially suspect” because the proposed rule did not include any proposed distance limitations in its use of terms like “adjacent waters” and “significant nexus” that are included in the Rule. *Id.*

187. See Clean Water Rule, 80 Fed. Reg. 37,074 (referring to the Technical Support Document). The Report is a scientific review and does not set forth legal standards for the Clean Water Act jurisdiction. TECHNICAL SUPPORT DOCUMENT, *supra* note 167, at 2. Rather, it summarizes current scientific understanding of the connections and functions by which small or temporary streams exert an influence on the chemical, physical, or biological integrity of waters protected by the CWA. *Id.* at 12.

188. Robert L. Glicksman & Matthew R. Batzel, *Science, Politics, Law and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J.L. & POL’Y 99, 105 (2010).

189. TECHNICAL SUPPORT DOCUMENT, *supra* note 167, at 158. The definition of “adjacent” is important, for example, because where “adjacent” waters are determined affects the beginning of “other waters” that require a case-specific evaluation of jurisdiction.

190. *Id.* at 66.

a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate.¹⁹¹

Therefore, the preamble and Technical Support documents are essential to understanding how the Agencies aligned contributions and limitations from five primary sources for explanation and implementation of the CWA: the statute itself, peer-reviewed science, case law, public input, and agency experience and expertise.¹⁹²

V. CONCLUSION

As all of the opposition and criticism may attest, the Rule is not perfect. But it is legally and scientifically sound, and it is essential to maintaining clean water in America. The language of the rule itself provides the necessary clarifications that were sought by Congress and hundreds of stakeholders alike. The issues posed by the Rule arising under the CWA will likely be settled soon by the Supreme Court, and will hopefully be implemented, making America's waters great again.

191. Clean Water Rule, 80 Fed. Reg. 37,058.

192. *Id.* at 37,064–65.

The “Charitable” Privilege: Evaluating the Status of Property Tax Exemptions for Institutions of Purely Public Charity in Pennsylvania

Rebecca L. Traylor*

ABSTRACT

Pennsylvania has historically exempted institutions of purely public charity from paying property taxes, though that practice is currently under fire from critics who argue many charities no longer warrant this exemption. Adding to this tension is a struggle between the Pennsylvania General Assembly and Pennsylvania Supreme Court over who has the power to define “institutions of purely public charity,” which has culminated in the introduction of Senate Bill 4, a proposed constitutional amendment which purports to give that power solely to the legislature. This article explores the evolution of institutions of purely public charity in Pennsylvania and explores the arguments surrounding Senate Bill 4. Additionally, the article particularly explains how Senate Bill 4 is contradictory to the intent of the original constitutional provision regarding institutions of purely public charity, which was intended to limit legislative abuse. The article also briefly describes problems of lost revenue due to property tax exemptions and concerns that many tax-exempt organizations no longer warrant that status, and concludes by exploring various measures that can be adopted to limit the existing criteria defining which institutions qualify as purely public charities.

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* Rebecca L. Traylor is a 2017 J.D. candidate at Duquesne University School of Law. She graduated from the University of Pittsburgh, *summa cum laude*, in 2011 with a B.A. in Political Science. The author would like to thank Dean Emeritus and Professor of Law Nicholas Cafardi for his helpful insights. All errors and opinions expressed herein are the author’s own.

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I. INTRODUCTION

For the last several years, there has scarcely been an issue more widely worried about, complained about, or debated about than money. With the economy arguably not what it once was, both individuals and local governments are finding new ways to raise money and to save money. One hotly contested avenue to do so has been to question the tax-exempt status of charities and other non-profits, many of which have historically been property tax-exempt. In Pennsylvania, which is home to numerous large charitable organizations that could potentially be liable for several million dollars if their tax-exempt statuses were to be revoked, these challenges mean a great deal. Complicating the issue even further is the growing concern that many of these charitable organizations are no longer actually “charitable,” and therefore no longer warrant their charitable tax-exempt status. Consequently, the law of charitable property tax exemptions in Pennsylvania today is in quite a precarious position.

According to the Pennsylvania Constitution, “[t]he General Assembly *may* by law exempt from taxation . . . [i]nstitutions of purely public charity.”¹ Early case law contemplated these institutions of purely public charity as those entities possessing eleemosynary characteristics,² giving more gratuitously than for a price, and reserving no private or pecuniary return.³ A basic premise of taxation is that “[t]axes are not penalties, but are contributions which all inhabitants are expected to make . . . for the support of the manifold activities of government.”⁴ Therefore, institutions of purely public charity are exempted from making tax contributions because the charitable entity is providing a service to the public that the government would otherwise have to provide.⁵ This has been commonly referred to as a “quid pro quo” between the institution and the government.⁶ However, while the charity earns its exemption in part by providing benefits to both society and the government, many organizations that are not charitable also provide benefits to both society and the government.⁷ As a result, Pennsylvania courts have continually clarified that institutions do not qualify for tax exemptions merely because they have good intentions.⁸

In the last several years, there has been a heated public debate over exactly what kinds of charitable institutions should qualify for tax exemptions.⁹ One major concern that has in part propelled this

1. PA. CONST. art. VIII, § 2(a)(v) (emphasis added).

2. *Young Men’s Christian Ass’n of Germantown v. City of Phila.*, 187 A. 204, 208 (Pa. 1936) (noting the court’s use of the word eleemosynary here means that the institution must have a charitable characteristic not found in private profit institutions).

3. *Trs. of Acad. of Protestant Episcopal Church v. Taylor*, 25 A. 55, 56 (Pa. 1892).

4. *YMCA of Germantown*, 187 A. at 210.

5. *Id.* In this early case, the court generally reasoned that “the exemption from taxation of institutions of public charity is founded on the fact that such a charity is assuming a share of the public burden.” *Id.* When an institution gives gratuitously, it relieves the government of some of its responsibilities. *See generally id.*

6. *Id.* (explaining the general idea that “[a]ny institution which by its charitable activities relieves the government of part of this burden is conferring a pecuniary benefit upon the body politic, and in receiving exemption from taxation it is merely being given a ‘quid pro quo’ for its services in providing something which otherwise the government would have to provide”).

7. *City of Wash. v. Bd. of Assessment Appeals of Wash. Cty.*, 704 A.2d 120, 126 (Pa. 1997) (Nigro, J., dissenting) (explaining that while many charitable institutions are valuable to society, many private entities are as well, and “[i]t does not logically follow that they are charitable”).

8. *See Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1316 (Pa. 1985) (explaining that mere non-profit status does not mandate exemptions from taxation); *YMCA of Germantown*, 187 A. at 211 (stating that “[e]ven the most praiseworthy institutions must expect to support the government by paying taxes when it engages in commercial activities no matter how it uses the net proceeds of such activities”).

9. PA. DEP’T OF THE AUDITOR GEN., *A Special Report: A Review of Potential Lost Revenue Due to Property Tax Exemptions* (Dec. 2014), http://www.paauditor.gov/Media/Default/Reports/RPT_PropTaxExemptions_12182014_LGW2_Final2.pdf (“Pennsylvania is at a major

scrutiny is that increasingly “cash-strapped” municipalities are losing out on millions of dollars of revenue because tax-exempt organizations own so much of the real estate in the cities in which they are located.¹⁰ In Pennsylvania, this issue is exacerbated by the fact that the state is a hotbed for institutions of higher education and massive hospital systems, both of which have historically been tax-exempt.¹¹ Furthermore, there is a concern that the tax-exempt institutions that own this real estate look less like eleemosynary entities that give gratuitously and more like large for-profit corporations.¹² Critics of some of these tax-exempt institutions argue that the institutions, among other things, no longer offer many free services;¹³ generate huge profits not properly invested back into the

crossroads in the decades-long debate over how to define and review the property-tax exempt status of nonprofit organizations.”); *Property Tax Exemptions Cost County Millions*, ALLEGHENY CTY. CONTROLLER CHELSA WAGNER’S TAXPAYER ALERTS (June 2012), <https://www.alleghenycontroller.com/admin/attachments/uploads/4441211ControllerChelsaWagnerTaxpayerAlertPropertyTaxExemptions.pdf> (“After decades of local governments in Pennsylvania questioning the tax exempt status of certain organizations, the question remains, ‘are these exemptions fair? In these challenging financial times, it is our duty and responsibility to address [these] questions.’”).

10. See PA. DEPT OF THE AUDITOR GEN., *supra* note 9. This report, released by the Pennsylvania Auditor General, provides taxpayers with data on “potential tax revenue from properties that are currently exempt from property taxes” in light of the mounting financial challenges facing counties, municipalities and school districts. *Id.* Table 2 shows that the total potential property tax liability for tax exempt properties in 2014, for example, is: \$619,732,732 in Allegheny County; \$164,500,125 in Bucks County; \$138,310,233 in Dauphin County; and \$75,478,602 in Erie County. *Id.* The tax-exempt properties considered by this chart include government owned properties, K–12 schools, churches, charitable organizations, hospitals, and higher education institutions. *Id.*

11. See generally *id.* For example, Table 3 also shows the total potential property tax liability for medical facilities with purely public charity status in 2014. *Id.* Those totals amount to: \$76,124,321 for Allegheny County; \$15,557,615 for Bucks County; \$16,512,001 for Dauphin County; and \$7,181,931 for Erie County. *Id.* See also *infra* notes 27 and 28.

12. See Loren D. Prescott, Jr., *Pennsylvania Charities, Tax Exemption, and the Institutions of Purely Public Charity Act*, 73 TEMP. L. REV. 951–952 (2000) (noting the recent aggressive challenges to many tax-exempt charities in Pennsylvania and how there is a “public perception of most charities as wealthy”); Natasha Lindstrom, *Nonprofit tax break proposal in Pennsylvania divisive*, TRIBLIVE NEWS (Apr. 5, 2015), <http://triblive.com/news/allegheny/8091700-74/pennsylvania-nonprofits-amendment#axzz3nYZN35sE> (quoting City Controller Michael Lamb as stating “Pittsburgh is now home to mega nonprofits that look more like corporate empires than social service providers”); Chris Potter, *Views on taxing nonprofits aired at hearing on proposed Senate bill*, PITTSBURGH POST-GAZETTE (Mar. 13, 2015), <http://www.post-gazette.com/news/state/2015/03/13/Views-on-taxing-nonprofits-aired-at-hearing/stories/201503120217> (quoting City Controller Michael Lamb as stating “[t]here is a big difference between the community food bank ... and the corporate land bank that continues to take properties off our tax rolls”).

13. Elisabeth Rosenthal, *Benefits Questioned in Tax Breaks for Nonprofit Hospitals*, N.Y. TIMES (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/us/benefits-questioned-in-tax-breaks-for-nonprofit-hospitals.html?_r=1 (quoting John D. Colombo, a professor of tax law at the University of Illinois Urbana–Champaign, who stated that “[t]he standard nonprofit hospital doesn’t act like a charity any more than Microsoft does—they also give some stuff away for free,” but that the hospital’s primary purpose is to provide health care for a fee).

company’s charitable purpose;¹⁴ and pay their executives exorbitant sums of money.¹⁵ In essence, the argument is that many of these “charitable” institutions are hardly distinguishable from the for-profit companies that they compete with.¹⁶

The issue of charitable tax exemptions has also become a major source of tension between the Pennsylvania Supreme Court and the General Assembly, specifically regarding who has the final say on defining “institutions of purely public charity.”¹⁷ In response to *Mesivtah Eitz Chaim of Bobov, Incorporated v. Pike County Board of Assessment Appeals*, a Pennsylvania Supreme Court decision clarifying that organizations must meet the court’s definition of “institutions of purely public charity” before considering any criteria enacted by the General Assembly,¹⁸ the Pennsylvania Legislature proposed a constitutional amendment designed to give it the sole power to determine the criteria for institutions of purely public charity.¹⁹ Supporters of the proposed amendment, Senate Bill 4, believe that the amendment will eliminate the purported confusion caused by using the court’s criteria and will allow for more consistency and clarity in determining which organizations qualify as institutions of purely public charity.²⁰ However, those against the amendment

14. *Id.* (discussing the argument that most hospitals are not providing the value of their tax exemptions in community benefit and the low average percent of operating costs spent on charity care and community benefit by hospitals).

