

# ADDRESSING CULTURAL BIAS IN THE LEGAL PROFESSION

DEBRA CHOPP<sup>∞</sup>

## ABSTRACT

Over the past two decades, there has been an outpouring of scholarship that explores the problem of implicit bias. Through this work, commentators have taken pains to define the phenomenon and to describe the ways in which it contributes to misunderstanding, discrimination, inequality, and more. This article addresses the role of implicit cultural bias in the delivery of legal services. Lawyers routinely represent clients with backgrounds and experiences that are vastly different from their own, and the fact of these differences can impede understanding, communication, and, ultimately, effective representation. While other professions, such as medicine and social work, have adopted measures that are designed to mitigate the effects of cultural bias on service delivery, the legal profession lags far behind. In contrast to professionals in these other disciplines, lawyers have seen little by way of change—to either educational models or to the Rules of Professional Conduct—with an eye toward addressing the problem of cultural bias. This article seeks to highlight the failure of the legal profession to take such steps and suggests avenues for reform.

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<sup>∞</sup> Staff Attorney, New York Legal Assistance Group, Tenants' Rights Unit; J.D. 2015, New York University School of Law. This article began as a final paper for Professor Paulette M. Caldwell's Education Law Seminar at NYU Law. It went through several drafts under her supervision and fulfilled my substantial writing requirement. I am indebted to Professor Matthew Coles for his seminar on Sexuality and the Law which gave me the background to make an attempt at synthesizing Equal Protection and desegregation jurisprudence. I would also like to thank Charles Mather, J.D. 2014, University of Michigan, for his comments on an earlier draft, as well as the staff of the *N.Y.U. Review of Law & Social Change* for all their assistance. Any errors or omissions are mine alone.

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## I.

## INTRODUCTION

Culture provides a foundation for the way we experience the world.<sup>1</sup> Rooted in traits such as ethnicity, race, religion, and gender identity, culture influences people’s values, behaviors, and beliefs.<sup>2</sup> Scholars have described culture as something akin to “the air we breathe—it is largely invisible and yet we are dependent on it for our very being.”<sup>3</sup> Because culture provides the backdrop for our understanding of the world, it also affects our understanding of others—though much of what shapes our views of the behavior of others is intangible to us and lies beneath the surface of our own self-knowledge.<sup>4</sup> This is as true of our positive assessments of others as it is of negative ones. Unconscious, instinctive negative judgment about others—or “implicit bias”—is inextricably tied to culture: a person’s multiple identities give rise to cultural affiliations,<sup>5</sup> and cultural affiliations are often at the root of implicit bias.

The past two decades have seen an explosion of research into implicit biases and the ways in which they affect human behavior.<sup>6</sup> As the United States becomes

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1. Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 48 (Kimberly Barrett & William George eds., 2004).

2. See Ruth G. Dean, *The Myth of Cross-Cultural Competence*, 82 FAMS. SOC’Y 623, 625 (2001).

3. Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001); see also Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 220–21 (2002) (“Like birds to air and fish to water, we are unaware of the culture in which we function until we are transported out of that culture by travel, experience, or education.”).

4. See Paul R. Tremblay, *Interviewing and Counseling Across Cultures*, 9 CLINICAL L. REV. 373, 376 (2002).

5. Bryant & Peters, *supra* note 1, at 48; see generally Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

6. See generally Mahzarin R. Banaji & Anthony G. Greenwald, *Into the Blindspot*, in BLIND SPOT (2013) (describing how the “automatic white preference” that most people express when taking the Implicit Association test regarding race actually predicts discriminatory behavior); Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Silver, *supra* note 3; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94

increasingly diverse,<sup>7</sup> cultural misunderstandings and manifestations of bias are more likely to occur. These misunderstandings and biases can pose significant problems in communication-based professions such as medicine, social work, and law. For these reasons, health care providers and social workers are governed by professional standards and ethical rules that direct professionals to avoid making decisions that are rooted in bias.<sup>8</sup> Multiple studies show that doctors and social workers are aware that understanding culture and rooting out bias are essential to effective communication with clients.<sup>9</sup> One might expect the legal profession to address service delivery in similar ways. Yet culture and bias receive relatively less attention in the legal profession.<sup>10</sup>

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CAL. L. REV. 945 (2006); Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 123, 123 (2002); Nicole E. Negowetti, Symposium, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015); Debra Lynn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013) (identifying the possible effects of unconscious bias throughout the legal system, and not just in particular areas of practice); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); JUSTIN D. LEVINSON & ROBERT J. SMITH, *IMPLICIT RACIAL BIAS ACROSS THE LAW* (2012) (exploring the ways in which implicit racial bias affects twelve different areas of law).

