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Using a Cultural Lens in the Law School Classroom to Stimulate Self-Assessment

Julie M. Spanbauer*

“The great end of education is to discipline rather than to furnish the mind; to train it to the use of its own powers rather than to fill it with the accumulation of others.”**

ABSTRACT

The American Bar Association is exerting pressure on United States law schools to improve teaching effectiveness by shifting the evaluation of student learning away from input measures to focus upon output-based assessments. Yet, many legal educators appear to be resistant to and fearful of change, in part, perhaps, due to their comfort with teaching methods such as the Socratic or case-dialogue approach, which demands little accountability for teaching effectiveness and provides more time for the pursuit of the traditional goals of scholarly productivity. This method of teaching as currently utilized in law schools is also innately professor-centric performance art. The article provides examples and exercises that demonstrate that any teaching method will be enhanced if a professor adopts a “cross-cultural” approach to teaching first-semester and first-year law students. A “cross-cultural” approach shifts the focus in the classroom to the students to assist them in becoming aware of the cultural contexts they bring to the study of law, enabling them to compare

* Professor of Law, The John Marshall Law School, Chicago; LL.M., 1992, Northwestern University School of Law; J.D., 1986, Valparaíso University School of Law. The author is grateful for the opportunity to present some of the ideas underlying this article. The examples and exercises in part III of this article were originally offered on March 26, 2011, at the Eleventh Annual Rocky Mountain Legal Writing Conference at the University of Nevada Las Vegas William S. Boyd School of Law in a presentation entitled, “*Using Discrimination Topics to Teach Basic First-Year Skills by Emphasizing the Reciprocal Relationship of Law and Culture*.” The ideas presented in this article also grew out of the Faculty Development Workshop conducted at The John Marshall Law School on February 11, 2011, by Professor Sophie Sparrow, University of New Hampshire School of Law. The author also thanks Glen Weissenberger, Judge Joseph P. Kinneary Professor Emeritus, University of Cincinnati Law School, for his insightful comments and detailed feedback.

** Tryon Edwards, *The News Dictionary of Thoughts: A Cyclopaedia of Quotations* 151 (C.N. Catrevas & Jonathan Edwards rev. ed. Standard Book Co. 1954).

their cultural perspective with the shifting cultural context of the law. Not only will this shift in classroom focus teach law students to become lifelong students of the law by critically self-assessing their learning, but it will additionally enrich a professor's scholarship. It does so because the professor who elicits and responds to the cultural perspectives of students in the classroom will better understand societal perceptions of the law, which will provide new avenues for traditional and nontraditional scholarship.

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INTRODUCTION

Law schools are experiencing intense pressure from a variety of internal and external sources to modify, perhaps radically, the manner in which lawyers are educated in this country.¹ The source of the most intense and immediate pressure is the American Bar Association (“ABA”) Section of Legal Education Council and Accreditation Committee,² whose proposed changes to the accreditation standards advocate, among other modifications, a shift in the

1. See *infra* notes 2-7, 13-16 and accompanying text.

2. Pursuant to Title 34, Chapter VI, § 602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS 3 (2010), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure_authcheckdam.pdf “The American Bar Association, through its Section of Legal Education and Admissions to the Bar, establishes standards for the accreditation of law schools and applies the Standards through its Accreditation Project, which approves new schools and conducts sabbatical reviews of existing schools.” Gary A. Munneke, *Managing A Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207, 1211-12 n.19 (2010).

evaluation process away from input measures³ to a focus upon output-based assessments.⁴ The stated objective is to focus on “what law students actually

3. The current ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS [hereinafter ABA STANDARDS] are available at http://www.abanet.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf. The proposed accreditation standards can be found at *Standards Review Committee*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review.html. Input measures, as reflected in the current standards include the following: “a law school’s facility, faculty size, and budget.” Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 NEV. L.J. 667, 667 (2011).

4. The current ABA Standards do incorporate “bar passage and job placement” statistics and outcome measures. 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, 226-27 (2011). Proposed Accreditation Standard 302 states:

- (a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.
- (b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:
 - (1) knowledge and understanding of substantive law, legal theory and procedure;
 - (2) the professional skills of:
 - (i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context; and
 - (ii) the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas.
 - (3) a depth in and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession; and
 - (4) knowledge and understanding of the following values:
 - (i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
 - (ii) the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and
 - (iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.
 - (5) any other learning outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school’s mission and goals.

ABA Section of Legal Education and Admissions to the Bar, *Standards Review Committee Draft for April 2011 Meeting*, 2-3 (Apr. 2011), <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Student%20Learning%20Outcomes%20%28redline%20to%20Standards%29.pdf>.

take away from their educational experiences.”⁵ The ABA is additionally proposing that law student assessment measures include “a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.”⁶ As a result, faculty members have been compelled to engage in comprehensive curriculum review, designed to incorporate methodology that provides students with increased data that measures their learning process.⁷

Recently, some law schools have started valuing and rewarding innovative teaching and assessment methods as well as scholarship devoted to pedagogy.⁸ Nevertheless, law schools have historically placed a much higher value on traditional legal scholarship than on classroom teaching.⁹ Therefore, the proposed changes to the ABA accreditation standards must be understood in the context of a system that has remained static for at least the past 130 years, in which many faculty members have spent their entire careers teaching in a modified “Socratic case-dialogue”¹⁰ method in combination with lecture.¹¹ A single comprehensive final examination at the end of the course also remains the standard, dominant form of assessment in law schools.¹² This traditional

5. Hill, *supra* note 3, at 667-68.

6. ABA proposed accreditation Standard 304 defines formative and summative assessment methods as follows: “Formative assessment methods are measurements at different points during a particular course or over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or the culmination of any part of a student’s legal education that measures the degree of student learning.” *Draft for April 2011 Meeting*, *supra* note 4, at 5-6.

7. See Fisher, *supra* note 4, at 234-35 (identifying the dean, who is answerable to the ABA, as playing “a key role in the development and implementation of assessment for the entire institution” and identifying as crucial to success “faculty development programs about how to do assessment”).

8. Fisher, *supra* note 4, at 235.

9. Dennis R. Honabach, *Responding to “Educating Lawyers”: An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. Tol. L. Rev. 311, 317 (2008) (arguing that “differences in merit raises tend to reflect scholarly productivity more than effective teaching,” that “summer stipends are more readily available to promote new scholarship than to improve teaching,” and that “the production of cutting edge scholarship is the key to a faculty member’s mobility.”).

10. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3* (Jossey-Bass 2007) [hereinafter *CARNEGIE REPORT*].

11. Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. Rev. 310, 334 (2011) (describing as “chief pedagogical tools—the Socratic method or a mix of lecture and discussion”).

12. *CARNEGIE REPORT*, *supra* note 10, at 162. “This one-shot, do-or-die assessment

system is broadly believed to support minimal faculty effort in teaching in order to afford faculty greater time to invest in scholarship.¹³

Public opinion also contributes to the impetus for improving teaching effectiveness in law schools. A weak economy in which law students are graduating with more and more debt,¹⁴ coupled with the inability of graduates to secure desirable employment,¹⁵ has resulted in a harsh public response, as evidenced in articles appearing in the *New York Times* and other newspapers that question the value of a law degree.¹⁶ Despite this confluence of events and circumstances, many legal educators may be resistant to and fearful of change. Law faculty appear to be most comfortable in a milieu that demands little accountability for teaching effectiveness and more time for the pursuit of the traditional goals of scholarly productivity.¹⁷

This article suggests that faculty resistance to public pressure and ABA directives is an overreaction that reflects a lack of understanding of teaching effectiveness and student assessment. The ultimate purpose of this article is not to present innovative pedagogy or to propose novel methods for assessment.

method has received harsh criticism that it lacks validity, reliability, and fairness.” Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum-Process and Product*, 41 U. Tol. L. Rev. 327, 331-32 (2010).