15. Matt Krupnick & Jon Marcus, *Think university administrators’ salaries are high? Critics say their benefits are lavish*, HECHINGER REP. (Aug. 5, 2015), <http://hechingerreport.org/think-university-administrators-salaries-are-high-critics-say-their-benefits-are-lavish/> (discussing the practice that university presidents and top administrators receive high salaries, receive housing allowances, and receive other perks such as cars and club dues paid for).

16. See Prescott, *supra* note 12 and accompanying text.

17. Compare *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 9 (Pa. 2012) (holding that an entity must first establish that it is an “institution of purely public charity” under the test established by the Pennsylvania Supreme Court before considering any statute in place by the legislature), with S.B. 4, P.N. 347, Session of 2015 (Pa. 2015) (proposing a constitutional amendment that would change the Pennsylvania Constitution to read “[t]he General Assembly may, by law . . . [e]stablish uniform standards and qualifications which shall be the criteria to determine qualifications as institutions of purely public charity”). See also Chris Potter & Rich Lord, *Pennsylvania bill debates definition of taxable charities*, PITTSBURGH POST-GAZETTE (Mar. 30, 2015), <http://www.post-gazette.com/news/state/2015/03/30/Pennsylvania-Senate-Bill-4-debates-definition-of-taxable-charities/stories/201503300012> (discussing the history of granting tax exemptions in Pennsylvania and the roles of the courts and the legislature in deciding questions of tax exemptions).

18. See *Mesivtah*, 44 A.3d at 9.

19. See S.B. 4, P.N. 347, Session of 2015 (Pa. 2015).

20. Rich Lord, *Proposed Pennsylvania tax-exemption amendment stalls*, PITTSBURGH POST-GAZETTE (Mar. 27, 2015, 12:00 AM), <http://www.post-gazette.com/news/state/2015/03/27/Proposed-Pennsylvania-tax-exemption-amendment-stalls/stories/201503270175> (discussing the argument made by nonprofits—supporters of the amendment—that they want clear standards and clarity to prevent frivolous challenges to their tax-exempt status).

worry that it will expand the legislature's power and make it easier for organizations to qualify for charitable tax exemptions.²¹ Possibly even more worrisome is the proposed amendment's potential infringement on the doctrine of separation of powers, which prohibits the legislature from interfering with the court's role in interpreting the constitution.²²

Part II of this comment will explore the evolution of what it means to be an institution of purely public charity in Pennsylvania. Part III will explain the arguments surrounding the proposed constitutional amendment, Senate Bill 4. Additionally, Part III will explain how the proposed amendment is contradictory to the intent of the original constitutional provision regarding institutions of purely public charity, which was intended to limit legislative abuse in granting tax exemptions. Part IV will briefly explain the problem of lost revenue due to property tax exemptions and explore the concern that many tax-exempt organizations no longer warrant charitable exemptions, and the arguments against those concerns. Finally, Part V will explore various measures that the Pennsylvania Legislature can adopt to limit the existing criteria defining which institutions qualify as purely public charities, as part of an effort to prevent institutions from qualifying for tax exemptions merely because they have good intentions.

II. THE EVOLUTION OF "INSTITUTIONS OF PURELY PUBLIC CHARITY" IN PENNSYLVANIA

A. *The Early Practice of Exemption by Special Legislative Grant*

The concept of granting tax exemptions to charitable organizations has existed in Pennsylvania for over one hundred years.²³ Before the Pennsylvania Constitution of 1874, tax exemptions were

21. For example, "municipal officials, employees of taxing districts such as schools, and those who believe large nonprofits such as hospital systems and universities should pay taxes when they behave more like for-profits than charities[] fear the Legislature would curtail their ability to challenge tax exemptions," which would ultimately disadvantage local economies. *Id.*

22. *See generally Mesivtah*, 44 A.3d at 7. "While the General Assembly necessarily must attempt to interpret the Constitution in carrying out its duties, the judiciary is not bound to the legislative judgment concerning the proper interpretation of constitutional terms." *Id.* (internal quotation omitted). "The General Assembly cannot displace [the Pennsylvania Supreme Court's] interpretation of the Constitution because 'the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court.'" *Id.* (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 948 (Pa. 2006)).

23. *See generally White v. Smith*, 42 A. 125 (Pa. 1899); *Donohugh's Appeal v. The Library Co. of Phila.*, 86 Pa. 306 (Pa. 1878). These are examples of early cases where the Pennsylvania Supreme Court decided issues of charitable tax-exemptions.

conferred by special legislative grants to property owned by hospitals, religious groups, educational institutions, and other private and corporate organizations.²⁴ Because the Pennsylvania Legislature could grant an exemption to any property it wanted, those special grants often resulted in favoritism, whereby exemptions were granted to some properties and not to others.²⁵ While a large majority of the exemptions granted went to true charities, as the Pennsylvania Supreme Court noted in *Donohugh’s Appeal*, “[s]ome of these were, at best, only private charities, and some of them . . . were not charities at all, but mere trading corporations for private and individual profit.”²⁶ This practice ceased, however, after the Pennsylvania Constitution of 1874 passed, which declared that tax exemptions should instead only be allowed by general law,²⁷ and when the Act of 1874 later specified for which particular classes of property.²⁸ As the court in *Donohugh’s Appeal* explained, this restriction on the power to grant tax exemptions evidenced the resolve

24. *Donohugh’s Appeal*, 86 Pa. at 311–12. In *Donohugh’s Appeal*, the court explains the history of charitable tax exemptions in Pennsylvania and notes that the state legislature passed one hundred and thirty acts between 1850 and 1873 exempting private or corporate property from taxation that fell into the following categories: institutions of public benevolence for the poor; hospitals; literary, scientific and educational institutions; religious churches and parsonages; cemeteries or burial places; military institutions; institutions of private benevolence; and those other miscellaneous or doubtful cases. *Id.*

25. *Id.*; see also *White*, 42 A. at 125. The court in *White* stated that “[p]revious to the constitution and Act of 1874, the legislature, by special act, relieved from taxation just what property it saw fit, whether the property was charitable, religious, or even devoted solely to purposes of corporate or private gain.” *Id.* “The legislative habit had grown into a great abuse.” *Id.*

26. *Donohugh’s Appeal*, 86 Pa. at 311 (using cemeteries as an example). Moreover, Pennsylvania politics during the period leading up to the adoption of the Pennsylvania Constitution of 1874 was notorious for being corrupt. Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 187, 190 (1993). Most of the legislation enacted during this time was special legislation, which resulted in a “[g]overnment . . . corrupted by the ‘blight of special legislation which like a black mold spread its mycelium beneath the political surface.’” *Id.* Furthermore, during this period, “[t]he concentration of money held by private, powerful corporations exerted a disproportionate, if not all-consuming, influence on the legislature.” *Id.* at 186. The legislature often sacrificed the public interest for private or personal interests. *Id.*

27. *Donohugh’s Appeal*, 86 Pa. at 308. In *Donohugh’s Appeal*, the court states: Article 9, section 1, of the new constitution of Pennsylvania [of 1874] declares “[a]ll taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit[,] and institutions of purely public charity.”

Id.

28. *Id.* at 308–309. The court notes:

The Act of May 14th 1874, Pamph. L. 158, passed to carry into effect this constitutional provision, provides that “all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed, necessary for the oc-

to abolish the favoritism that resulted from special legislation and to put "a limit upon the legislative power to exempt which was before unlimited."²⁹ Furthermore, by abolishing exemptions by special legislation, courts could only determine if a property qualified for a tax exemption as an institution of purely public charity by undertaking the difficult task of looking to the particular facts of the case.³⁰

B. *The Pennsylvania Supreme Court Fashions the HUP Criteria*

While the Pennsylvania Constitution of 1874 and Act of 1874 laid a framework for the law on charitable tax exemptions, neither defined "institution of purely public charity," and certain criteria, at times conflicting, later developed through case law.³¹ In a landmark charitable tax exemption case decided in 1985, *Hospital Utilization Project v. Commonwealth* ("*HUP*"), the Pennsylvania Supreme Court chronicled the various criteria Pennsylvania courts had used over the past one hundred years to define institutions of purely public charity.³² For example, early case law required that the benefits resulting from a charitable institution's acts must go to the public, and that the institution could reserve no private or pecuniary return.³³ Additionally, Pennsylvania courts had also held that "[w]hat is 'given' must be more nearly gratuitous than for a price" and that a charitable organization must render services to those that are "legitimate subjects of charity."³⁴ Further, in *HUP*,

cupancy and enjoyment of the same; all burial-grounds not used or held for private or corporate profit; all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity" together with public school-houses, court-houses, jails, &c., are hereby exempted from all and every county, city, borough, road, and school tax, with a proviso that the exemption shall not extend to property not in actual use for the purposes specified, and from which any income or revenue is derived.

Id.

29. *Id.* at 312; see also *White*, 42 A. at 125–26. Furthermore, because the Pennsylvania Constitution of 1874 "was drafted in an atmosphere of extreme distrust of the legislative body and of fear of the growing power of corporations . . . [l]egislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution." Marritz, *supra* note 26, at 191.

30. *White*, 42 A. at 126.

31. See *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1312–14 (Pa. 1985); see also *White*, 42 A. at 126 (stating that "the varying facts presented by the different cases resulted in apparently conflicting legal conclusions as to the application of the designation [of purely public charity]").

32. *HUP*, 487 A.2d at 1312–17.

33. *Id.* at 1312–13 (citing *Episcopal Acad. v. Phila.*, 25 A. 55, 56 (Pa. 1892)).

34. *Id.* at 1313–14 (quoting *Young Men's Christian Ass'n of Germantown v. City of Phila.*, 187 A. 204, 208 (Pa. 1936)).

the court also mentioned the idea of the “quid pro quo” and that “[t]he measure of an institution’s gratuitous aid to those requiring it is the measure by which the government is relieved of its responsibilities.”³⁵

In *HUP*, the court’s analysis of the historical considerations used to determine if an organization qualified as an institution of purely public charity resulted in a new, five-part definition which succinctly captured the above-mentioned characteristics.³⁶ Under the *HUP* definition, an entity qualifies as an “institution of purely public charity” if it:

- (a) Advances a charitable purpose;
- (b) Donates or renders gratuitously a substantial portion of its services;
- (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
- (d) Relieves the government of some of its burden; and
- (e) Operates entirely free from private profit motive.³⁷

Following *HUP*, these five criteria became the test for determining institutions of purely public charity.³⁸

The court’s analysis in the *HUP* case provides an excellent example of the application of the new criteria.³⁹ In *HUP*, the court explained that plaintiff, Hospital Utilization Project (“HUP”), a health record data processing company challenging the denial of its tax-exempt status,⁴⁰ was not charitable because: its mission to reduce operating costs at hospitals was not a gift to the general public;⁴¹ HUP did not donate or render gratuitously any of its services because all of its clients paid fees approximating the actual costs of

35. *Id.* at 1314 (quoting *YMCA of Germantown*, 187 A. at 210).

36. *Id.* at 1317.

37. *Id.*

38. *See* *Guthrie Clinic v. Sullivan Cty. Bd. of Assessment Appeals*, 898 A.2d 1194, 1198 (Pa. Commw. Ct. 2006) (stating generally that an institution must first demonstrate that it is a purely public charity by meeting the test set forth in *HUP*).