7. See Jennifer M. Ortman & Christine E. Guarneri, *United States Population Projections: 2000 to 2050*, U.S. CENSUS BUREAU (Aug. 2, 2016, 9:32 AM), <http://www.census.gov/population/projections/files/analytical-document09.pdf> [<https://perma.cc/P27S-ZM34>]; see also Mary Isaacson, *Clarifying Concepts: Cultural Humility or Competency*, 30 J. PROF. NURSING 251 (2014).

8. See CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, <https://www.socialworkers.org/pubs/code/code.asp> [<https://perma.cc/3RM4-KSHG>]; see also AMERICAN MEDICAL ASSOCIATION PRINCIPLES OF MEDICAL ETHICS, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page> [<https://perma.cc/7VMU-XLEB>]. Other professions address bias as well. For example, the American Psychological Association (APA) maintains standards and guidelines about bias and the treatment of cultural and linguistic differences. See APA STANDARD 2.01, <http://www.apa.org/ethics/code/index.aspx> (last visited Aug. 3, 2016); see also GUIDELINES ON MULTICULTURAL EDUCATION, TRAINING, RESEARCH, PRACTICE, AND ORGANIZATIONAL CHANGE FOR PSYCHOLOGISTS, <http://www.apa.org/pi/oema/resources/policy/multicultural-guidelines.aspx> (last visited Aug. 3, 2016). For additional examples, see ABA Comm. on Ethics & Prof'l Responsibility, *Appendix*, in NOTICE OF PUBLIC HEARING 10-12, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/rule\\_8\\_4\\_amendments\\_12\\_22\\_2015.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.athcheckdam.pdf) [<https://perma.cc/APW6-D85U>].

9. See generally Robert M. Ortega & Kathleen Coulborn Faller, *Training Child Welfare Workers from an Intersectional Cultural Humility Perspective: A Paradigm Shift*, 90 CHILD WELFARE 27 (2011); Michele Goodwin & Naomi Duke, *Health Law: Cognitive Bias in Medical Decision-Making*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 95 (2012); Alan Nelson, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, 94 J. NAT'L MED. ASS'N 666 (2002); Peter A. Clark, *Prejudice and the Medical Profession: A Five-Year Update*, 37 J. L. MED. & ETHICS 118 (2009); Elizabeth A. Jacobs et al., *Teaching Physicians-in-Training to Address Racial Disparities in Health: A Hospital-Community Partnership*, 118 PUB. HEALTH REP. 349 (2003).

10. Some commentators have addressed the role of culture in legal education and in legal practice. See, e.g., Annette Wong, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic and Cultural Differences*, 21 S. CAL. REV. L. & SOC. JUST. 431, 460-65 (2012) (arguing that cultural awareness is an issue of professional responsibility and that it is incumbent on lawyers to raise issues of culture to courts).

This article addresses the inadequate treatment of culture and bias in the legal profession and, specifically, in legal education and in the code of ethics for lawyers. It examines the Model Rules of Professional Conduct as a guide for lawyers in navigating cultural bias, and compares the Rules of Professional Conduct to the ethical standards for social workers and physicians.<sup>11</sup> In this article, I advocate for both greater acknowledgement of implicit bias as well as the introduction of the concept of “cultural humility” into legal education and into the Rules of Professional Conduct that govern lawyers. Cultural humility emphasizes self-reflection and treats each person as an expert on his or her own cultural experience.<sup>12</sup> It builds on models of cross-cultural communication already in existence and can help lawyers respect the cultural backgrounds of their clients, communicate with them more successfully, and tell their stories to decision-makers and negotiation partners with greater fidelity to the client’s lived experience.