13. See *supra* note 9.

14. The average law student graduating from a private university does so with approximately \$100,000 in debt. Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67, 69 n.3 (2010). For the last 30 years, the cost of legal education has risen steadily; “Between 1992 and 2002 . . . the cost of legal education rose 134 percent at public schools and 76 percent at private schools. Since 2002, tuition has continued to rise anywhere from 5 to 15 percent a year.” Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 608 (2010).

15. The National Association for Law Placement reported that sixty-four percent of law students who graduated in 2010 “reported having full-time jobs that require a law degree within nine months of graduation.” Katherine Mangan, *In Tight Job Market, Some Want Bar Association to Toughen Law-School Accreditation Standards*, THE CHRON. OF HIGHER EDUC. (July 31, 2011), <http://chronicle.com/article/Bar-Association-Is-Urged-to/128441/>. For those graduates fortunate enough to obtain employment, “the median starting salary fell by nearly 13 percent for 2010 graduates versus 2009 graduates, to \$63,000.” *Id.*

16. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1, available at <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html>; Bryan A. Garner, Op-Ed., *Three Years, Better Spent*, N.Y. TIMES, July 25, 2011, at 01 available at <http://www.nytimes.com/Roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>; Amanda Robert, *Recent Grads Question Decision to Go To Law School*, CHI. LAW., Aug. 1, 2011, 19, 19-21.

17. Segal, *supra* note 16. See *supra* note 9.

Such work is being done by others.¹⁸ The goals of this article are much more modest. Part I of this article examines the predominant teaching method in United States law schools and concludes that regardless of its origins, this methodology is innately professor-centric because it is largely a performance art.¹⁹ Part II of this article analyzes the benefits of adopting a “cross-cultural” approach to classroom teaching with first-semester and first-year students and concludes that such an approach will benefit both faculty and students in assessment and self-assessment of student learning.²⁰ Part III provides examples and exercises suitable for first-semester and first-year law students to illustrate this “cross-cultural” approach to legal education and to demonstrate how small changes in focus can reap substantial benefits.²¹ An understanding of these approaches should move faculty members away from resistance and fear, allowing them to focus upon output and assessment measures.

Ultimately, this article seeks to assure faculty that innovative, culturally sensitive teaching methodologies are not overly burdensome, nor will they operate to de-emphasize the role of traditional scholarship. Particularly through the utilization of cross-cultural methods, a professor should find the classroom experience to be one that actually informs both traditional and non-traditional scholarship because it provides a window to the relationship between contemporary culture and the law.²²

18. Kate Nace Day & Russell G. Murphy, “Just Trying to be Human in this Place”: *Storytelling and Film in the First-Year Law School Classroom*, 39 STETSON L. REV. 247, 252, 257-64 (2009) (describing the benefits of using storytelling and movies in first-year Criminal Law and Constitutional Law courses); Hill, *supra* note 3, at 670-678 (urging collaborative peer editing); examples of assessment methods currently utilized at some law schools include the following: Rogelio A. Lasso, *Is our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 96-97 (advocating among other types of assessment methods, “self-evaluated and computerized” assessment measures and “criterion-referenced” essay problems); some of the innovative pedagogy has been introduced by “law professors entering legal education today” and has included active learning techniques in the form of “role-playing, group exercises, simulations, and live-client clinics.” Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 627 (2008).

19. See *infra* notes 23-43 and accompanying text.

20. See *infra* notes 44-78 and accompanying text.

21. See *infra* notes 79-134 and accompanying text.

22. Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 368, 370 n.10 (1990) (discussing the “dualist model,” which asserts “that classroom teaching brings a faculty member into regular contact with the sometimes novel ideas and questions of students which in turn informs and enriches the faculty member’s scholarship.”).

I. CLASSROOM TEACHING IS NOT PERFORMANCE ART

For years, when a colleague returned to his office after teaching and was asked, "How was class?" that colleague would invariably respond with a wry smile: "I was nothing short of magnificent." This beloved teacher's playful comment reflects an underlying belief-system for many within the legal academy who view teaching as a performance—a one-way street, in which a body of material is transmitted.²³ This myopic focus exclusively on the professor's performance can result in the disjunction between teaching and learning when it manifests, for example, through student questions that reveal a basic misunderstanding about the material or when students' final examination answers reveal a consistent misunderstanding of a core course concept or of a fundamental reality about the nature of the United States' legal system.²⁴

The dominant or signature law school pedagogy reinforces a focus on the professor as the center of the classroom rather than focusing on the students' learning process.²⁵

In many ways, a Socratic professor functions as a conductor or puppet master, carefully orchestrating the questions and arguments to guide the discourse in a preordained direction. A case method classroom therefore centers on the professor himself, and the students typically view the professor as holding the truth to the subject, but rarely revealing it.²⁶

The advocates of a modified Socratic or case-dialogue approach to law school teaching defend it despite its origins in formalism, which have long

23. The Socratic method was never intended to be thought of as a vehicle for "the transmission of some substantive body of knowledge." Douglas Lind, *Book Review*, 60 J. Legal Educ. 705, 720 (2011) (THOMAS D. EISELE, BITTER KNOWLEDGE: LEARNING THE SOCRATIC LESSONS OF DISSOLUTION AND RENEWAL (2009)). The trend in other countries is away from a content-based focus in legal education. Mashburn, *supra* note 18, at 637 & n.184.

24. The Carnegie report asserts that academic scholars and students have expressed "puzzlement, frustration, and anguish" with the exceedingly stressful practice of the single, comprehensive examination format, finding it to be "unfair, counterproductive, demoralizing, and arbitrary." Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 881 n.158 (2009) (quoting WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 165 (2007)).

25. Jess M. Krannich, James R. Holbrook, & Julie J. McAdams, *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 384 (2009).

26. *Id.*

since been criticized by members of the academy.²⁷ The Socratic method persists “less as doctrine and more as process.”²⁸ Many professors continue to believe that through the question and answer process, students will learn to “think like a lawyer”:

[A]t its best, through this version of the Socratic method, “[t]he teacher leads the students to generalizations and inferences regarding the subject matter under study, and prompts the student. In effect, the teacher says to the student, ‘If you wish to know, you must exert your own intellectual effort. You must work with the data from experience yourself. Through your own inquiry will come knowledge.’”²⁹

The case-dialogue or modified Socratic teaching method as practiced by many professors is not in itself attuned to student learning.³⁰ In fact, it may be characterized as largely indifferent to student learning because the purpose and goals of this teaching method are rarely communicated to students and because students are not generally given feedback or assessment as a part of this process.³¹

The problem with the Socratic method as practiced in today’s classroom lies . . . in the teacher’s complete failure to explain the purpose to first semester students combined with its formalistic roots. Given this combination of factors, it is no wonder that the first-semester student, as novice legal thinker, is often seduced into a search for *the* right answer. First-semester teachers also rarely take the time to summarize and evaluate classroom discussion. This omission compounds the potential for reinforcing poor reasoning and logical errors. In order to learn to “think like a lawyer,” students need to be told “when an argument is circular” and when they have made “factual misstatements” or when they have “mistaken cause-and-effect relationships.” Without this kind of

27. See Peggy Cooper Davis, *Desegregating Legal Education*, 26 GA. ST. U.L. REV. 1271, 1273 (2010). *But see id.* at 1275 (asserting that the Socratic method was “not so much a retreat to formalism as it was an escape from learning by passive absorption of conclusions about the law to a regime of learning by original study and critique of judicial decisions.”).

28. Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 167, 173 (1999) (quoting Steven Alan Childress, *The Baby and the Bathwater: Salvaging a Positive Socratic Method*, 7 OKLA. CITY U.L. REV. 333, 336 (1982)).

29. Spanbauer, *supra* note 28, at 174 (quoting June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1012-13 (1989)).

30. *Id.*

31. *Id.*

feedback, they will not understand the purpose of the Socratic method, and they will not be empowered to make and anticipate sound legal arguments.³²

Not only are entering law students frequently mystified by the purpose of the Socratic or case-dialogue approach to legal education, they are also jarred by the interactive nature of the law school classroom, which frequently includes involuntary participation.³³ All of this is unfamiliar and, very likely, unsettling to first-year law students, many of whom “attended mostly large, anonymous undergraduate classes, in which they may not have been required to attend or participate in any manner and from which they received little personalized feedback.”³⁴ Many entering law students are, therefore, ill-equipped to engage in oral and written communication and in critical reasoning simply because the large first-year law school classroom is a frightening and confusing arena.³⁵

Moreover, these same students are not learning from conventional textbooks and secondary sources typically used in other disciplines.³⁶ Instead, they are attempting to learn by reading primarily redacted cases, which were never intended as teaching material and which were written by legal experts (judges) to resolve a narrow legal dispute with other legal experts (i.e. lawyers) as the intended audience.³⁷ The dominant nature of this reading material is dense, filled with legal jargon and procedural and other technical legal complexities the students cannot possibly understand at the outset.³⁸ Given the

32. Spanbauer, *supra* note 28, at 175.

33. Mashburn, *supra* note 18, at 621.

34. *Id.* at 633.

35. Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 U. LOUISVILLE L. REV. 95,104-05 (2009).

36. M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn From Those Professors Who Teach Legal Writing*, 61 MERCER L. REV. 899, 908 (2010) A textbook “provides students with the information needed for the course in a textual format.” *Id.* In contrast, a casebook is “a compilation of cases organized in some topical fashion. Someone could read a textbook and understand the subject matter, but no novice learner could simply read a casebook and understand the subject matter.” *Id.*

37. *See id.* at 908-09.

38. *See id.* at 906;

[T]he case method “attempt[s] too much” for the time available and the capacity of the average student and . . . to plunge a student into this chaos [of cases], with his powers untried and imperfect, and his knowledge of principles incomplete, to grope his way through it as best he may, and to triangulate from case to case, supposing that he is getting forward when he is only going astray, is not to educate him, but tends rather to make him proof against education.

W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 84 (1997) (internal quotes omitted) (quoting Edward J. Phelps, *Methods of Legal Education*, 1 YALE L. J. 139, 141

tailored and individualized dispute-resolution purpose of each case, the reading material inevitably provides an incomplete and myopic synthesis of any area of law.³⁹ Many professors have “increasingly blended the Socratic method with other, less confrontational approaches, such as lectures, discussions, simulation exercises and problem-solving sessions.”⁴⁰ Regardless, professors still must intentionally shift the focus to students’ learning rather than to the transmission of knowledge. If this shift does not occur, the professors will remain the central focus and students will continue to struggle.⁴¹

While tradition and inertia have undoubtedly perpetuated the predominant teaching method in United States law school classrooms, its ultimate effectiveness is transparently questionable.⁴² More than likely, the prevailing methods remain entrenched because professors have not been exposed to alternative models and because professors are concerned that adopting new methodologies will diminish their time to engage in traditional scholarship.⁴³ The following sections of this article introduce some alternative teaching approaches that are designed to make the classroom experience more meaningful and productive for both the professor and the student. Simultaneously, these approaches will teach students to engage in a process of self-assessment, which is integral to a progressively deepening understanding of the law.

II. ADOPTING A CROSS-CULTURAL APPROACH TO THE FIRST-YEAR LAW SCHOOL CLASSROOM

Regardless of whether a professor retains a more traditional approach to teaching or adopts a mix of traditional and innovative teaching techniques, shifting focus to the students and their learning can readily be accomplished if a professor adopts a simple change embracing a view of first-year students as

(1892)).

39. See *id.* at 84; See also Phelps, *supra* note 38, at 141.

40. Mashburn, *supra* note 18, at 621.

41. Carter, *supra* note 38, at 97 (asserting that the “Socratic method” evolved during the twentieth century as a pedagogy that “placed the teacher at center stage”). See also Sandra R. Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT’L & COMP. L.J. 601, 630 (1991) (arguing that “the Socratic method focuses on teaching rather than learning, since the method of instruction centers on the professor who is asking the questions, rather than the student”).

42. See Spanbauer, *supra* note 28, at 175.

43. See Ruth v. McGregor, *Response to Bang Goes the Theory-Debunking Traditional Legal Education*, 3 PHOENIX L. REV. 343, 344 (2010) (responding to assertion “that law professors use the Socratic method primarily because it is easier to use that approach than to use other teaching methods”).

“cultural outsiders.”⁴⁴ Viewing students as “cultural outsiders” and adopting a cross-cultural approach to legal education may, at times, include equating entering law students with students from other countries for whom English is a second language (“ESL”)⁴⁵ and for whom United States culture and the United States legal system are unfamiliar and foreign.⁴⁶ Given the fact that entering law students are encountering a new discourse and culture complete with distinct conventions and vocabulary, treatment of students as “cultural outsiders” is certainly warranted.⁴⁷ This focus on law students as “cultural outsiders” is further reinforced by the demographics of contemporary law student classes. In recent years, the law school classroom has become more multicultural with ethnic and racial minorities comprising more than twenty percent of the J.D. student population.⁴⁸ “Research documents that although many of these students do not speak English as a second language, they often experience feelings of isolation as they prepare to enter a largely white profession . . . due to the fact that they are not a part of the dominant culture and are instead surrounded by a largely white student body, with few faculty role models.”⁴⁹

A student-as-cultural-outsider perspective may further enable a professor to understand the ways in which these same students have been influenced by “*law as a cultural projection*—not necessarily understood through any detailed acquaintance with its practice, doctrine, or effects but perceived in terms of constructed images or fictional narratives.”⁵⁰ These constructed images and

44. The phrase, “cultural outsider,” is sometimes limited to ethnic, racial, and other minority students, but for purposes of this article is intended to describe anyone “for whom the normative assumptions of law” are foreign. See Barbara J. Flagg, *Experimenting with Problem-Based Learning in Constitutional Law*, 10 WASH. U.J.L. & POL’Y 101, 108 n.18, 109 (2002).

45. ESL students are students “whose first or official language is not English.” Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT’L J. LEGAL INFO. 396, 397 n.1 (2007).

46. *Id.* at 419. These students “need training in or exposure to sociolinguistic and cultural norms.” *Id.*

47. *Id.* at 443-46.

48. Since early 2000, minority students have “comprised more than 20 percent of the total J.D. enrollment in ABA- accredited law schools.” Andrew Brenton, Comment, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should be Replaced with a System for Accrediting Employers for their Antidiscriminatory Employment Practices*, 26 WIS. J.L. GENDER & SOC’Y 349, 383 (2011).