39. *HUP*, 487 A.2d at 1317–19.

40. *Id.* at 1307–08.

41. *Id.* at 1317. HUP is an organization, created by an association of hospitals, which prepares statistical abstracts of patient medical record data upon their discharge and provides the information to participating hospitals so that each institution can compare its statistics to those of other hospitals. *Id.* at 1309. HUP is not “charitable” in the legal sense,” and therefore failed to advance a charitable purpose. *Id.* at 1315.

the services;⁴² and the hospitals and health care facilities that HUP serviced were not legitimate subjects of charity.⁴³ Additionally, the court concluded that HUP was not relieving the government of a burden because the type of research service it provided was not typically undertaken by the government⁴⁴ and, also, that HUP was not operating entirely free from private profit motive because its officers and directors were well-paid and the company generated a profit that it invested back into its operation.⁴⁵ As a result of these findings, the court held that HUP was not entitled to a property tax exemption as an institution of purely public charity.⁴⁶

After the *HUP* criteria were established, many charitable organizations and local governments were uncertain about which entities still qualified as tax-exempt institutions of purely public charity.⁴⁷ Some commentators noted how the court's definition of "institution of purely public charity" after *HUP* established a "set of requirements more detailed and certainly less flexible than the approach previously used by the courts,"⁴⁸ which created confusion and resulted in increased litigation.⁴⁹ One reason in particular the *HUP* criteria may have been considered less flexible is because it became the only way of identifying institutions of purely public charity, from a test that "condense[d] over one hundred years of case

42. *Id.* at 1317. The court noted that because clients must pay fees in order to receive the statistical reports, HUP's "operation is devoid of the eleemosynary characteristics generally associated with charitable organizations." *Id.* HUP therefore failed to donate or render gratuitously a substantial portion of its services. *Id.*

43. *Id.* The hospitals and health care facilities that HUP services are administrative entities, and are the ones who benefit from HUP's services by being able to cut operating costs after comparing what they do to other facilities. *Id.* Therefore, "[a]ny benefit to the sick or infirm is secondary and incidental. In this context, hospitals and health care services, some of which are operated for profit, do not fall within the genre of the poor, incapacitated, distressed or needy." *Id.* HUP therefore failed to benefit a substantial and indefinite class of persons who are legitimate subjects of charity. *Id.*

44. *Id.* at 1317 n.10. HUP therefore failed to relieve the government of some of its burden. *Id.*

45. *Id.* at 1317-18. In its analysis, the court also explained that "[i]n many respects it is difficult to distinguish HUP from any other commercial enterprise." *Id.* at 1318. HUP therefore failed to operate entirely free from private profit motive. *Id.* at 1317-18.

46. *Id.* at 1318.

47. See Prescott, *supra* note 12, at 957 (discussing generally the aftermath of the *HUP* decision); Patrick Sullivan, *Pennsylvania's Property Tax Exemption Might Go to Voters*, NONPROFIT TIMES (Sept. 13, 2013), <http://www.thenonproffitimes.com/news-articles/pennsylvanias-property-tax-exemption-might-go-to-voters/> (explaining the "climate of uncertainty" surrounding tax exemption determinations and that the *HUP* test did not give organizations any guidance on how to meet or adhere to the criteria).

48. Prescott, *supra* note 12, at 957.

49. *Id.* See also Andy Carter, *PA History Shows the Wisdom of SB 4 and Nonprofit Tax Exemptions*, HOSP. AND HEALTHSYSTEM ASS'N OF PA. (Mar. 13, 2015), <https://www.haponline.org/Newsroom/Blog-Postings/ID/879/PA-History-Shows-the-Wisdom-of-SB-4-and-Nonprofit-Tax-Exemptions>.

law[.]”⁵⁰ Additionally, the resulting confusion was due in part to different courts in different parts of the state interpreting the *HUP* criteria differently and therefore ruling differently.⁵¹ This consequently resulted in increased litigation, as is exemplified by The Hospital and Healthsystem Association of Pennsylvania’s (“HAP”) claim that “Pennsylvania courts presided over at least 20–25 ongoing legal challenges between *hospitals* and political subdivisions” alone.⁵²

C. *The Pennsylvania Legislature Institutes Act 55*

In recognition of the increasing confusion⁵³ and concern over the inconsistent application of the *HUP* criteria,⁵⁴ the Pennsylvania Legislature passed the Institutions of Purely Public Charities Act 55 (“Act 55”) in 1997.⁵⁵ Act 55 set much more detailed legislative standards for determining the eligibility of institutions of purely public charity, which could be applied uniformly throughout the state, thereby eliminating the inconsistent application of the *HUP* criteria, confusion among both the courts and the institutions themselves, and increased litigation stemming from the issue.⁵⁶ Similar to the five *HUP* criteria, Act 55 also included sections regarding charitable purpose,⁵⁷ private profit motive,⁵⁸ community service,⁵⁹ charity to persons,⁶⁰ and government service,⁶¹ as the basis for its new detailed criteria for “institutions of purely public charity.”

However, while Act 55 principally reiterated and expanded upon the *HUP* criteria, it also noticeably “relaxed some of the requirements for meeting the HUP Test.”⁶² In particular, Act 55 broadened

50. Prescott, *supra* note 12, at 957.

51. Carter, *supra* note 49.

52. *Id.* (emphasis added).

53. Institutions of Purely Public Charity Act, 10 PA. CONS. STAT. § 372(a)(4) (1997) (“(a) Findings . . . (4) Lack of specific legislative standards defining the term ‘institutions of purely public charity’ has led to increasing confusion and confrontation among traditionally tax-exempt institutions and political subdivisions to the detriment of the public.”).

54. *Id.* § 372(a)(5) (“(a) Findings . . . (5) There is increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which may violate the uniformity provision of the Constitution of Pennsylvania”).

55. *Id.* §§ 371–385.

56. *Id.* § 372(b).

57. *Id.* § 375(b) (“The institution must advance a charitable purpose.”).

58. *Id.* § 375(c) (“The institution must operate entirely free from private profit motive.”).

59. *Id.* § 375(d)(1) (“The institution must donate or render gratuitously a substantial portion of its services.”).

60. *Id.* § 375(e)(1) (“The institution must benefit a substantial and indefinite class of persons who are legitimate subjects of charity.”).

61. *Id.* § 375(f) (“The institution must relieve the government of some of its burden.”).

62. PA. DEP’T OF THE AUDITOR GEN., *supra* note 9, at 2. As explained below, this creates tension between the Pennsylvania Supreme Court and the Pennsylvania Legislature. *Id.*

prong (b) of the *HUP* test, that an institution “donate[] or render[] gratuitously a substantial portion of its services,” and prong (e), that it “[o]perate[] entirely free from private profit motive.”⁶³ For example, in *HUP*, the court explained that the determination of whether an organization satisfies the requirement that it donate or render gratuitously a substantial portion of its services is made by looking at the facts and circumstances of each case.⁶⁴ Yet, Act 55 implemented a bright-line test, allowing organizations to satisfy this prong by meeting “safe harbor” standards, such as only maintaining an open admissions policy or by simply offering some services at no charge to some portion of those served by the organization.⁶⁵ Additionally, Act 55 also significantly broadened the issue of compensation of officers, directors, and employees by requiring only that compensation may not be “based *primarily* on the financial performance of the institution[,]”⁶⁶ giving organizations substantial flexibility in creating compensation packages to reward executives and employees based on the financial performance of the institution.⁶⁷ Similarly, Act 55 ignored factors sometimes considered by courts when evaluating private profit motive, such as large advertising budgets or non-competition agreements, which are traditional markers of for-profit institutions.⁶⁸

The differences in criteria generate the issue of which definition of “institution of purely public charity” is supreme. *Id.*

63. *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985); *see also* 10 PA. CONS. STAT. § 375(c)–(d) (1997).

64. *HUP*, 487 A.2d at 1315 n.9. In this footnote, the court explains that:

Whether or not the portion donated or rendered gratuitous is “substantial” is a determination to be made based on the totality of circumstances surrounding the organization. The word “substantial” does not imply a magical percentage. It must appear from the facts that the organization makes a bona fide effort to service primarily those who cannot afford the usual fee.

Id. *See also* Prescott, *supra* note 12, at 964–66.

65. Prescott, *supra* note 12, at 966–71, 996–97. By offering a generous bright-line test instead of looking to the facts and circumstances of each case to determine if an institution is donating or rendering gratuitously a substantial portion of its services, the legislature expanded the opportunities for institutions to qualify. *Id.*

66. 10 PA. CONS. STAT. § 375(c)(3) (1997) (emphasis added).

67. Prescott, *supra* note 12, at 993 (requiring no close scrutiny of executive compensation, it is possible “[t]hat a charitable institution would commit resources otherwise available for charitable purposes to a business use such as executive compensation . . . leav[ing] some wondering about the current distinction between charities and commercial enterprise”).

68. *Id.* at 999–1001. *See also* Sch. Dist. of Erie v. Hamot Med. Ctr., 602 A.2d 407, 410–15 (Pa. Commw. Ct. 1992) (affirming the trial court’s conclusion that the organization had a private profit motive). In *Hamot*, the court found evidence of private profit motive, in part because “Hamot spent in excess of one million dollars in advertising in the 1987 fiscal year, over \$800,000 in the 1988 fiscal year and almost \$700,000 for the 1989 fiscal year” and further because “[i]ts community relations department is staffed by eleven persons and operates on an annual budget of over half a million dollars.” *Id.* at 411. *See also* Pinnacle Health Hosps. v. Dauphin Cty. Bd. of Assessment Appeals, 708 A.2d 1284, 1295 (Pa. Commw. Ct. 1998) (concluding that non-competition clauses are evidence of private profit motive).

As a result, Act 55 sharply divided those in favor and those against the new legislative standards. Proponents of Act 55 applauded the legislature, believing the bill provided clearer standards that could be uniformly applied, thus resulting in fewer disputes over an organization’s tax-exempt status⁶⁹ and providing the issue of charitable tax exemptions with much-needed stability.⁷⁰ Conversely, opponents of Act 55 maintained that the bill’s relaxed requirements resulted in an overall lenient test, under which almost any organization could qualify.⁷¹ Notably, among the proponents of Act 55 were organizations such as the University of Pittsburgh Medical Center (“UPMC”), HAP, and the Pennsylvania State Alliance of YMCAs, which would benefit from a more lenient test, as opposed to those against Act 55, such as the local government taxing authorities.⁷² Consequently, the issue of charitable tax exemptions was in flux and courts were left to grapple between the Pennsylvania Supreme Court’s stated *HUP* criteria and the General Assembly’s legislative standards laid out in Act 55.

D. The Pennsylvania Supreme Court Declares the HUP Criteria Controlling in the Mesivtah Case

The tension between the perceived, stricter *HUP* criteria and more lenient Act 55 standards came to a head before the Pennsylvania Supreme Court in 2012 in *Mesivtah Eitz Chaim of Bobov, Inc.*

69. Carter, *supra* note 49. Proponents essentially believed that Act 55 accomplished its mission of reducing the negative consequences of the *HUP* criteria. *Id.* Under Act 55, “[t]he same clear, consistent standards for tax exemption applied to nonprofits across the entire state. Legal disputes about whether an organization should be tax exempt were few. Nonprofits (along with tax payers) were spared the uncertainty and legal costs of lengthy court battles and appeals processes.” *Id.*

70. Sullivan, *supra* note 47 (“[B]efore Act 55, it was a circus trying to operate without any level of predictability . . . Act 55 provided stability and predictability.”).