The effects of greater acknowledgement of implicit bias and introduction of cultural humility into legal education, our Rules of Professional Conduct, and into the ethos of the profession have the potential to be far-reaching. By helping lawyers examine their own biases and take steps to minimize the effect of these biases, we will be a more effective and compassionate profession and may reduce miscommunication and conflict in legal practice, both in scenarios where cultural differences are apparent and even when they are hidden.

This article proceeds in four parts. Part I offers a working definition of “culture” and endeavors to demonstrate the ways in which culture affects human behavior and the practice of law in particular. Part I also explores notions of cultural competence and cultural humility as frameworks for professionals who engage in cross-cultural communication. These frameworks become relevant later in the paper in assessing how to improve both legal education and the ethical rules for lawyers along these dimensions. Part II delves into the topic of implicit bias and argues that because bias is pervasive, we ought to be doing more to acknowledge and address it in both legal education and in the ethical standards that govern lawyers. One way to address implicit bias is to train lawyers in cultural humility and to include this concept in the Rules of Professional Conduct for lawyers. Parts III and IV drill down deeper. They examine the extent to which

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11. I choose in this article to compare the treatment of culture and bias in law to the treatment of culture and bias in medicine and social work. I do so because I teach and practice law in a medical-legal partnership clinic (the Pediatric Advocacy Clinic) where I routinely interact with doctors and social workers and have had the opportunity to see differences in the professions.

12. Cultural humility differs from the concept of cultural competence that has been adopted by many professions. *See, e.g.*, Ortega & Faller, *supra* note 9, at 33 (encouraging child welfare workers to move away from a cultural competence framework and to engage clients as experts on their own cultures as part of the service delivery process); *see generally* Melanie Tervalon & Jann Murray-Garcia, *Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education*, 9 J. HEALTH CARE FOR POOR & UNDERSERVED 117 (1998).

legal education (Part III) and the Rules of Professional Conduct for lawyers (Part IV) are attentive to issues of culture. Parts III and IV also compare the legal field to both social work and medicine when it comes to training and ethical standards relating to cultural competence and implicit bias. We will see that law lags far behind these other fields along these dimensions. Part IV also advocates for amending the Model Rules of Professional Conduct to align them with the rules of ethics that govern health care providers and social workers, and to bring issues of culture and bias into the consciousness of practicing attorneys.

## II.

### WHAT WE MEAN WHEN WE TALK ABOUT CULTURE

#### A. *Definition of Culture*

Before delving into the question of whether and to what extent the legal profession is sensitive to matters of cultural competence, it is appropriate to specify what we mean when we talk about “culture.” “Culture,” according to one account, is “a system of shared beliefs, values, customs, behaviors, and artifacts that members of a society use to cope with their world and with one another, and that is transmitted from generation to generation through learning.”<sup>13</sup> Cultural groups can be based on a range of different identities including race, religion, age, sexual orientation, gender, immigration status, social status, language, and geography.<sup>14</sup> No single characteristic will determine a person’s “culture”—we are each a part of several cultures, and each culture generates its own norms.<sup>15</sup> A person’s behaviors and values are thus driven, in part, by a complex confluence of cultures and by the way in which society treats members of different groups. Culture is closely bound up with identity; it may be understood as an expression of group identity.

Culture affects the way we experience the world and the people in it.<sup>16</sup> Our choice of words, our tone of voice, our proximity to another person when we speak to them are all influenced by the cultures in which we were raised.<sup>17</sup> Culture also

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13. DANIEL G. BATES & FRED PLOG, HUMAN ADAPTIVE STRATEGIES 3 (1991).

14. Bryant & Peters, *supra* note 1, at 48; Tremblay, *supra* note 4, at 379; *see generally* Joseph R. Betancourt, *Cross-Cultural Medical Education: Conceptual Approaches and Frameworks for Evaluation*, 78 ACAD. MED. 560 (2003). While cultural groups form around these and many other identities, the case examples that I use in this article to illustrate the complexity of cross-cultural lawyering are drawn from my own experience practicing law within a poverty law clinic and tend to focus on cultural differences stemming from race, ethnicity, and socioeconomic status. These examples, for similar reasons, are more likely to be rooted in the practice of public interest law and not corporate law.