49. Julie M. Spanbauer & Katerina P. Lewinbuk, *Embracing Diversity Through a Multicultural Approach to Legal Education*, 1 CHARLOTTE L. REV. 223, 224 (2009).

50. Roger Cotterrell, *Law in Culture*, 17 RATIO JURIS. 1, 5 (Mar. 2004). For purposes of this article, culture is simply defined as a process “by which meaning is

narratives not only influence lay expectations, but also profoundly influence the law itself. In fact, some scholars assert that “[m]ass-mediated images” have become “as powerful, pervasive, and important as are other early twenty-first-century social forces—for example, globalization, neo-colonialism, and human rights—in shaping and transforming legal life.”⁵¹ Failing to recognize the cultural dimension of both perception and function would inevitably diminish the teaching and learning of the function of law in contemporary society.⁵²

A cultural outsider approach to legal education does not require dramatic reform in the classroom, nor does it demand that the professor adopt any particular normative view of culture. The idea that law is one powerful “institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings” is not novel.⁵³ In fact, the ramifications of a social constructivist view of law and culture have been explored for decades by legal realists, pragmatists, members of the critical legal studies movement, and critical race and critical feminist theorists.⁵⁴ Consequently, resources are readily available to assist a professor in using this approach with virtually any subject matter.⁵⁵

produced, performed, contested, or transformed” through “any set of signifying practices.” Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 42 (2001).

51. Anthony Chase, *The Real French Constitution*, 30 NOVA L. REV. 209, 210 (2006).

52. *See id.*

53. Mezey, *supra* note 50, at 45.

54. Spanbauer & Lewinbuk, *supra* note 49, at 233 & n. 61. As one author explained,

Law engenders a complex, hermeneutic process which includes its own specialized language and its own shared knowledge, i.e., “legal culture.” The field of law (or legal culture) has a recognizable internal organization based on “protocols and assumptions, characteristic behaviors and self-sustaining values” forming an incomplete but autonomous social field. Law is also fundamentally constitutive. “Law is intimately involved in the constitution of social relations and the law itself is constituted through social relations.” Law could be said to operate inseparably from society, and therefore, from culture. Law is local knowledge, a cultural institution comprising complex processes which vary from place to place and period to period. Law, therefore, may be characterized as a component of culture and the relationship between law and culture is dynamic and creative. The study of law has shallow meaning when abstracted from its cultural context.

Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 650-51 (1997).

55. For “[a] sampling of the recent books addressing law and culture,” *see* Spanbauer & Lewinbuk, *supra* note 49, at n.63. Foundation Press has also “released a series of books designed to provide a legal, political, and social context for some of the standard cases used in contract law, tax, civil procedure, constitutional law, criminal procedure,

However, the purpose of a cultural approach as advocated in this article is different from the often-cited reason that cultural context is necessary “to provide students with a broad perspective and better understanding of the law and to enable students to make their own normative decisions.”⁵⁶ Instead, the cultural approach as promoted in this article acts as a means of shifting the focus away from the professor and toward the students’ learning process so that both the professor and the student are in a better position to assess student learning. Because “[c]lassroom talk is deeply embedded in culture,”⁵⁷ the professor who recognizes that these students are “cultural outsiders” is better equipped to identify and anticipate the ramifications to the first-year law school classroom and to the larger legal culture. “Cultural outsiders” will struggle with analysis governed by a largely deductive analytical paradigm and a system of analogy and distinction of precedent.⁵⁸ Distilled to its essence, students will be participants in a learning process that teaches law as something more than discreet abstractions.⁵⁹

If a professor remains attuned to the phenomenon that all entering law students bring with them a view of law influenced by the larger cultures within which they have lived, the professor will be in a position to navigate the inevitable dichotomy of the cultural context within which the law evolved and the cultural contexts of students’ perception of the law.⁶⁰ This focus on cultural gaps in student expectations will provide a professor with immediate feedback in the classroom as to both student understanding and misunderstanding. Further, such a focus will allow the professor to capitalize on such gaps as teaching moments to demonstrate to the students how their cultural perceptions differ from embedded legal cultural assumptions and the historical assumptions that motivated lawmakers to adopt particular laws.⁶¹ However, it will do so only when the professor demonstrates sensitivity to cultural dichotomies and

employment discrimination, environmental law, immigration law, intellectual property law, labor law, property law, and torts law courses. *See, e.g.,* CONTRACT STORIES (Douglas G. Baird ed., 2007).” Spanbauer & Lewinbuk, *supra* note 49, at n.151.

56. Spanbauer & Lewinbuk, *supra* note 49, at 233.

57. Spanbauer, *supra* note 45, at 421 (quoting ULLA CONNOR, CONTRASTIVE RHETORIC: CROSS-CULTURAL ASPECTS OF SECOND- LANGUAGE WRITING 23 (1996)).

58. *Id.* at 402-03. *See also* Jessie C. Gearson, *Teaching the Transitions*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 57, 57 (1998).

59. Gearson, *supra* note 58, at 58.

60. *See* Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 Cap. U. L. Rev. 149, 193 (2012) (advocating the use of various self-assessment tools to aid students in the development of metacognitive skills and to provide “the professor with more information to assess their students’ learning”).

61. *Id.* at 192.

receptivity to a teaching process which permits students to share their own cultural perspectives.

Students who are made aware of their own cultural perceptions will, in turn, be in a better position to self-assess their learning and understanding of the law.⁶² Simultaneously, they will be able to better examine the cultural influences driving the law and the shifting historical perspective of the law over time.⁶³ Students who learn to question their cultural assumptions in this way, as well as the cultural assumptions they identify as underlying various aspects of the law, will develop some of the "critical self-learning skills" necessary to their professional growth as attorneys.⁶⁴

A most important aspect of assessment is student self-assessment. Throughout an attorney's professional life after law school, her success in practice will depend on the ability to self-assess professional performance, behavior, and attitudes. "An indispensable trait of the truly competent lawyer, at whatever stage of career development, is that of knowing the extent and limits of his competence: what he can do and what requires the assistance of others."⁶⁵

A cultural approach can be implemented in any subject area.⁶⁶ For purposes of illustration, this article will focus on employment discrimination-based problems because they have proven to be effective when used in a first-semester legal research and writing course or in any introduction to the legal system of the United States. Studies have demonstrated that a majority of adults have had personal experience with the concept of discrimination (either through family members, friends, or first-hand experiences) and, as a result, entering law students will have definite views of what does and does not constitute discrimination.⁶⁷ These views of discrimination vary depending upon cultural perspective, thus providing an opportunity for classroom exploration of multiple points of view of the concept of discrimination.⁶⁸

62. In this way, students will self-consciously begin to understand law as "a symbol of cultural inheritance. Like language, law evolves and grows. Yet . . . it also necessarily retains a sense of cultural homogeneity and gains its essential meanings (its implicit criteria of interpretation and evaluation) from its rootedness in the traditional cultural matrix—the inherited environment." Cotterrell, *supra* note 50, at 6.

63. *Id.*

64. Lasso, *supra* note 18, at 96.

65. *Id.*

66. See *supra* note 55 and accompanying text.

67. Gina J. Chirichigno, Comment, *Crying Wolf? What We Can Learn From "Misconceptions" About Discrimination: A Transformational Approach to Anti-Discrimination Law*, 49 How. L.J. 553, 572 (2006).