71. Sean D. Hamill & Jonathan D. Silver, *Ruling ‘Game-Changer’ for Nonprofit Tax Status*, PITTSBURGH POST-GAZETTE (May 2, 2012, 2:54 PM), <http://www.post-gazette.com/business/businessnews/2012/05/02/Ruling-game-changer-for-nonprofit-tax-status/stories/201205020257>. “Act 55 swung the pendulum toward a more lenient test, and everybody who wanted exemptions was very happy about that and everybody who represents taxing authorities was unhappy about that,” said M. Janet Burkardt, an attorney with the Law Offices of Ira Weiss, solicitor for Pittsburgh Public Schools.” *Id.* For example, opponents argued that the fact that exempt-status cases were rarely challenged after the Act passed was actually evidence of Act 55’s leniency. *Id.*

72. See Allegheny County Public Meeting to Discuss Constitutional Amendment on Tax-Exempt Properties, *Public Charities Testimony*, PA. DEPT OF THE AUDITOR GEN. (Mar. 12, 2015), <http://www.paauditor.gov/Media/Default/Misc/FULL%20testimony%20list%20D2.pdf> (including transcripts of testimony of those in favor and opposed to Senate Bill 4, taken at a public meeting discussing the proposed amendment). UPMC is a very large hospital system primarily located in Western Pennsylvania. *UPMC Facts & Stats*, UNIVERSITY OF PITTSBURGH MEDICAL CENTER, <http://www.upmc.com/about/facts/pages/default.aspx> (last visited Dec. 26, 2016).

*v. Pike County Board of Assessment Appeals (“Mesivtah”).*⁷³ In *Mesivtah*, Mesivtah Eitz Chaim of Bobov, Incorporated, a nonprofit religious entity operating a summer camp that primarily offered classes on the Orthodox Jewish faith, appealed the Pike County Board of Assessment’s denial of its request for a charitable exemption from real estate taxes.⁷⁴ A central fact at issue in the case was that while the camp’s facilities were open to the public, no county residents used the facilities.⁷⁵ The trial court also denied the request for an exemption and the Commonwealth Court affirmed, applying the *HUP* criteria and explaining that there was insufficient evidence to prove the camp relieved the county government of some of its burden.⁷⁶

On appeal before the Commonwealth Court, the charitable organization argued that because Act 55 defined “burden relieving” more expansively than the *HUP* test[,]” and because it met the standards set out in Act 55 which was enacted after *HUP*⁷⁷ and which thus displaced the *HUP* criteria,⁷⁸ it did not also need to satisfy the *HUP* criteria.⁷⁹ The county, on the other hand, argued that the *HUP* criteria had been applied even after Act 55’s enactment, and, further, that the doctrine of separation of powers prohibited the General Assembly from interfering with the court’s role in interpreting and defining the constitution—which it believed to be the case with Act 55.⁸⁰ Accordingly, the Pennsylvania Supreme Court was poised to address the conflict between *HUP* and Act 55 by answering definitively whether the General Assembly had the right to influence the constitutional definition of “institution of purely public charity” through its enactment of Act 55.⁸¹

As its answer, the Pennsylvania Supreme Court held that Act 55 does not replace the constitutional minimum set out in the *HUP* case.⁸² More specifically, if an entity meets the constitutional interpretation of purely public charity encompassed by the *HUP* criteria, then it may qualify for an exemption if it also meets Act 55; *but*, if

73. 44 A.3d 3 (Pa. 2012).

74. *Id.* at 5.

75. *Id.*

76. *Id.* This is prong (d) of the *HUP* criteria. See *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985).

77. *Mesivtah*, 44 A.3d at 6.

78. *Id.* at 6–7 (“It claims the *HUP* test was a stopgap measure displaced by the General Assembly’s definition[.]”).

79. *Id.* at 6 (“Appellant argued that it need not satisfy the *HUP* test, since the General Assembly enacted the Institutions of Purely Public Charity Act, 10 PA. CONS. STAT. §§ 371–385 (Act 55), after the *HUP* case was decided.”).

80. *Id.* at 7.

81. *Id.*

82. *Id.* at 9.

an entity does not first qualify for exemption under the *HUP* criteria, then Act 55 does not apply.⁸³ As part of its reasoning in holding the court’s definition controlling over that of the General Assembly, the court pointed out that no part of the Pennsylvania Constitution grants the General Assembly “non-reviewable authority” to decide what does or does not constitute an “institution of purely public charity.”⁸⁴ Furthermore, the court also returned to the idea that the Pennsylvania Constitution of 1874 was intended to limit legislative authority in granting tax exemptions.⁸⁵ The court reasoned that the result of the charitable organization’s argument would be that the General Assembly could then define whatever entity it wanted as an institution of purely public charity,⁸⁶ and that, in essence, would defeat the constitution’s very purpose of limiting legislative authority to grant tax exemptions.⁸⁷

While the majority opinion in *Mesivtah* had resounding significance, Justice Saylor’s dissent also brought up important observations.⁸⁸ A large part of the dissenting opinion focused on the role of the legislature and the court in defining “institution of purely public charity.”⁸⁹ The dissent pointed out that the issue of charitable tax exemptions is a policy-oriented area where “legislative determinations [are] particularly important.”⁹⁰ Consequently, if Act 55 is otherwise in line with the constitution, Justice Saylor believed that the judiciary should defer to its standards, since Act 55 was the result of a reasonable policy-decision to have a more efficient and uniform

83. *Id.* Specifically, the court held that a “party must meet the definition of ‘purely public charity’ as measured by the test in *HUP*” in order “to receive an exemption without violating the Constitution[.]” *Id.* “If it does so, it may qualify for exemption if it meets the statute’s requirements. Act 55, however, cannot excuse the constitutional minimum—if you do not qualify under the *HUP* test, you never get to the statute.” *Id.*

84. *Id.* at 8.

85. *Id.*

86. *Id.*

87. *Id.* The court elaborated, explaining:

Accordingly, Article VIII, § 2 was designed not to grant, but limit, legislative authority to create tax exemptions. To eliminate judicial review of the constitutionality of the General Assembly’s creations would defeat this purpose. The General Assembly could, by statute, define any entity whatsoever as an ‘institution of purely public charity’ entitled to exemption from taxes, returning to the practice the constitutional provision was designed to eliminate. It could create classifications of charities so oblique it would turn § 2 into an exception that swallows the uniformity requirement of Article VIII, § 1. Such a counterintuitive outcome would be contrary to Article VIII, § 2’s purpose of limiting the General Assembly’s ability to grant tax exemptions.

Id.

88. *See id.* at 9–11 (Saylor, J., dissenting).

89. *Id.* at 10.

90. *Id.*

application of the *HUP* criteria.⁹¹ This argument becomes particularly important later on to those in favor of Senate Bill 4—the next critical event in the evolution of institutions of purely public charity in Pennsylvania.

III. THE PROPOSAL OF SENATE BILL 4 AND ITS AFFECT ON THE EVOLUTION OF INSTITUTIONS OF PURELY PUBLIC CHARITY IN PENNSYLVANIA

The Pennsylvania Supreme Court's interpretation of what constitutes an institution of purely public charity now faces a new challenge by way of the introduction of Senate Bill 4.⁹² Senate Bill 4, introduced in early 2013, is a proposed constitutional amendment to give the Pennsylvania Legislature the authority to determine the criteria for "institutions of purely public charity" regarding property tax exemptions.⁹³ The proposed amendment reads,

The General Assembly may, by law . . . [e]stablish uniform standards and qualifications which shall be the criteria to determine qualification as institutions of purely public charity. . . .⁹⁴

Senate Bill 4 was introduced by Senators Mike Brubaker and Joseph Scarnati in reaction to the 2012 *Mesivtah* decision, and is intended to "clarify that it is the *exclusive role* of the General Assembly to write laws providing for the qualifications of institutions of purely public charity."⁹⁵ Though in *Mesivtah* the Pennsylvania Supreme Court was simply engaging in its right to constitutional interpretation, Senate Bill 4's sponsors take issue with how the court elevated its own judgment above that of the legislature, again caus-

91. *Id.* at 11. Justice Saylor pointed out that "specifying additional criteria for each prong" through Act 55 did not "displace this Court's constitutional rulings or the *HUP* test in its entirety. Rather, the General Assembly determined—as a matter of policy—that more refinement was necessary for efficient, uniform application of that test and enacted legislation to serve that goal." *Id.*

92. See S.B. 4, P.N. 347, Session of 2015 (Pa. 2015).

93. *Id.*

94. *Id.*

95. Memorandum from Senator Mike Brubaker and Senator Joseph Scarnati on Purely Public Charities to All Pennsylvania Senate Members (January 28, 2013) [hereinafter Memorandum] (on file with the Pennsylvania State Senate) (emphasis added). This memorandum predates the introduction of Senate Bill 4, and details the proposal of Senators Mike Brubaker and Joseph Scarnati to reintroduce legislation regarding purely public charities (now referred to as Senate Bill 4). *Id.*

ing confusion regarding the criteria for purely public charity status.⁹⁶ Therefore, Senate Bill 4 is meant to preserve the legislature’s role as policymaker and to finally provide certainty in this area of the law.⁹⁷

In Pennsylvania, proposed constitutional amendments must pass two two-year legislative sessions before being added to the general election ballot to be approved by Pennsylvania voters.⁹⁸ Senate Bill 4 passed the 2013–2014 legislative session and passed in the Senate in February 2015, and is now currently being considered by the House Finance Committee.⁹⁹ While there are many procedural obstacles in its path to becoming law, Senate Bill 4’s most formidable obstacle may be the bitter controversy that surrounds it.

Part of this controversy stems from the uncertainty surrounding the bill’s potential impact on the future of charitable property tax exemptions.¹⁰⁰ While the bill gives the General Assembly the power to establish standards for institutions of purely public charity,¹⁰¹ it does not go beyond that and actually establish any standards.¹⁰² In fact, as one news outlet reported, “[t]he uncertainty stems from what the amendment would not do. It would not change the definitions of purely public charities, nor the criteria set by the Legislature through the Institutions of Purely Public Charities Act 55 of 1997.”¹⁰³ The bill would give lawmakers the power to decide what to do next—keep Act 55 as it is, revise it, or develop a new set of standards governing tax exemptions for charitable institutions.¹⁰⁴ Or yet, as one commentator noted, Senate Bill 4 may do nothing, as the Pennsylvania Supreme Court would still be the final arbiter

96. *Id.* (“By elevating its own judgment above the will of the General Assembly, the Court has created uncertainty as to the qualifications for public charities in Pennsylvania. Charitable organizations statewide could have their public charity status called into question based on this decision.”).

97. *Id.* (Senate Bill 4 is “legislation amending the Constitution to preserve the General Assembly’s role as policy maker in area of purely public charities and to provide certainty in this area of the law.”).

98. *Senate Bill 4 and the Determination of Purely Public Charity for PA Nonprofits*, FORBES FUND, <https://forbesfunds.org/state-taxation-issues> (last visited Dec. 28, 2015).

99. *Id.*

100. Lindstrom, *supra* note 12 (“Nobody is really sure what happens if the constitutional amendment passes—does the standard become more restrictive? Less restrictive?” [Auditor General Eugene] DePasquale said. ‘Nobody has any idea.’”).

101. S.B. 4, P.N. 347, Session of 2015 (Pa. 2015).

102. *Id.* The short text of the proposed legislation does not go beyond giving the General Assembly authority to establish standards. *Id.*

103. Lindstrom, *supra* note 12.

104. *Id.*

over the constitutional phrase “purely public charity.”¹⁰⁵ Nevertheless, despite this uncertainty surrounding the bill, there has been no shortage of vehement arguments raised both in favor and against Senate Bill 4 and its supposed consequences.