15. Tremblay, *supra* note 4, at 379; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

16. Betancourt, *supra* note 14, at 561.

17. Bryant & Koh Peters, *supra* note 1, at 48.

affects the attributions we make about others. If we experience someone as rude, it is (in part) because we have a culturally contingent understanding of what it means to be polite.

People learn their culture through a process of assimilation, which entails learning and internalizing group preferences, evaluations, and values.<sup>18</sup> Of course, the process of learning a culture or assimilating into it does not generate a unified cultural being or a perfect representation of a given particular culture. People are more complex than that, and they routinely reject values and norms held dear by the cultures with which they identify. People may embrace or eschew the language, tone of voice, style of dress, customs, practices, and beliefs associated with a culture they count as their own. And, of course, individual identity and cultural identity evolve over time.<sup>19</sup> To understand culture, then, one must understand that the norms associated with a particular culture may change and that people who associate with a given culture may diverge significantly in their practices and beliefs. (The necessity of this point will come into sharper relief in Part I.B. below, as I explore the limitations of the “cultural competence” model for addressing cross-cultural communications between professionals and clients.)

Two brief examples can help to illustrate the profound and pervasive ways in which culture shapes human behavior and understanding in ways that are relevant to the practice of law. First: One prominent expression of culture is the way in which people show love to, and the way in which they discipline, their children. In some cultures, keeping children physically close is an expression of love, while in others fostering independence is valued more highly.<sup>20</sup> In some cultures, discipline is practiced by separating a child from her environment (a “time-out”), while in other cultures, spanking is the norm.<sup>21</sup> These parenting approaches are central to child custody cases, which examine the behavior of parents in light of

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18. Lawrence III, *supra* note 6, at 337–38; *see also* Ortega & Faller, *supra* note 9, at 29.

19. This may be especially true in the United States. Ortega & Faller, *supra* note 9, at 29. *See also* Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 486, 492–93 (2003) (explaining that culture is as much about difference as it is about unity and noting the challenge for law to respect and reflect culture in a multicultural state).

20. Marcia Carteret, *How Individualism and Collectivism Manifest in Child Rearing Practices*, DIMENSIONS CULTURE (Aug. 3, 2016, 11:14 AM), <http://www.dimensionsofculture.com/2013/09/how-individualism-and-collectivism-manifest-in-child-rearing-practices/> [<https://perma.cc/FJS4-KNDD>]; MEREDITH SMALL, KIDS: HOW BIOLOGY AND CULTURE SHAPE THE WAY WE RAISE YOUNG CHILDREN 13 (2002) (noting, for example, that “preschool is a microcosm of the message Western culture in general sends as an imperative for a well-functioning society. One must be independent, self-reliant, but be able to cooperate and share and listen and obey authority. And these goals make sense both historically and economically—Western culture believes that the way to be successful is to be an individual achiever.”).

21. *See generally* Jennifer E. Lansford, *The Special Problem of Cultural Differences in Effects of Corporal Punishment*, 73 L. & CONTEMP. PROBS. 89 (2010); Opinion, *Is Spanking a Black and White Issue?*, N.Y. TIMES, Aug. 14, 2011.

the “best interests of the child.”<sup>22</sup> A family lawyer will face the task of understanding her client’s parenting approaches and explaining them to the trier of fact to make the case that the parent is acting in the best interests of her child.

Second: Culture is an important determinant of whether a person views themselves as an independent, autonomous decision-maker, or part of a collective and possessed of limited ability to make independent decisions.<sup>23</sup> This expression of culture can loom large in connection with settlement (and other) negotiations. A criminal defense lawyer might assume she is operating in her client’s best interests when negotiating a plea deal in exchange for a reduced sentence, for example, and may not understand that her client’s community will not allow her to admit guilt as it would bring shame on the community.<sup>24</sup> A competent lawyer must therefore understand the constraints on her client’s autonomy.