68. Theorists advocate numerous reasons for differing views of discrimination. "A

Moreover, the moral and legal issues implicated in an employment discrimination scenario evoke strong emotional responses and will thereby naturally engage students.⁶⁹ Finally, students are frequently surprised to learn that their strong responses stand in sharp contrast to the technical, narrow legal concept of discrimination as reflected in federal, state, and local employment discrimination laws. These same students are also sometimes surprised to learn that state and local employment discrimination legislation frequently leads the way in changing outmoded concepts of discrimination and that federal legislation lags behind current sociological and psychological understandings of discriminatory attitudes and behavior.⁷⁰ These cultural dichotomies in

person's self-concept, their identification with a particular racial group, and their concept of what that membership entails, will influence their views on discrimination." *Id.* at 568. Some experts assert that members of minority groups who frequently experience discrimination more readily detect discrimination. *Id.* at 571. Other scholars argue "that those who experience discrimination somehow find the phenomenon more significant than those who do not." *Id.* at 572. Empirical evidence supporting the view that members of protected classes and those who experience discrimination are more likely to view a situation as involving discrimination is, however, "sparse." Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 803 (2006).

69. Such strong reactions should not be surprising given the fact that employment discrimination involves two very significant harms—harm to an individual's property interest in employment and personal injury involving "personal dignity." Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1450 (1996).

70. *Id.* Some scholars describe the application of the *McDonnell Douglas* test, applied in cases alleging individual disparate treatment or intentional discrimination, as being "too mechanical in practice." Chirichigno, *supra* note 67, at 584. The test as originally articulated by the United States Supreme Court in 1973 requires a plaintiff to set forth the following *prima facie* case: (1) The plaintiff is a member of a protected class; (2) The plaintiff is qualified; (3) The plaintiff suffered an adverse employment action; and (4) The plaintiff was treated differently than other similarly situated employees who are not within plaintiff's protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See also Chirichigno, *supra* note 67, at 580. Some states prohibited employment discrimination long before Title VII was enacted:

States began to develop laws prohibiting employment discrimination decades before Congress enacted Title VII of the Civil Rights Act of 1964. Title VII was modeled on those laws but went further than most of them, most notably by prohibiting sex discrimination. After Title VII was enacted, all of the states that previously lacked antidiscrimination statutes adopted them. Today, many state employment discrimination statutes are considerably more protective of employees' rights than the federal version.

Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 90-91 (2002). States have led the way, although not unanimously so, in protecting against employment discrimination based upon sexual orientation. See Christy Mallory & Brad Sears, *LGBT Rights: Toward a More Perfect*

meaning provide an opportunity to reinforce the reciprocal relationship of law and culture in which law sometimes transforms attitudes and beliefs and at other times is driven and influenced by cultural events and experience.⁷¹

Employment discrimination-based problems are effective despite the contention that entering law students are ill-equipped to handle sophisticated areas of the law because they lack a liberal arts education and a foundation in U.S. history and government, including the concept of federalism.⁷² The 150-year history surrounding the legislative enactment of federal employment discrimination is a subject that can be readily contextualized by lecture or through assigned readings. Looking beyond the statute, these important historical events and cultural attitudes and beliefs provide an essential context to understanding the law.⁷³ While the cultural history is complex, it is easily understood by students when it is presented in an encapsulated form as a predicate for the legal discussion.

Title VII provides an appropriate example of impactful federal legislation. Enacted almost 100 years after its predecessor, the Civil War Reconstruction Era statutes,⁷⁴ Title VII is arguably “the most comprehensive and influential

Union: An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT-Related Workplace Policies, 5 ALB. GOV'T L. REV. 478, 508 & n.116 (2012) (citing 29 states as not prohibiting sexual orientation employment discrimination). See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 43 (2011) (noting “the subtle, complex and sometimes even unconscious nature of modern discrimination.”).

71. Spanbauer & Lewinbuk, *supra* note 49, at 235.

72. James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide With Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 Cath. U. L. Rev. 735, 753 (2012).

73. There are some older law review articles that trace in detail the history of the Reconstruction era legislation. See, e.g., Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 35-66 (1980).

74. 42 U.S.C. § 1981, the relevant Reconstruction era employment discrimination legislation, was enacted twice, first as section 1 of the Civil Rights Act of 1866 and was reenacted in 1870, pursuant to “section 5 of the fourteenth amendment as a part of the Enforcement Act of 1870” and was “revised and recodified in 1874.” *Developments in the Law*, *supra* note 73, at 36. The relevant operative statutory language remains unchanged and reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2000). For a discussion of the Civil Rights Act of 1991 and its

antidiscrimination law in American history.”⁷⁵ Others have described the more recently enacted Americans with Disabilities Act of 1990 as the “most sweeping piece of civil rights legislation since the Civil War era.”⁷⁶ The Reconstruction era, “which ended slavery and established a new system of labor in the South based in large part on a new form of white supremacy,” is similarly one of the most important “transformative moments in U.S. constitutional history.”⁷⁷ Introducing entering students to this combination of legislation, in tandem with its cultural context, achieves the additional goal of providing a solid foundation in U.S. law from an historical perspective typically addressed by a liberal arts education.⁷⁸

III. CLASSROOM EXERCISES DESIGNED TO EXPLOIT CULTURAL GAPS

Using discrimination topics illustrates a teaching methodology that explores cultural dichotomies that vividly illustrate different aspects of the U.S. legal system. Such an approach is a useful tool for a professor who teaches legal research, legal analysis, statutory interpretation, and the interrelationship of statutory and case law, including the role of courts in crafting interpretive rules. The complexity presented by administrative exhaustion requirements and the interactions between state and federal employment discrimination laws

amendments to Section 1981, see Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After ARAMCO and the Civil Rights Act of 1991*, 9 CONN. J. INT’L L. 1, 49 (1993).

75. Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1061 (2011).

76. Tim Edwards, *Constitutional Limits on an Employer’s Right to Dictate the Terms of an Addict’s Recovery Under the ADA: Some Sobering Concerns*, 44 WAYNE L. REV. 1679, 1696 & n.81 (1994) (quoting Senator Hatch). See also Megan McMillan, *Trading Constitutional Principles for Policy Ends: An Ideographic Study of Disability Interest Group and Agency Response to Board of Trustees of the University of Alabama V. Garrett*, 5 J. L. SOC’Y 501, 502 (2004).

77. Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L. J. 37, 69-70, n.131 (2009) (citing Bruce Ackerman, *WE THE PEOPLE: 1-FOUNDATIONS* 3-162 (1991) (asserting three such transformative periods in the constitutional history of this country, “the Founding, Reconstruction, and the New Deal”)).

78. Leonard J. Long, *Basic Economics for Aspiring Lawyers: A Review of Richard A. Ippolito, Economics for Lawyers*, 28 QUINNIPIAC L. REV. 219, 220 (2009) (describing a liberal arts education as including “broader and deeper exposure to the sciences, mathematics, history, political science, psychology, statistics, and economics”).

can be avoided in a first-year classroom through careful drafting of problems to focus on narrow concepts and issues.⁷⁹

The Americans with Disabilities Act of 1990⁸⁰ ("ADA") provides an illustration of a comprehensive statute that is well-suited to the exploration of cultural attitudes and beliefs. Its detailed findings and purposes sections⁸¹ illustrate the unique function of findings and purposes, which do not command or bind, but rather serve to explain and justify a congressional decision to expand federal law.⁸² It is extremely well suited to the development of exercises illustrating their function as valuable sources of policy-based interpretive analysis and arguments.⁸³

The numerous and detailed definitional sections provide lessons in close reading, the importance of the interrelation of discreet statutory sections which should not be read in isolation, as well as the need for a disciplined approach to statutory interpretation. For example, the application of the statute turns on the

79. In order to exhaust administrative remedies under Title VII, a "claimant must first file a charge with the EEOC" within the applicable limitations period. Ashley R. Wright, Note, *An Ambiguous Clarification: How Burlington Northern & Santa Fe Railway Co. v. White's Resolution of a Circuit Split Creates Uncertainty in the Eighth Circuit*, 61 ARK. L. REV. 161, 164 n.35 (2008). "When Congress passed Title VII [in 1964] . . . , Congress explicitly recognized that Title VII . . . really is meant to set a floor and not a ceiling to employment anti-discrimination principles; that it expected, specifically, that States and localities would provide for more expansive employment protection than Title VII itself does." Aaron Schuham, *Employment Discrimination: 45 Years of Enforcement of Title VII of the Civil Rights Act of 1964: Enforcement and the Future*, 1 AM. U. LABOR & EMP. L.F. 225, 241 (2011).