A. *Arguments in Favor of Senate Bill 4*

Many of the arguments in favor of Senate Bill 4 and the General Assembly’s ability to set criteria for charitable tax exemptions echo those arguments that arose in favor of Act 55.¹⁰⁶ In fact, many of the strongest supporters of Senate Bill 4 include organizations that also supported Act 55, such as UPMC, HAP, and the Pennsylvania State Alliance of YMCAs—the beneficiaries of Act 55’s leniency.¹⁰⁷ Additionally, several of the arguments in favor of Senate Bill 4 seem to be founded in the belief that Act 55 will remain intact, or at least that the climate surrounding charitable tax exemption determinations will be consistent with the lenient climate after Act 55’s passage.¹⁰⁸

For example, supporters of Senate Bill 4 likewise believe that the bill will create,¹⁰⁹ or restore,¹¹⁰ a singular set of criteria that organizations can use to determine if they qualify as an institution of purely public charity or not.¹¹¹ A more detailed, singular set of criteria would result in a more objective and less complicated test, providing the clarity that many argue is absent when using the

105. See PA. DEPT OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Dean Emeritus Nicholas P. Cafardi, Professor of Law at Duquesne University School of Law, on March 12, 2015) (stating that “[i]n our constitutional democracy, there is no such thing as a legislative act that is not able to be interpreted or reviewed by the third branch of government, the judiciary. Nor is there a phrase in the Pennsylvania Constitution that the judiciary cannot interpret”).

106. See Carter, *supra* note 49. Proponents essentially believed that Act 55 accomplished its mission of reducing the negative consequences of the HUP criteria. *Id.* Under Act 55, “[t]he same clear, consistent standards for tax exemption applied to nonprofits across the entire state. Legal disputes about whether an organization should be tax exempt were few. Nonprofits (along with tax payers) were spared the uncertainty and legal costs of lengthy court battles and appeals processes.” *Id.* See also Sullivan, *supra* note 47.

107. PA. DEPT OF THE AUDITOR GEN., *supra* note 72 (including transcripts of testimony of those in favor and opposed to Senate Bill 4, taken at a public meeting discussing the proposed amendment); Lindstrom, *supra* note 12; Lord, *supra* note 20.

108. This observation is based on the fact that support for Act 55 and Senate Bill 4 is largely one and the same in many respects, as is exemplified below. See also Hamill & Silver, *supra* note 71; PA. DEPT OF THE AUDITOR GEN., *supra* note 72 and accompanying text.

109. PA. DEPT OF THE AUDITOR GEN., *supra* note 72 (from the testimony of John W. Paul, President and CEO of Allegheny Health Network, on March 9, 2015).

110. *Id.* (from the testimony of the Pennsylvania State Alliance of YMCAs).

111. *Id.* (from the testimony of John W. Paul, President and CEO of Allegheny Health Network, on March 9, 2015 in support of Senate Bill 4) (“This bill simply aims to provide a law that will create a singular set of criteria, by which nonprofits can use to clearly determine if they need to pay taxes or provide community services.”).

court’s *HUP* test.¹¹² As it was, instituting a singular set of criteria that provided clarity was one of the most celebrated aspects of Act 55.¹¹³ Clarity benefits larger organizations, which have been the most vocal in their support for Senate Bill 4, in addition to smaller organizations with fewer resources.¹¹⁴ This is arguably because by continuing to apply the *HUP* criteria, which offers less guidance, on a case-by-case basis, the criteria will continue to be applied inconsistently across the state.¹¹⁵ Such inconsistency, supporters say, leads to more costly litigation, which in turn results in higher costs for the nonprofit entity and which could then lead to job loss and/or reduced services and benefits.¹¹⁶

Supporters have also argued their support for Senate Bill 4 by showing the negative consequences of *not* adopting it. For example, some supporters maintain that by continuing under the court-imposed *HUP* criteria, nonprofit organizations will continue to face frivolous challenges,¹¹⁷ which they believe will come from the “cash-strapped municipalities . . . using the court system against legitimate nonprofits to fill public coffers.”¹¹⁸ A perceived frivolous challenge to an institution’s tax-exempt status could result in less collaboration between local taxing bodies and nonprofits, and hinder them working together to find solutions to some of the municipalities’ revenue issues.¹¹⁹ Perhaps less persuasive is the Pennsylvania Association of Nonprofit Organizations’ argument in support of Senate Bill 4, which claims that passage of the bill will give them the ability to influence local elected officials to support their

112. See Sullivan, *supra* note 47 (explaining the “climate of uncertainty” surrounding tax exemption determinations and that the *HUP* test did not give organizations any guidance on how to meet or adhere to the criteria).

113. *Id.* (“[B]efore Act 55, it was a circus trying to operate without any level of predictability’ . . . ‘Act 55 provided stability and predictability.’”).

114. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015) (“UPMC believes that a less complicated, more objective test for IPPC status would benefit smaller nonprofits, and particularly community hospitals . . .”).

115. *Id.* (from the testimony of Patricia J. Raffaele, Vice President of Professional Services as Hospital Council of Western Pennsylvania, on March 12, 2015) (“The current scenario—different courts rendering different opinions—is a barrier to clarity and consistency.”).

116. *Id.* Patricia J. Raffaele explained that “[c]ostly court cases, inconsistent decisions and the possibility of paying taxes will lead to continued erosion of our already financially fragile providers, especially in the rural areas of our region.” *Id.* Further, Raffaele noted that “[i]ncreased costs to any healthcare provider can and will lead to lost jobs and reduced community services and benefits relied on by many individuals and their families.” *Id.*

117. Lord, *supra* note 20.

118. Lindstrom, *supra* note 12.

119. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015) (stating that “combative challenges to large nonprofits are less likely to generate good results for local taxing bodies than are invitations to collaboration”).

cause.¹²⁰ Although it is impossible to know if Senate Bill 4 would actually result in these speculated outcomes, the unknown has not stopped supporters from continuing to loudly voice their approval of the bill.

B. Arguments against Senate Bill 4

Much of the criticism surrounding Senate Bill 4 concerns the parties actually behind the bill's introduction, such as UPMC, Highmark, and HAP, repeatedly judged as "mega-charities" that look like for-profit corporations.¹²¹ The Executive Director of Pittsburgh UNITED claimed that these "mega-charities" are supporting the bill because they fear "that some of their practices are threatened in a regulatory environment that asserts the *HUP* test as the qualification for exemptions, and not the more lax standards set out by Act 55."¹²² Consequently, there seems to be a strong belief on both sides that the intent of Senate Bill 4 is to reduce accountability for nonprofit organizations.¹²³ However, those opposed to Senate Bill 4 instead claim that these charities should be held accountable "to the communities that subsidize them" and that when they are not held to a high standard, like the one imposed by the *HUP* criteria, "they burden people instead of lightening their load."¹²⁴ Such an

120. *Id.* (from the written statement of Anne L. Gingerich, Executive Director, Pennsylvania Association of Nonprofit Organizations, on March 12, 2015) (stating that a positive outcome of Senate Bill 4 passing would be that "[n]onprofits could have the ability to influence their local delegation to support their cause"). Notably, this argument in favor of the ramifications of Senate Bill 4 is very reminiscent of the corruption and legislative abuse leading up to the adoption of the Pennsylvania Constitution of 1874. *See White v. Smith*, 42 A. 125 (Pa. 1899).

121. *See Lindstrom, supra* note 12 ("UPMC and Highmark join the Hospital Association of Pennsylvania in supporting SB 4"); PA. DEP'T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Barney Oursler, Executive Director of Pittsburgh UNITED, on March 12, 2015) ("It's no secret the real movers behind amending the constitution to remove judicial oversight of purely public charities are not soup kitchens and small non-profits[.]").

122. PA. DEP'T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Barney Oursler, Executive Director of Pittsburgh UNITED, on March 12, 2015). "Pittsburgh United is a coalition of community, labor, faith, and environmental organizations committed to advancing the vision of a community and economy that work for all people." PITTSBURGH UNITED, <http://pittsburghunited.org> (last visited Apr. 9, 2017).

123. PA. DEP'T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Barney Oursler, Executive Director of Pittsburgh UNITED, on March 12, 2015) (Senate Bill 4 is an "amendment that today strikes me and many others in our community as a constitutionally guaranteed loophole for a few giant not-for-profits"). "[T]he intent and effect of the amendment is clear: to reduce accountability for mega-charities like UPMC." *Id.* (from the testimony of Lois Campbell, Executive Director of Pennsylvania Interfaith Impact Network, on March 12, 2015). "PANO, the organization of nonprofits in PA, has advocated for the amendment on the grounds that by returning us to the more lax regulatory environment of Act 55, charities are better shielded from challenge and accountability." *Id.*

124. *Id.* (from the testimony of Lois Campbell, Executive Director of Pennsylvania Interfaith Impact Network, on March 12, 2015). Lois Campbell also stated that "[w]hen charities

argument is based on the notion that when someone does not pay taxes, everyone else must pay more.¹²⁵ As a result, those opposed to Senate Bill 4 believe that the criteria for charitable tax exemptions should be narrow because tax exemptions are “a privilege, not a right.”¹²⁶

Furthermore, while supporters of Senate Bill 4 believe that its non-adoption will lead to less collaboration between local governments and charitable organizations, it has been suggested that even under Act 55 and prior to *Mesivtah*, negotiations between local governments and large nonprofits were “basically a hat in hand begging exercise.”¹²⁷ It was the *Mesivtah* decision, which affirmed the superiority of the *HUP* criteria, which created a more equal footing for negotiations by giving local governments leverage.¹²⁸ Furthermore, the “explosion of opposition from municipal leaders, unions, police and fire associations, [and] school boards” is based on the worry about the legislature even further broadening the standards for charitable tax exemptions under Senate Bill 4, thus interfering with their ability to challenge tax exemptions.¹²⁹ While the cost of

do not relieve government of burden, when they do not offer a significant portion of their services without charge, when they do not benefit everyone and do not operate entirely free of the private profit motive, . . . they create more problems than they solve.” *Id.*

125. *Id.* (from the testimony of Dean Emeritus Nicholas P. Cafardi, Professor of Law at Duquesne University School of Law, on March 12, 2015). *See also* ALLEGHENY CTY. CONTROLLER CHELSA WAGNER’S TAXPAYER ALERTS, *supra* note 9 (explaining that “[a]s property taxes are the main source of revenue for counties, municipalities, and school districts, exempt property decreases the total available taxable property that can generate revenue for these governments . . . [which] means that nonexempt, taxable properties bear a larger share of the total tax burden”); Daphne A. Kenyon & Adam H. Langley, *The Property-Tax Exemption for Nonprofits and Revenue Implications for Cities*, URBAN INST. 2 (Nov. 2011), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412460-The-Property-Tax-Exemption-for-Nonprofits-and-Revenue-Implications-for-Cities.PDF> (explaining that exempting “nonprofits from property taxation means that homeowners and businesses must bear a greater share of the property tax burden”).

126. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Dean Emeritus Nicholas P. Cafardi, Professor of Law at Duquesne University School of Law, on March 12, 2015). Tax exemptions are a privilege because the Pennsylvania Constitution says that “[a]ll taxes shall be uniform, upon the same class of subjects,” essentially meaning that everyone has to pay taxes. PA. CONST. art. VIII, § 1. An exemption from taxation is a privilege because one does not have to pay a tax that everyone else must pay. *See generally id.*

127. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Michael Lamb, Pittsburgh City Controller, on March 12, 2015) (referring to negotiations for Payments in Lieu of Taxes). Payments in Lieu of Taxes (PILOTs) are voluntary payments made by tax-exempt nonprofits as a substitute for not paying property taxes. Kenyon & Langley, *supra* note 125, at 6. PILOT payments typically result from negotiations between local governments and the individual nonprofit organizations. *Id.*

128. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Michael Lamb, Pittsburgh City Controller, on March 12, 2015) (explaining that, “[a]s a matter of tax fairness, having a more equal footing in this negotiation as provided in the *Bobov* ruling has helped municipalities across the state. It has given leverage where there was none before.”).