When lawyers are unaware of how culture influences their clients’ behavior or their clients’ values, they risk substituting their own judgment for that of their clients and failing to pursue their clients’ true objectives.<sup>25</sup> Sue Bryant emphasizes this point in her examination of cross-cultural lawyering: “The capacity to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences.”<sup>26</sup>

Thus lawyers must know how to account for culture in their client interactions, so that they can build a trusting lawyer-client relationship and understand and work toward their client’s goals. Working toward a client’s goals often entails telling their clients’ stories, persuading decision-makers to find in favor of their clients, and negotiating favorable settlements for their clients. When lawyers are not cognizant of the power of culture, they risk misunderstanding their client’s stories, misinterpreting their clients’ goals and objectives, and potentially alienating their clients as well as the decision-makers in their clients’ cases.<sup>27</sup> This is antithetical to “client-centered” lawyering, which places an extremely high premium on communication and trust in the attorney-client relationship.<sup>28</sup>

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22. See, e.g., MICH. COMP. LAWS § 722.23 (2016) (listing 12 best interest factors that judges must consider in making child custody determinations. Factors include, but are not limited to: “(a) The love, affection, and other emotional ties existing between the parties involved and the child[.]” and “(b) the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or religion or creed, if any.” These factors in particular implicate the family’s culture, even if the statute is not explicit about it.). Each state has its own version of the best interest of the child factors for courts to consider during child custody cases. See table on file with author.

23. Tremblay, *supra* note 4, at 400–02.

24. Bryant & Peters, *supra* note 1, at 50.

25. Bryant, *supra* note 3, at 42–43.

26. *Id.* at 41–42.

27. Tremblay, *supra* note 4, at 388.

28. See generally David A. Binder et al., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3rd ed. 2012).

*B. Integrating Cultural Understanding into Client-Based Professions*

Much has already been written in the fields of law, medicine, and social work about how to teach professionals to combat stereotypes and consider clients' complex identities when providing services to them,<sup>29</sup> and many client-based professions now strive to assure that service providers attain "cultural competence."<sup>30</sup> Cultural competence has been defined as "a set of attitudes, skills, behaviors, and policies enabling individuals and organizations to establish effective interpersonal and working relationships that supersede cultural differences[.]"<sup>31</sup>

In the medical context, Dr. Michael Paasche-Orlow has identified three values that are "essential" to cultural competence: "(1) acknowledgement of the importance of culture in people's lives, (2) respect for cultural differences, and (3) minimization of any negative consequences of cultural differences."<sup>32</sup> Scholars and practitioners alike recognize that there is no quick way to achieve cultural competence. The process is dynamic, ongoing, and developmental, and it requires a long-term commitment.<sup>33</sup>

Because people are simultaneously embedded within multiple cultures, however, it is extremely difficult to become "culturally competent," particularly if "competence" denotes mastery of "facts" about a particular culture.<sup>34</sup> The cultural competence model carries the risk that professionals will feel overly confident in their understanding of clients from other cultures. It also carries the risk that people will rely on stereotypes when engaging with people from different

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29. See *supra* notes 6, 9 and accompanying text.

30. See, e.g., Mary Isaacson, *Clarifying Concepts: Cultural Humility or Competency*, 30 J. PROF. NURSING 251, 251 (2014) (specifically exploring cultural competence in the field of nursing).

31. Marcie Fisher-Borne, Jessica Montana Cain & Suzanne L. Martin, *Mastery to Accountability: Cultural Humility as an Alternative to Cultural Competence*, 34 SOC. WORK EDUC. 165, 168 (2014) (quoting TERRY L. CROSS ET AL., TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE (1989)). The authors go on to note that "[m]any cultural competency frameworks fail to encourage critical self-awareness that examines or challenges the inherent power imbalance between provider and client . . . but instead focus primarily on *exposing* providers to different (i.e., non-dominant) cultural groups." *Id.* at 169 (emphasis in original).