80. 42 U.S.C. § 12101 et seq. (2006). It should be noted that this article focuses on Title I of the Act, the employment section, but there are four additional titles: Title II applies to "public services, public employment, public communications, and public transportation," Title III applies to public accommodations, Title IV applies to telecommunications, and Title V addresses application and coordination with existing state and federal law and miscellaneous provisions. Julie M. Spanbauer, *Kimel and Garrett: Another Example of the Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 806 n.125 (2003).

81. 42 U.S.C. § 12101 (2006).

82. James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Antidiscrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 129 (2000) (describing the findings and purposes section of the Americans with Disabilities Act in combination with legislative committee reports as "[t]he best sources of legislative history").

83. For a discussion of the importance of teaching students to make effective policy arguments, see Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59 (2001).

definition of an “employer,” which is borrowed from Title VII⁸⁴ and the Age Discrimination in Employment Act.⁸⁵

The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.⁸⁶

This minimum employee requirement, originally intended to insulate small employers from the potentially catastrophic costs of litigation,⁸⁷ has become an embedded cultural feature of federal employment discrimination law and persists despite the fact that it is not premised on financial stability and despite the fact that numerous states have lower employee threshold requirements.⁸⁸ Students are frequently surprised to learn that the fact of discrimination is premised upon the size of the employer and that abstract rather than actual economic concerns of the employer outweigh, as a matter of law, the interests

84. 42 U.S.C. § 2000e(b) (2006). Title VII originally required 25 employees, but Congress amended Title VII in 1972 to reduce the number of employees to 15. Kendra Samson, Note, *Does Title VII Allow for Liability Against Individual Defendants?*, 84 KY. L.J. 1303, 1320 (1996). “Two other antidiscrimination statutes, the Americans with Disabilities Act (‘ADA’) and the Age Discrimination in Employment Act (‘ADEA’), contain almost identical definitions of ‘employer.’ As a result, courts use the same analysis for all three statutes.” *Id.* at 1305.

85. 29 U.S.C. § 621 et seq. (2006).

86. 42 U.S.C. § 12111(5)(A) (2006).

87. Eric Allen Harris, Note, *The Americans with Disabilities Act: Equal Opportunities for Individuals with Disabilities, in Some Large Businesses, in Some Major Cities, Sometimes . . .*, 69 U. PITT. L. REV. 657, 660 (2008) (discussing the fact that small employers are “spared compliance and litigation expenses”).

88. *Id.* at 669 (explaining that “[t]his blanket rule may indeed protect some mom-and-pop businesses, but it is also shielding lucrative and sophisticated businesses from compliance”). State employment discrimination laws frequently apply to smaller businesses:

The anti-disability discrimination provisions of Title 46a in Connecticut, for instance, apply to all private employers with three or more employees. Anti-disability laws in fourteen states apply to all private employers regardless of size, but in the remaining states employers with fewer employees than the statutory threshold escape the requirements of either the ADA or the comparable state statutory schemes.

Zachary D. Schurin, Note & Comment, *Monkey-Business: Connecticut’s Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for the Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 137, 151 (2008).

of individuals in a discrimination-free work environment. These same students may have different cultural expectations of employment as an entitlement rather than a privilege, due, in part, to the fact that these laws have been in existence from the time they were born, perhaps creating a settled and broadly held expectation on their part.⁸⁹

A contrasting definitional section also merits classroom consideration. Unlike the limitation imposed by the minimum employee requirement, the definition of “disability” is noteworthy because it is a reason the ADA is so often described as one of the most sweeping federal enactments.⁹⁰

The term “disability” means, with respect to an individual—
(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)) . . .

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.⁹¹

Accordingly, an individual who has no substantially limiting impairment may seek the same protections afforded to those who do have such impairment provided the former individual is perceived by an employer as having a qualifying impairment.⁹² This provision is consistent with the body of

89. In fact, laws such as Title VII and the Americans with Disabilities Act operate as incursions on the employment at will doctrine, the latter of which historically rendered employment a privilege rather than an entitlement. See Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 355 (2008).

90. See *supra* note 77 and accompanying text.

91. 42 U.S.C. § 12102 (2006).

92. § 12102(C).

employment discrimination law pre-dating its enactment in the sense that discrimination is defined from the perspective of the alleged discriminator rather than from the experience of the victim.⁹³ Unlike other discrimination laws, however, the ADA is expansive in terms of coverage in that it does not require that a victim be a member of a protected class in the traditional understanding of employment discrimination law.⁹⁴ Student views on what it means to discriminate and to experience discrimination can be explored and compared with the legislative meaning.⁹⁵

If classroom time is available to explore various discrimination statutes, the ADA can either be included at the beginning as an introduction to a comprehensive statute or can be included at the end as a capstone to this exploration.⁹⁶ Discussing the statute may prove useful for faculty who view this law as of recent vintage given their contextualized understanding of discrimination law.⁹⁷ For many students entering law school, however, the

93. In terms of claims of disparate treatment, under Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act,

a plaintiff establishes a prima facie case of discrimination by showing that the employer took the employment action "because of" her protected status. Title VII prohibits employers from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin." The ADA prohibits discrimination against a qualified individual "because of" her disability. Similarly, the ADEA prohibits discrimination against an individual "because of" her age.

Miriam Kim, Comment, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 154 (2002).

94. Courts have distinguished the ADA from Title VII, the latter of which "says nothing about protection of persons who are perceived to belong to a protected class." Craig Robert Senn, *Perception over Reality: Extending the ADA's Concept of "Regarded as" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 859, n.154 (2009) (quoting *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004)).

95. For a more thorough discussion of this topic, see *supra* notes 117-130 and accompanying text.

96. The Americans with Disabilities Act was signed on July 26, 1990, but "progressive implementation of its provisions did not begin until Jan. 1992. The general effective date for the public services and public accommodations titles was 26 Jan. 1992; the general effective date for entities with 25 or more employees was 26 July 1992; and the general effective date for entities with 15-24 employees was 26 July 1994." David M. Studdert & Troyen A. Brennan, *HIV Infection and the Americans with Disabilities Act: An Evolving Interaction*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 86 n.10 (1997).

97. Its predecessor, the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., "provided limited employment protection for 'handicapped' employees of the federal government, federal contractors, and recipients of federal aid." Edward J. McGraw, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521, 521 n.1 (1993).