129. Lindstrom, *supra* note 12. Such groups argue that such a change would “make it too difficult for municipalities to challenge the status of nonprofits.” *Id.*

increased litigation may be a concern to some,¹³⁰ making it too difficult to challenge the status of so-called “institutions of purely public charity” could be detrimental to local economies. In particular, because non-profits own twenty to forty percent of properties throughout Pennsylvania,¹³¹ limiting a local government’s ability to challenge suspect tax-exempt status could result in a significant amount of lost tax revenue.

One key argument critical of Senate Bill 4 focuses largely on the concern over the power that should be granted to the legislature. Specifically, while the language of Senate Bill 4 indicates that the General Assembly would like to become the “sole arbiter” over the issue of defining “institution of purely public charity,” the legislature simply cannot ignore nor pretend that legislative acts and constitutional phrases will always be subject to judicial review.¹³² Moreover, as those suspicious of the consequences of Senate Bill 4 have explained, “if the intention of the bill is to reinstate Act 55, there is no need to transfer the power from the judiciary to the general assembly.”¹³³ Contrary to arguments in support of Senate Bill 4, transferring power to the legislature could lead to more “uncertainty from one legislative session to the next” and/or an “increased possibility of governmental overreach.”¹³⁴ Consequently, because

130. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Patricia J. Raffaele, Vice President of Professional Services as Hospital Council of Western Pennsylvania, on March 12, 2015).

131. Lindstrom, *supra* note 12.

132. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Dean Emeritus Nicholas P. Cafardi, Professor of Law at Duquesne University School of Law, on March 12, 2015). Dean Cafardi elaborated, explaining:

That authority [to decide what the conditions of tax exemption are] has historically resided with our state’s Supreme Court, as the interpreter of the Pennsylvania Constitution. The General Assembly, however, would like to change the status quo and become the sole arbiter in this case. It would like to set the conditions of tax exemption and say which institutions meet them, with no interference from the courts, and no review by the courts of their actions . . . I think that result would be contrary to the basic principles of our state government. In our constitutional democracy, there is no such thing as a legislative act that is not able to be interpreted or reviewed by the third branch of government, the judiciary. Nor is there a phrase in the Pennsylvania Constitution that the judiciary cannot interpret.

Id. The concept of judicial review refers to the power of a court to make decisions on the validity of an act of the legislature in relation to the Constitution. Edward S. Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639 (1926). The power of judicial review is incidental to the court’s power to hear cases and controversies. *Id.*

133. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of the Greater Pittsburgh Nonprofit Partnership, on March 12, 2015).

134. *Id.* See also Donohugh’s Appeal, 86 Pa. 306, 311 (1878) (explaining that the Pennsylvania Constitution of 1874 establishing exemptions by general law was in part because of the problem that keeping the power in the hands of the legislature meant that “views of successive legislatures might be more or less liberal on the subject,” and this ultimately resulted in legislative abuse).

governmental overreach rings of legislative abuse, we return to a foundational principle of the legislature’s ability to grant charitable tax exemptions as established by the Pennsylvania Constitution of 1874.

C. *Returning to the Concern of Legislative Abuse*

The proposed power to be granted to the Pennsylvania Legislature through Senate Bill 4 is reminiscent of the legislative abuse that the Pennsylvania Constitution of 1874 was designed to curtail.¹³⁵ The court in *Mesivtah* addressed this issue when it noted that:

Article VIII, § 2 was designed not to grant, but limit, legislative authority to create tax exemptions. To eliminate judicial review of the constitutionality of the General Assembly’s creations would defeat this purpose. The General Assembly could, by statute, define any entity whatsoever as an “institution of purely public charity” entitled to exemption from taxes, returning to the practice the constitutional provision was designed to eliminate.¹³⁶

A grant of power on this scale, where the court’s criteria seemingly is taken out of the equation, like that proposed in Senate Bill 4,¹³⁷ could very well result in serious, negative consequences. Historically, leaving exemption determinations up to the General Assembly completely has proven to result in favoritism, whereby some organizations unfairly benefit while others do not.¹³⁸ Under Senate Bill 4, the legislature would be in a position to make entirely discretionary decisions, if there were no check on its power.¹³⁹ Again,

135. See *White v. Smith*, 42 A. 125 (Pa. 1899). “Previous to the constitution and Act of 1874, the legislature, by special act, relieved from taxation just what property it saw fit, whether the property was charitable, religious, or even devoted solely to purposes of corporate or private gain. The legislative habit had grown into a great abuse.” *Id.* During this period “[t]he concentration of money held by private, powerful corporations exerted a disproportionate, if not all-consuming, influence on the legislature. . . . State government was characterized as ‘relatively unfettered state legislatures responding to powerful economic interests.’” Marritz, *supra* note 26, at 186–87. The legislature often sacrificed the public interest for private or personal interests. *Id.*

136. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 8 (2012).

137. S.B. 4, P.N. 347, Session of 2015 (Pa. 2015) (containing language that proposes to instead give the General Assembly the power to establish qualifications for determining institutions of purely public charity).

138. See *Donohugh’s Appeal*, 86 Pa. at 311; *White*, 42 A. at 125.

139. See *Donohugh’s Appeal*, 86 Pa. at 311–12. Prior to the Pennsylvania Constitution of 1874, the legislature granted charitable tax exemptions through special, discretionary, legislative grants. *Id.*

allowing this sort of complete discretion has proven to lead to favoritism.¹⁴⁰ What's more, such a result would likely lead to entities qualifying for charitable tax exemptions from property taxes when they are actually undeserving of that privilege.¹⁴¹ In sum, granting power on the scale proposed and supposed of Senate Bill 4 might essentially mean unlimited power for the General Assembly.¹⁴²

Several present-day facts support this concern that Senate Bill 4 may just lead to that type of legislative abuse. Many of the bill's strongest supporters are very large nonprofit organizations that have a lot of resources and power to devote to promoting their best political interest,¹⁴³ and have absolutely done just that in the past.¹⁴⁴ One news outlet reported on big tax-exempt institutions being "vigorous political players," claiming that, for example, "Highmark's [PAC] spent \$203,000 last year[.] . . . The hospital association's PAC spent \$198,000, and the association spent another \$1.08 million on lobbying. UPMC employees gave at least \$20,000 to the association's PAC, and made at least an additional \$113,000 in donations to other political committees and candidates."¹⁴⁵ Such an investment towards influencing the political agenda¹⁴⁶ is arguably the surest way to be certain that legislation remains (even unfairly) in their favor.¹⁴⁷ And such influence may exacerbate the issue with undeserving exemptions, especially since that was a perceived problem with Act 55¹⁴⁸ and Senate Bill 4 arguably purports to perpetuate Act 55.¹⁴⁹ In particular, Act 55 broadened both prongs (b) and (d) of the *HUP* criteria,¹⁵⁰ and specifically relaxed the pri-

140. See discussion *supra* Part II.A.

141. *Donohugh's Appeal*, 86 Pa. at 311. Prior to the Pennsylvania Constitution of 1874, the legislature granted some charitable tax exemptions to corporations that were profit-motivated and not charitable at all. *Id.*; see also PA. DEP'T OF THE AUDITOR GEN., *supra* note 126 and accompanying text (stating that tax exemptions are "a privilege, not a right").

142. See *Donohugh's Appeal*, 86 Pa. at 311-12 (implying that when there is no restriction or general law otherwise restricting the legislature's power to exempt, that power can be unlimited).

143. See Lindstrom, *supra* note 12. Some of Senate Bill 4's largest supporters are organizations like UPMC, HAP, and Highmark. *Id.*

144. Potter & Lord, *supra* note 17.

145. *Id.*

146. *Id.*

147. Favoritism is a by-product of granting the General Assembly sole power in making tax-exemption determinations. See generally *Donohugh's Appeal*, 86 Pa. at 311.

148. Hamill & Silver, *supra* note 71 and accompanying text.

149. See discussion *supra* Part III.A.

150. See Hosp. Utilization Project v. Commonwealth, 487 A.2d 1306, 1317 (Pa. 1985); 10 PA. CONS. STAT. § 372-385, § 375(c)-(d) (1997).

vate profit motive prong by allowing institutions to spend considerable sums of money on compensation packages and advertising, but still qualify for exemption.¹⁵¹

Yet another fact in support of the belief that Senate Bill 4 may lead to legislative abuse is the plain language of the bill itself,¹⁵² as well as the bill’s supporters’ stated intent to give the General Assembly ultimate authority.¹⁵³ For example, the intent to give the legislature the “exclusive role” in defining “institutions of purely public charity”¹⁵⁴ is arguably equal with intent to give the legislature unlimited authority. Both situations purport to eliminate or reduce the input of the court. This could likely not be the case because, as stated above, the Pennsylvania Supreme Court still has the power of constitutional interpretation over the phrase “institutions of purely public charity,” and it has shown that it can interpret that phrase more narrowly.¹⁵⁵ However, Senate Bill 4 remains troubling because, as history has shown, unlimited legislative power in this area of the law did in fact lead to legislative abuse.¹⁵⁶ As the balance of power between the legislature and the Pennsylvania Supreme Court remains in flux, there are genuine reasons to worry that that could be the case again.

IV. THE DEBATE OVER LOST REVENUE AND UNWARRANTED EXEMPTIONS

The concern over Senate Bill 4, possible legislative abuse, and allowing more supposed charitable institutions to qualify for property tax exemptions is fueled in part by (1) the growing distress over lost revenue due to property tax exemptions and (2) the belief that many organizations no longer warrant exemption.

151. See 10 PA. CONS. STAT. §§ 372–385, § 375(c)(3) (1997) (noting that an institution operates entirely free from private profit motive when “[c]ompensation, including benefits, of any director, officer or employee, is not based *primarily* upon the financial performance of the institution”) (emphasis added); Prescott, *supra* note 12, at 993 (stating that Act 55 wholly broadens the issue of compensation of officers, directors and employees by leaving charities with “considerable flexibility in crafting compensation packages” to reward executives and employees based on the financial performance of the institution).

152. See S.B. 4, P.N. 347, Session of 2015 (Pa. 2015).

153. Memorandum, *supra* note 95. Senate Bill 4 is intended to “clarify that it is the exclusive role of the General Assembly to write laws providing for the qualifications of institutions of purely public charity.” *Id.*

154. *Id.*

155. Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals, 44 A.3d 3, 7–9 (Pa. 2012).

156. White v. Smith, 42 A. 125 (Pa. 1899).

A. *Lost Revenue from Charitable Property Tax Exemptions*

There is a very real concern today that property tax exemptions are causing an increasingly heavy burden to fall on municipalities and taxpayers.¹⁵⁷ One of the strongest arguments behind this concern is that when charitable organizations are granted exemptions from taxation, everyone else must pay more.¹⁵⁸ More specifically, in this scenario, because “property taxes are the main source of revenue for counties, municipalities, and school districts, exempt property decreases the total available taxable property that can generate revenue for these governments. This means that non-exempt, taxable properties bear a larger share of the total tax burden.”¹⁵⁹

What’s more, taxable properties are also burdened with the responsibility of still paying to provide tax-exempt organizations with police protection, fire protection, and other public services.¹⁶⁰ This issue is also further exacerbated by the reality that many tax-exempt organizations are providing services to benefit people *outside* of the areas they are located,¹⁶¹ similar to the problem encountered in *Mesivtah*.¹⁶² For example, two common illustrations of this consequence are the realities that “hospitals normally serve an entire metropolitan area, not a single city; [and] many universities educate students from around the world. Yet the cost of the exemption is borne entirely by the municipality where the nonprofit is located.”¹⁶³ Now, it should be noted that this concern must be balanced against the good these institutions do for the communities

157. See Kenyon & Langley, *supra* note 125, at 2 (explaining that “[f]or cities heavily reliant on the property tax, the exemption of nonprofits from property taxation means that homeowners and businesses must bear a greater share of the property tax burden”). This can be especially concerning during hard economic times and when tax-exempt nonprofits make up a significant portion of a municipality.

158. *Id.* See Young Men’s Christian Ass’n of Germantown v. City of Phila., 187 A. 204, 210 (Pa. 1936) (“When any inhabitant fails to contribute his share of the costs . . . some other inhabitant must contribute more than his fair share of that cost.”).

159. ALLEGHENY CTY. CONTROLLER CHELSA WAGNER’S TAXPAYER ALERTS, *supra* note 9.

160. See YMCA of Germantown, 187 A. 204, 210 (Pa. 1936) (“Every inhabitant and every parcel of property receives governmental protection. Such protection costs money.”); Kenyon & Langley, *supra* note 125, at 2 (noting that “municipalities still need to pay to provide these nonprofits with public services like police and fire protection and street maintenance”).

161. Kenyon & Langley, *supra* note 125, at 8.

162. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 5 (2012).

163. Kenyon & Langley, *supra* note 125, at 8. See also Evelyn Brody, *All Charities are Property-Tax Exempt, but Some Charities are More Exempt Than Others*, 44 NEW ENG. L. REV. 621, 637 (2010) (discussing that a charity benefiting the public does not mean the benefit has to necessarily be geographic). However, such a reality provides a sound argument for the suggestion that the “relieves the government of some of its burden” prong in HUP should refer to the county, city, and schools whose taxes the exempt organization is *not* paying.

they are located in, such as revitalizing or generating other income for the area. Nevertheless, because these are tough economic times for local governments and individuals all around, it is easy to see why residents may be less than willing to continue supporting such large property-tax-exempt institutions.

Residents may be less than willing to continue supporting some of these institutions especially in light of figures which show just how much real estate certain tax-exempt institutions own. Non-profits own approximately “20 to 40 percent of properties located in Pennsylvania cities”¹⁶⁴—quite a substantial amount. Additionally, other research has revealed that tax-exempt properties “account for about \$1.5 billion in untapped tax revenue” across the state.¹⁶⁵ It is important to note that this figure *does* include tax-exempt properties owned by the government, not just properties owned by tax-exempt institutions of purely public charity.¹⁶⁶ Therefore, one must consider that lost revenue due to tax-exempt properties is not entirely because of the tax-exempt status of non-profits.¹⁶⁷ Yet, one can get a sense of just how much the total potential property tax liability may be for institutions of purely public charity by examining medical facilities alone. In a report prepared by the Pennsylvania Department of the Auditor General in 2014, research showed that the total potential property tax liability for medical facilities with purely public charity status in 2014 amounted to over \$177 million for only ten counties in Pennsylvania.¹⁶⁸ As these are considerable amounts of money that the municipalities, and the activities they support, are losing out on, it is no wonder that there has been a much closer weighing of the good these tax-exempt charitable institutions do for the community versus what they cost it.

164. Lindstrom, *supra* note 12.

165. *Id.*

166. *Id.*

167. *Id.* For example, in Allegheny County, the percentage of the total share of potential revenue that could be generated if tax-exempt properties were taxed is: 15.64% for County Government and 8.11% for Municipal Government. ALLEGHENY CTY. CONTROLLER CHELSA WAGNER’S TAXPAYER ALERTS, *supra* note 9, at 2.

168. PA. DEPT OF THE AUDITOR GEN., *supra* note 9, at 7. These ten counties include: \$76,124,321 for Allegheny County; \$2,675,644 for Beaver County; \$15,557,615 for Bucks County; \$16,512,001 for Dauphin County; \$7,181,931 for Erie County; \$6,280,067 for Lackawanna County; \$18,184,315 for Lehigh County; \$9,613,394 for Luzerne County; \$1,149,444 for Monroe County; and \$24,135,955 for Montgomery County. *Id.* These figures include “the sum of county, municipal, and school district taxes for parcels owned by medical facilities.” *Id.*

B. *The Concern That Some Charitable Property Tax Exemptions Are Unwarranted*

Close scrutiny of tax-exempt charities also exists particularly in light of a growing belief that many tax-exemptions are being granted to organizations underserving of them. Historically, there used to be a clearer distinction between for-profit institutions operating under an idea of profit maximization and non-profit institutions, which traditionally were not supposed to generate profits at all.¹⁶⁹ However, “[a]s society has evolved and as charitable segments within the nonprofit sector have modernized, notions of the types of activities that constitute charity have changed.”¹⁷⁰ As such, there is a tendency now for charitable institutions to look less like eleemosynary entities that give gratuitously and more like large for-profit corporations.¹⁷¹

Several characteristics of many of today’s tax-exempt charitable institutions have led to this belief. One consideration is the questionable level of charitable services actually being rendered. For example, research has shown that “uncompensated care provided by nonprofit hospitals for the most part may not be substantially distinguishable from that given by for-profit hospitals.”¹⁷² This means that nonprofit hospitals are not providing substantially more free care than for-profit hospitals. Prong (b) of the *HUP* test, however, would mandate that the charitable organization donate or render gratuitously a *substantial* portion of its services.¹⁷³ One key allegation criticizing the hospital-giant UPMC’s tax-exempt status is that UPMC donates less than two percent of its revenue to needy patients.¹⁷⁴ Another criticism, primarily of hospitals, is based on the acknowledgement that there have been instances of hospitals

169. Nina J. Crimm, *Why All is Not Quiet on the “Home Front” for Charitable Organizations*, 29 N.M. L. REV. 1, 21–23 (1999).

170. *Id.* at 21.

171. For example, in the case of hospitals, “[t]his change may have been fueled in part by the proliferation of mergers, acquisitions, joint ventures and conversions of nonprofit hospitals . . . into for-profits.” *Id.* at 23–24.

172. *Id.* at 22.

173. *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985) (emphasis added).

174. In 2013, Pittsburgh Mayor Luke Ravenstahl filed a lawsuit challenging the tax-exempt status of UPMC’s properties in Pittsburgh. Jeremy Boren & Bobby Kerlik, *Ravenstahl: Pittsburgh sues to remove UPMC’s tax-exempt status*, TRIBLIVE (Mar. 20, 2013), <http://triblive.com/news/adminpage/3696701-74/tax-upmc-exempt#axzz3JoVW24sN>. Among some of the allegations in the lawsuit against Western Pennsylvania’s largest health care system is that UPMC pays several of its executives seven-figure salaries; it has closed or scaled back operations that were underperforming; it donates less than two percent of its revenues to needy patients; and it acts as a for-profit, international corporation that has interests all over the world. *Id.*

closing facilities in order to maintain a good financial performance.¹⁷⁵ Because many hospitals were established in areas where there was a great need for medical services, it is understandable that their subsequent closures have left many with a feeling of abandonment—both literally and figuratively—regarding the organization’s supposed charitable purpose.¹⁷⁶

Perhaps one of the most widely criticized characteristics of many charitable organizations today is what they pay their top executives. Sums have reached what many believe to be extraordinary levels, considering the longstanding requirement that institutions of purely public charity should operate without private profit motive.¹⁷⁷ For example, a study by the Urban Institute revealed that while “the typical chief executive received \$169,000 at non-profit hospitals and roughly \$114,000 at colleges and universities[,]” in some cases those numbers climbed into the millions.¹⁷⁸ In addition, many organizations also supplement high salaries with generous expense accounts and other allowances.¹⁷⁹ While it is certainly very true that many of these organizations must consider the need to keep salaries and benefits high in order to attract the best talent

175. *Id.*

176. *Id.* See also Phil Galewitz, *Hospitals pack up in poor areas, move to wealthier ones*, CNNMONEY (May 1, 2015), <http://money.cnn.com/2015/04/20/news/economy/hospitals-relocating/> (quoting Gerard Anderson, director of the Center for Hospital Finance and Management at the Johns Hopkins Bloomberg School of Public Health as stating “[h]ospitals were established in inner cities where the greatest needs were and now, essentially, that charity obligation has gone by the wayside as they are looking at their bottom line[.]”).

177. See *HUP*, 487 A.2d at 1318. This criticism that charitable organizations are paying their executives too much also relates back to a criticism of Act 55. See Prescott, *supra* note 12, at 993 (noting that Act 55 wholly broadens the issue of compensation of officers, directors and employees by leaving charities with “considerable flexibility in crafting compensation packages” to reward executives and employees based on the financial performance of the institution).

178. Eric C. Twombly & Marie G. Gantz, *Executive Compensation in the Nonprofit Sector: New Findings and Policy Implications*, URBAN INST. 2 (Nov. 2001), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310372-Executive-Compensation-in-the-Nonprofit-Sector.PDF> (“In select cases, chief executives at nonprofit hospitals and higher education institutions are paid more than 1.5 million[.]”). For example, one news outlet reported “UPMC lavishes more than 20 of its executives with seven-figure salaries, including President and CEO Jeffrey Romoff, who received nearly \$6 million in compensation in 2011. He made \$4 million in 2010.” Boren & Kerlik, *supra* note 174.

179. Twombly & Gantz, *supra* note 178, at 3. “[N]on-profits act like other firms by supplying some chief officers with expense accounts or other allowances to purchase housing, food, and clothing[.]” *Id.* For example, “UPMC rents the ‘most expensive office space’ in Pittsburgh in the U.S. Steel building for [CEO] Romoff, who has access to a ‘private chef and dining room, chauffeur and private jet.’” Boren & Kerlik, *supra* note 174.

possible, executive salaries reaching levels in the millions only perpetuate the concerns about many tax-exempt charitable institutions operating with a strong private profit motive.¹⁸⁰

Similar arguments to those criticizing compensation revolve around the high figures charitable organizations spend on fundraising and the low figures spent on program expenses. Experts recommend that a charitable organization's fundraising costs not exceed thirty-five percent of the related contributions to an organization,¹⁸¹ and that a charity's total expenses spent on the program and services it delivers hover around at least seventy-five percent.¹⁸² One extreme example of a tax-exempt Pennsylvania charity clearly not meeting these basic recommendations is the Lower Paxton-based Children's Cancer Recovery Foundation—ranked as one of "America's Worst Charities."¹⁸³ This particular organization used professional fundraisers to raise \$34.7 million over ten years, but instead of using most of that money for its charitable mission, instead paid \$27.6 million to the fundraisers and had less than one percent going to direct aid.¹⁸⁴ While this may be considered a severe example, it nonetheless provides at least some validation for concerns about organizations claiming to be charitable, when that may be a fact that is clearly debatable.

While critics continue to point out flaws in the operations of today's charitable institutions, there are several counterarguments in support of tax-exempt nonprofit organizations. For example, some nonprofits might argue that they are providing services and bene-

180. Prescott, *supra* note 12, at 993. High salary levels for executives at charitable institutions generate concerns about the charitable institution being greedy and looking like a for-profit institution. See Prescott, *supra* note 12 and accompanying text. This in turn may make the charitable institution look underserving of its tax-exempt status (if the organization is property-tax-exempt). *Id.*

181. Patrick Sullivan, *Survey: Charities Should Spend 23% On Overhead*, THENONPROFITTIMES (Aug. 15, 2012), <http://www.thenonproffitimes.com/news-articles/survey-charities-should-spend-23-on-overhead/>.

182. CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=470#P> (last visited Jan. 2, 2016). Charity Navigator is a leading organization dedicated to providing the public with detailed information about the operations of various charitable organizations in an effort to make people aware of how the money they donate is actually being used. CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=628#.VvwmQcc0mu4> (last visited Mar. 30, 2016).