ADA and the protected class it creates has constructed the students' cultural understanding of the concept of disability.⁹⁸ These same students have witnessed disability accommodation as a routine part of their own classroom experience.⁹⁹

What the students may not know is that the ADA is deemed by some a failure.¹⁰⁰ Since the ADA's effective date, studies conducted by the Center for Disease Control, the Census Bureau, and the Bureau of Labor "all show a measurable drop in disabled employment," with the Current Population Survey revealing "a nearly 5% national employment rate decline, from 1994 (24%) to 2004 (19.3%)."¹⁰¹ Students for whom disability accommodation is a routine part of the classroom experience may be surprised to learn that some experts advocate that the ADA be repealed because the experts believe the costs of accommodation create a disincentive for employers to hire disabled workers.¹⁰²

Law professors can also explore this body of employment discrimination law with a classroom discussion eliciting student views on their understanding of the meaning of a distinct type of discrimination, i.e., race discrimination, to be followed by an exercise exploring the meaning of race first through the lens of Section 1981,¹⁰³ and then through the lens of Title VII.¹⁰⁴ A simple fact pattern could be:

Mary was born in Mexico and moved to the United States with her parents when she was sixteen years old. Mary is a United States citizen. She was recently denied employment. She believes she was the victim of discrimination.¹⁰⁵

98. American Bar Association data covering the Fall 2003 entering class through the Fall 2008 entering class indicates "that highest percentage category of entering law students is for ages twenty-three to twenty-five." Judith L. Ritter, *Growin' Up: An Assessment of Adult Self-Image in Clinical Law Students*, 44 AKRON L. REV. 137, 145 n.52 (2011).

99. For a discussion of the accommodations afforded to learning disabled students, see W. Ray Williams, *Annual Survey of the United States Supreme Court and Federal Law: Hand-Up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 649-56 (2001).

100. Schurin, *supra* note 88, at 155.

101. *Id.*

102. *Id.*

103. 42 U.S.C. § 1981(a) (2006).

104. 42 U.S.C. § 2000e-2(a)(1) (2006).

105. Any facts regarding the nature of the alleged acts of discrimination have been intentionally omitted. If students ask for more factual detail, they are informed that they have been assigned the first level of inquiry – whether Mary, the potential plaintiff, is within the class protected by the statute.

Students can be asked a threshold question of statutory interpretation: whether either statute potentially applies to Mary's discrimination claim.¹⁰⁶

The fact pattern is designed to illustrate the importance of historical cultural context to legislation, the need to ascertain legal definitions as either contained in a comprehensive statute or as crafted by courts, and the cultural gap separating lay and legal understandings of discrimination. If the students are not provided any information beyond the language of these two statutory sections, they will be required to isolate and focus upon the relevant language in both statutes in an attempt to ascertain plain or ordinary meaning,¹⁰⁷ beginning first with Section 1981: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens . . ."¹⁰⁸ After much discussion, students generally conclude that although the statutory language, "white citizens" is crucial to ascertaining whether Mary is protected by Section 1981, it must be read in conjunction with the broad language, "[a]ll persons within the jurisdiction of the United States."¹⁰⁹ Many students conclude that given the breadth of this latter language, it is likely that Mary falls within the class protected by Section 1981.

Students are more likely to quickly conclude that Mary is protected by the following, more specific language in Title VII:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.¹¹⁰

After initially discussing both statutes and their application to the fact pattern, students are provided greater context in being informed that the two statutes were enacted approximately 100 years apart. When asked which statute appears to be a product of the Twentieth Century and which was enacted

106. The minimum employee requirement can also be examined in the context of these facts under Title VII. See *supra* note 84 and accompanying text. In order to further simplify and focus this threshold issue of statutory application, Mary is described as being a U.S. citizen. For a discussion of the application of Section 1981 to alienage claims, see *Anderson v. Conboy*, 156 F.3d 167, 170 (2d Cir. 1998) (commenting that "[f]ew cases have addressed whether Section 1981 prohibits discrimination on the basis of alienage").

107. For a discussion of plain or ordinary meaning, see SCALIA & GARNER, *infra* note 116, at 436.

108. 42 U.S.C. § 1981(a) (2006).

109. *Id.*

110. 42 U.S.C. § 2000e-2(a)(1) (2006).

in the Nineteenth Century, some students point to Section 1981 as the more contemporary piece of legislation, believing it to be more expansive in its language protecting "[a]ll persons within the jurisdiction of the United States,"¹¹¹ unqualified by racial or other classification. When these same students learn that Section 1981 was originally passed immediately after the Civil War and was enacted to protect recently freed slaves,¹¹² some students may more confidently conclude that Mary is not protected by this piece of legislation because she is not African American.

A class discussion as to the manner in which the language of the statute could be interpreted to protect Mary rarely reveals the analysis actually employed by the U.S. Supreme Court in a 1987 decision answering a similar issue of statutory application.¹¹³ The different lower court opinions also provide insight into the different approaches the courts have utilized in attempting to differentiate

between race, national origin, and ethnicity and in fitting individuals into particular protected categories. The suit was brought by a U.S. citizen born in Iraq, who believed he was denied tenure because of his Arab origin and Muslim religion. The Federal District Court initially held that a section 1981 action could be maintained "because the complaint alleged denial of tenure because respondent was of the Arabian race." Upon a motion for summary judgment, a different judge "construed the pleadings as asserting only discrimination on the basis of national origin and religion" and ruled that section 1981 did not reach "claims of discrimination based on Arabian ancestry." This language illustrates the difficulties in isolating discrimination based on race. The Court of Appeals held that "although under current racial classifications Arabs are Caucasians," when Congress passed section 1981 it intended to protect persons against discrimination based on "at the least, membership in a group that is ethnically and physiognomically distinctive."

In affirming the judgment of the Court of Appeals, the U.S. Supreme Court noted that despite "a common popular understanding that there are three major human races - Caucasoid, Mongoloid, and Negroid[, m]any modern biologists and anthropologists . . . criticize racial classifications as arbitrary and of little use in understanding the variability of human beings" leading "some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature." Nonetheless, the majority

111. 42 U.S.C. § 1981(a) (2006).

112. See Comment, *supra* note 73, at 33.

113. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

recognized that section 1981 protection was limited to “racial discrimination” and framed its decision in these terms: “Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination” Thus, despite conceding the difficulties in defining race, the U.S. Supreme Court did not challenge racial categorization per se but made it more inclusive.¹¹⁴

In reaching its decision, the Supreme Court relied upon nineteenth century dictionaries and encyclopedias to provide meaning to these legislatively created racial classifications and to conclude that a U.S. citizen who had been born in Iraq was entitled to protection under Section 1981.¹¹⁵ The opinion provides an opportunity for discussion of the role of legislative history, how it is created, and what types of legislative history courts are inclined to invoke as a window into cultural context to aid statutory interpretation. Simultaneously, it invites discussion of the various interpretive perspectives, including textualism, and the potential problems with such approaches.¹¹⁶

Again, this process urges students to ask themselves whether their own cultural context and their view of the meaning of race interfered with or perhaps rendered them unable to view race through a different cultural lens. Students are also asked to consider the ways in which the legal construction of race is at odds with their personal views. The language in Section 1981, “the

114. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 322-24 (1997). For additional discussion of the case, see Robert W. Emerson, *Franchise Termination: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559, 610 n. 254 (quoting *St. Francis Coll.*, 481 U.S. at 613). The Court also indicated that this interpretation was supported by legislative history. *St. Francis Coll.*, 481 U.S. at 612.