183. David Wenner, *Three central Pennsylvania charities portrayed negatively in investigative report*, PENN LIVE (June 17, 2013), http://www.pennlive.com/midstate/index.ssf/2013/06/worst_charities_childrens_canc.html#incart_m-rpt-1.

184. *Id.*

fits that would exceed the amount the organization would be obligated to pay in property taxes if it was not exempted.¹⁸⁵ Such an argument combats the assertion that some organizations may not be donating or rendering gratuitously a substantial portion of their services. Additionally, specifically regarding the health care industry, since there are no public hospitals in Pennsylvania, the continual operation of nonprofit hospitals assures that care for the poor and underprivileged does not fall on the local government or taxpayers.¹⁸⁶ This argument necessarily leads to the conclusion that nonprofit hospitals are relieving the government of some of its burden.¹⁸⁷ Further, in response to the claim that many exempt organizations are actually operating *for profit*, almost any organization could make the argument that they must generate more in revenue than what they pay in expenses to avoid going out of business.¹⁸⁸ Yet suspicions surrounding an institution’s private profit motive and what services are actually being rendered gratuitously, among other things, continue to grow and are bolstered by the hard facts calling into question just how “charitable” some tax-exempt organizations may be.

V. PROPOSED LIMITATIONS ON CHARITABLE PROPERTY TAX EXEMPTIONS

Given the real concern regarding the extent of property tax exemptions granted to charitable institutions today, Pennsylvania

185. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015). In the case of UPMC:

Last year, Mercy [Hospital] provided the community with approximately \$53 million in free or uncompensated care per IRS guidelines. By contrast, the total amount of property taxes that would be paid on its exempt real estate would be \$4.9 million, or less than ten percent of that charity care. In fact, the \$53 million in free or uncompensated care Mercy provides by itself exceeds the \$48 million in property taxes the Auditor General’s report suggested all of UPMC’s hospitals would pay if their properties were put on the tax rolls.

Id.

186. *Id.* (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015). Specifically, “Pennsylvania is the only large state in the nation without public hospitals. As a result, the responsibility to provide medical care for Pennsylvania’s poor and underprivileged falls not upon taxpayers or local governments, as it does in many states, but rather upon nonprofit hospitals like UPMC Mercy.” *Id.* Public hospitals would cost hundreds of millions of dollars to establish and operate. *Id.*

187. *Id.*

188. *Id.* (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015) (stating that “[a]ll companies, whether for-profit or nonprofit, must try to generate more in revenues than they pay out in expenses if they want to avoid going out of business”).

should consider adopting some measures that offset or restrict existing exemptions to alleviate these anxieties. There are several responses available that could help to partially offset the impact of lost revenue on municipalities due to charitable tax exemptions, even though the Pennsylvania legislature has indicated a desire to do the exact opposite through Senate Bill 4. For example, some states have begun instituting user fees, where nonprofits pay fees for services like water, sewer, and garbage collection.¹⁸⁹ Similarly, some municipalities have also imposed municipal service fees, which are payments somewhere between a fee and a tax that can be charged solely to tax-exempt nonprofits, and that pay for public goods normally funded by taxes, like street maintenance.¹⁹⁰ Although these fees do not make up for the substantial sums of lost property tax revenue, they are a way for cities to recoup at least some money from organizations, while the charitable institutions retain their tax-exempt status.

One measure already used in Pennsylvania are Payments in Lieu of Taxes (PILOTs), which are voluntary payments made by tax-exempt nonprofits as a substitute for not paying property taxes.¹⁹¹ PILOTs are typically negotiated between local governments and individual nonprofits, can be in the form of annual or one-time payments, and may go into a municipality's general fund or can be paid straight into a specific project or program.¹⁹² While PILOTs can be critical in making up for lost revenue, negotiations can often become contentious and payments may be sporadic, since they are completely voluntary on the part of the charitable organization.¹⁹³ PILOTs can end up being very large sums of money, even into the millions, which makes them more on par with lost tax revenues; however, due to their voluntary nature, they are unreliable.

Yet other legislative actions are available for Pennsylvania to narrow the law or general scope of property tax exemptions for charitable institutions. In order to address the concern that organizations are paying their executives too much, the state could consider adopting a cap on executive compensation. A cap could ensure that

189. Kenyon & Langley, *supra* note 125, at 5.

190. *Id.*

191. *Id.* at 6.

192. *Id.*

193. *Id.* "PILOTs can provide crucial revenue for certain municipalities and are one way to make nonprofits pay for the public services they consume." *Id.* "However, negotiations can become contentious, and the often ad hoc determination of payment amounts results in widely varying payments among similar nonprofits." *Id.* With existing conflicts between the HUP criteria and Act 55, and now Senate Bill 4, it is easy to imagine that any PILOT negotiations might easily become contentious.

compensation levels remain reasonable and that organizations do not lean more towards operating for private profit motive. However, instituting a cap would also lead to issues such as where should the cap be set at or the potential for limiting the ability of charitable organizations to attract top talent.¹⁹⁴ Similar to a cap on compensation, the state could also set a limit on what percent of its budget tax-exempt charitable organizations can spend on fundraising. Additionally, the state might go even further and set a minimum on the percentage of its budget an organization should spend on providing gratuitous services. Ensuring that organizations contribute at least a certain amount in free services would help to safeguard exemptions being granted to organizations that do indeed advance a charitable purpose and donate a substantial portion of their services gratuitously. If the Pennsylvania Legislature could be persuaded to set limits, whatever they may be, the public’s concerns over undeserving charitable tax exemptions might easily be appeased.

State and local governments might also consider narrowing the scope of charitable property tax exemptions by “phasing out property tax exemptions after a certain period.”¹⁹⁵ This approach recognizes the local government’s interest in preventing the loss of this revenue stream indefinitely,¹⁹⁶ and might assuage local governments with the knowledge that they will receive money from the charitable organizations at some future point. In addition, Pennsylvania might limit the number of acres that can qualify for exemption, which could ensure that an organization’s continued expansion “not be at the expense of local government.”¹⁹⁷ Such a measure could be extremely effective when dealing with organizations like UPMC, for example, which consistently grow larger and larger. The state might also consider setting a dollar limit on the amount of property that can be tax-exempt.¹⁹⁸ This measure would protect against organizations continually receiving exemptions

194. Prescott, *supra* note 12, at 993.

195. Gil A. Nusbaum, *Weighing the Options on State and Local Property Taxes*, 19 EXEMPTS 1, 5 (2007).

196. *Id.* at n.15. Specifically, this approach “would allow new organizations to get started without the burden of having to pay property tax, while also recognizing the local government’s interest in not losing this revenue stream indefinitely. Furthermore, this option also allows the organization to plan for the eventual imposition of the property tax.” *Id.*

197. *Id.* at n.16 (“This approach recognizes that there is a threshold reasonable level of property ownership beyond which further expansion should not be at the expense of local government.”).

198. *Id.*

when they have such a good financial standing that no longer justifies further exemption.¹⁹⁹ While the key to many of these approaches is in adequately balancing the interests of the local governments with those of the tax-exempt charitable institutions,²⁰⁰ they do represent very viable options for limiting charitable tax exemptions that would allow deserving institutions to maintain their tax-exempt status, while also ferreting out underserving organizations and allowing local governments to make up some of that lost tax revenue.

And though many of these proposals are appealing, there are arguably several reasons to take pause before adopting such restrictive measures. For example, it would be important to consider that if a charitable organization no longer qualifies for a tax exemption, it may be forced to cut services or benefits to the public in order to maintain its financial stability.²⁰¹ The community could thus lose out on a much needed or relied upon service. Further, if an organization cannot remain financially stable, it may be forced to close, in turn possibly forcing the taxpayers or local government to bear the burden of paying for the services the organization had offered.²⁰² This could overburden taxpayers already resentful of the burden tax-exempt organizations have placed on them. Additionally, imposing more regulations might strain an already tenuous relationship between those in favor of more exemptions and those against them, leading to less cooperation and an erosion of goodwill.²⁰³

Nevertheless, despite these possible repercussions, many of the measures discussed above do provide practical ways of meeting the concerns in this area of the law discussed throughout this comment. For example, imposing user and municipal fees could in part relieve “cash-strapped” municipalities, while imposing caps on compensation or acreage could provide the clarity and consistency applauded under Act 55 as well as the narrowness appreciated about the *HUP*

199. *Id.* at n.17 (“This method would provide another way to balance the interests of tax-exempt organizations with those of local governments, with ownership of property beyond the ceiling indicating that the organization has a level of wealth or ability to pay that does not justify further exemption.”).

200. *Id.*

201. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Patricia J. Raffaele, Vice President of Professional Services as Hospital Council of Western Pennsylvania, on March 12, 2015) (stating that “[i]ncreased costs to any healthcare provider can and will lead to lost jobs and reduced community services and benefits relied on by many individuals and their families”).

202. *Id.* (from the testimony of Tom McGough, Executive Vice President and Chief Legal Officer of UPMC, on March 12, 2015).

203. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72; *see also supra* text accompanying note 119.

criteria. Moreover, many of these measures could not only assuage concerns about lost tax revenue and undeserving exemptions, but they could provide that clarity, consistency, and narrowness—thus acting as a happy medium to satisfy everyone’s concerns.

VI. CONCLUSION

Pennsylvania has been faced with many challenges regarding the concept of property tax exemptions for charitable institutions over the past 100 years. The current struggle for power between the Pennsylvania Supreme Court and the General Assembly, and tax-exempt nonprofits and municipalities, present some of the most complicated challenges yet. Senate Bill 4, however, is not the solution. Though the consequences of Senate Bill 4’s potential passage remain unclear,²⁰⁴ one point of law that remains resolute is that the Pennsylvania Legislature may not cut out the Pennsylvania Supreme Court’s right to interpret the constitutional phrase “institutions of purely public charity.”²⁰⁵ Such a proposal is misguided, and indeed worrisome, as the Pennsylvania Constitution of 1874 was expressly designed to limit legislative authority in granting tax exemptions.²⁰⁶

Instead of fighting the Pennsylvania Supreme Court and local governments through Senate Bill 4, the Pennsylvania Legislature should be looking at ways to compromise. Today’s concerns over lost tax revenue and unwarranted exemptions are real and unlikely to go away. Many of the more restrictive measures on charitable property tax exemptions suggested above could easily alleviate those concerns, and still provide benefits to the legislature and nonprofits such as clarity and consistency. While it is easy to get caught up in the political struggle surrounding the phrase “institutions of purely public charity,” it is critical to remember the fundamental principle that tax exemptions are a privilege.²⁰⁷ Therefore, whatever future measures are adopted, or returned to, in defining “institutions of purely public charity,” as the Pennsylvania Supreme Court once so aptly stated, it remains essential “to reinforce

204. Lindstrom, *supra* notes 100–103 and accompanying text.

205. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 7 (2012); *see also supra* text accompanying note 22.

206. *Marritz, supra* note 26, at 191.

207. PA. DEP’T OF THE AUDITOR GEN., *supra* note 72 (from the testimony of Dean Emeritus Nicholas P. Cafardi, Professor of Law at Duquesne University School of Law, on March 12, 2015). “The Uniformity Clause of the Pennsylvania Constitution adds that the burden of paying taxes should fall equally on us all.” *Id.* “Accordingly, tax exemption is a privilege, not a right. When some of us do not pay taxes, the rest of us must pay more.” *Id.*

the traditional characteristics of charities rather than to expand their scope to the point that the term 'charity' is meaningless."²⁰⁸

208. *City of Wash. v. Bd. of Assessment Appeals of Wash. Cty.*, 704 A.2d 120, 126 (Pa. 1997).



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