115. “These dictionary and encyclopedic sources are somewhat diverse, but it is clear that they do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race.” *Id.*

116. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 432 (2012) (defining legislative history as “proceedings leading to the enactment of a statute, including legislative hearings, committee reports, and floor debates”). One problem in relying on legislative intent as a basis for a particular statutory interpretation is that it “can render the interpretation of statutes inappropriately unresponsive to changes in the interpretive environment over time.” LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 83 (2010). Justice Scalia advocates an “austere” version of textualism, which another self-described textualist, Judge Frank Easterbrook, argues that “‘the choice among meanings [of words in statutes] must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.’” Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012 (book review).

same right . . . as is enjoyed by white citizens" can only be understood by what it meant to be African American prior to the Civil War Reconstruction era legislation. Students may be asked to consider whether the answer should be found in the language of an 1857 U.S. Supreme Court decision in which the Court determined that Dred Scott was not "a citizen for purposes of federal court jurisdiction."¹¹⁷

The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by the instrument to the citizen?¹¹⁸

The Court provided a negative answer to this question and "went even further, holding that 'people of the United States' and 'citizens' were coextensive and that even 'free negroes' were not part of 'this people' as contemplated in the U.S. Constitution."¹¹⁹ Because being white was part and parcel of being a citizen, it is not surprising that the first federal employment discrimination legislation defined race in relationship to white privilege.¹²⁰ Thus, "the construction of race is the construction of relationships. The relationship context creates a dualism—whites or nonwhites—and allows races to be defined against one another by reference to what other races are and are not."¹²¹ Students might also be asked to consider whether the current legal construct of race, which "invokes biologically based human characteristics (so-called 'phenotypes')," should continue in light of the scientific community findings that "no biological basis for distinguishing human groups along the lines of race."¹²² Students can also be encouraged by the professor to evaluate current proof requirements that may not be effective in combating the most common type of discrimination, which is the product of unconscious stereotypes and bias prevalent in contemporary society.¹²³

117. Saito, *supra* note 114, at 270. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 403 (1857) (holding Scott was not a citizen of Missouri, and the Court, therefore, lacked jurisdiction over his claim).

118. *Id.*

119. Saito, *supra* note 114, at 270 (quoting *Scott*, 60 U.S. (19 How.) at 403).

120. See Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 52 n.12 (1997).

121. *Id.*

122. Saito, *supra* note 114, at 283.

123. Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of*

At this point in the discussion, students should begin to understand the need to self-consciously assess their judgments and assumptions, particularly when exploring an older statute and any previously unexplored area of law. A final exercise will remind them that cultural context is important to understanding contemporary law. The students will be shown a televised debate between Senator Strom Thurmond of South Carolina, the principal democratic opponent of the Civil Rights Act of 1964, and Senator Hubert H. Humphrey of Minnesota, the Act's principal democratic proponent, on the eve of the introduction of the bill into the Senate.¹²⁴ Although this debate occurred less than fifty years ago, the students will likely be shocked and offended by Senator Thurmond's racist arguments made against the law.

Senator Thurmond described the bill that became the Civil Rights Act of 1964 as affording preferential rights to some at the expense of the constitutional rights of others.¹²⁵ He also blamed the victims of race discrimination, arguing that the bill would vest preferential rights in "a favored few who vote in block" and who take part in "lawless riots."¹²⁶ He declared the bill to be an attempt to "appease those waging a vicious campaign of civil disobedience" and warned that enacting the bill into law would "only encourage further mob violence."¹²⁷ His comments were especially troubling given "the televised violence in the South against peaceful civil rights demonstrators" that was occurring during this time.¹²⁸ He inaccurately described the bill as requiring racial balance. Indeed, when Thurmond asked, "[w]hose jobs are these negroes and minorities going to take?"¹²⁹ He suggested that if enacted, it would result in whites losing their jobs.¹³⁰

Motivation in Reducing Implicit Workplace Discrimination, 95 VA. L. REV. 1893, 1895-96 (2009).

124. DVD: *Birth Struggle of the 1964 Civil Rights Act* (CBS Television Network Broadcast Mar. 18, 1964), available at www.films.com (Films for the Humanities & Sciences) [hereinafter DVD]. Both Humphrey and Thurmond were democrats. *Id.* Thurmond was one of nineteen senators opposing the Civil Rights. *Id.* Opponents in the senate led a filibuster that went on for 534 hours, one minute, and 51 seconds, lasting a total of 77 days. *Id.* The bill was approved by the senate on June 19, 1964 by a vote of 73 to 27. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Michael R. Kuffner, *Commentary: From Public Schools to Public Libraries: Examining the Impact of Brown v. Board of Education on the Desegregation of Public Libraries*, 59 ALA. L. REV. 1247, 1258 (2008). In fact, experts argue that "televised violence in the South against peaceful black civil rights demonstrators dramatically disgusted the nation and directly led to the passage of the 1964 Civil Rights Act." *Id.*

129. See DVD, *supra* note 124.

130. *Id.*

Although Senator Humphrey characterized the bill as “moderate, reasonable, and bi-partisan,” he also considered it necessary to respond to the “great moral challenge . . . to the conscience of the nation.”¹³¹ The students might be surprised, however, by their discomfort with some of Senator Humphrey’s statements and language contrasting African Americans and the limited civil rights they enjoyed with the rights enjoyed by “very unsavory characters,” including “people who have little or no good reputation” and “people who come from foreign countries.”¹³² The students will be asked to consider whether his suspicion and skepticism of noncitizens reflected an entrenched, perhaps unconscious, understanding of white citizenship as the benchmark of privilege against which all other group rights were measured.¹³³

The students are then asked to consider how much the law has changed cultural beliefs and to reflect upon Senator Thurmond’s statement: “[y]ou can’t do some things by law. Some things must come in the hearts and minds of the people.”¹³⁴ They are also reminded that this is legislative history they can see and hear that has not been preserved only in written form. The students are then asked to consider what they might have witnessed had this technology been available when the Civil War Reconstruction era statutes, such as Section 1981, were debated.

This exercise is intended to bring legislative history to life and to reinforce how important it is to consider the cultural context of those who made the law, the current cultural context within which the law operates, and the cultural views and understandings students bring to the law when they attempt to interpret it. Professors can construct this and other similar exercises to assist them in focusing on student learning by navigating the shifting cultural context of law over time and its potential divergence from the students’ own cultural perspectives.

CONCLUSION

A professor who focuses classroom discussion on identifying the cultural perspectives of the students and introducing them to law through a cultural lens is simultaneously teaching students to become aware of their cultural perspective, while simultaneously aiding students to self-consciously compare their perspective with the shifting cultural context of the law. Teaching this technique of self-assessment is not only critical to a lawyer’s development as a lifelong student of the ever-changing legal landscape, it also is a partial

131. *Id.*

132. *Id.*

133. *See supra* notes 117-121 and accompanying text.

134. *See DVD, supra* note 124.

response to looming ABA directives regarding assessment and to negative public opinions about the value of legal education. Learning this process of self-assessment early in law school will enable students to measure their own grasp of classroom material no matter what pedagogy or technique a professor might use. Moreover, professors will benefit from adopting a cultural perspective in the classroom. A professor's scholarship, even traditional scholarship, may be enriched because the professor who elicits and responds to the cultural perspectives of students in the classroom will better understand societal perceptions of the law, which should provide new avenues for traditional and nontraditional scholarship.

The technique of using culture in the classroom does not require seismic shifts in law school teaching. Rather, it employs the modest addition of regularly changing the focus of the discussion to illuminate dichotomies in the cultural context of the law's development and the students' cultural perception of the law. A natural product of this student-centered environment will be that students learn to self-assess. This process of self-assessment represents an important aspect of the academy understanding of effective teaching in law school classrooms.