32. Michael Paasche-Orlow, *The Ethics of Cultural Competence*, 79 ACAD. MED. 347, 347 (2004).

33. Ortega & Faller, *supra* note 9, at 35.

34. Bryant, *supra* note 3, at 41 (explaining that each person is part of multiple cultural groups at once (based on, for example, race, socioeconomic status, gender, ethnicity) and that people may accept or reject values from their various cultures. Bryant cautions against reinforcing stereotypes in the study of culture.); see also Betancourt, *supra* note 14, at 562 ("With the huge array of cultural, ethnic, national, and religious groups in the United States, and the multiple influences, such as acculturation and socioeconomic status, that lead to intra-group variability, it is difficult to teach a set of unifying facts or cultural norms (such as 'fatalism' among Hispanics or 'passivity' among Asians) about any particular group.").



cultures because they have studied the culture and maintain the belief that they are competent.<sup>35</sup>

Dr. Paasche-Orlow acknowledges the limitations of this approach to cultural competence and stresses that true cultural-competence comes from patient-centered care. He points out that it “would be ludicrous, for example, to assume that all Haitian patients believed in Voodoo[.]”<sup>36</sup> Cultural competence requires the professional to exhibit openness to other cultures. It also requires self-awareness by the professional such that s/he recognizes his/her own cultural perspective as well as the existence of a culture of the profession.<sup>37</sup>

Because there is a risk of professional over-confidence in the cultural competence model, a slightly different—and better—way for professionals to understand their role in engaging people from different cultures may be found in the concept of “cultural humility.”<sup>38</sup> This concept acknowledges the profound impact that culture has on human behavior and deliberately positions the client as the expert on his/her culture. Two commentators explained as follows:

[C]ultural competence in clinical practice is best defined not by a discrete endpoint but as a commitment and active engagement in a lifelong process that individuals enter into on an ongoing basis with patients, communities, colleagues, and with themselves. This training outcome, perhaps better described as cultural humility versus cultural competence . . . is a process that requires humility as individuals continually engage in self-reflection and self-critique as lifelong learners and reflective practitioners. It is a process that requires humility in how physicians bring into check the power imbalances that exist in the dynamics of physician-patient communication by using patient-focused interviewing and care. And it is a process that requires humility to develop and maintain mutually respectful and dynamic partnerships with communities on behalf of individual patients and communities in the context of community-based clinical and advocacy training models.<sup>39</sup>

Physicians and social workers who adopt this approach toward working with patients and clients shed the unrealistic expectation that they will achieve “competence” in the cultures of their patients/clients. Instead, they acknowledge the role that difference and culture play in service delivery: they reflect on the

35. Betancourt, *supra* note 14, at 562. Research shows that people who feel unbiased may be more susceptible to the effects of unconscious bias. See Jerry Kang et al., *supra* note 6, at 1173–74.

36. Paasche-Orlow, *supra* note 32, at 348.

37. *Id.* at 348.

38. See generally Ortega & Faller, *supra* note 9 (encouraging child welfare workers to move away from a cultural competence framework and to engage clients as experts on their own cultures as part of the service delivery process).

39. Melanie Tervalon & Jann Murray-Garcia, *Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Patient Training Outcomes in Multicultural Education*, 9 J. HEALTH CARE FOR POOR & UNDERSERVED 117, 118 (1998) (internal citations omitted).

cultures that influence their own experiences and behaviors; and they assume the role of learner by asking their clients questions about their own lived experiences. The goal of this approach is to improve communication and understanding between professional and patient/client.<sup>40</sup>

This approach can be as useful for lawyers engaging in cross-cultural communications as it is for medical and social work professionals. And, indeed, without explicitly adopting the “cultural humility” framework, legal scholars have recognized the importance of legal professionals treating clients as the experts on their cultures.<sup>41</sup> Paul Tremblay, for example, encourages lawyers to use “heuristics” when they interview and counsel clients from cultures that are different from their own. He explains:

The central premise of the heuristics idea is this: A lawyer working with an ethnic minority client can neither assume that the client’s cultural preferences do not matter . . . nor be certain that the specific differences of which the lawyer is aware will call for predictable variations in their interaction. The former danger we label as cultural imperialism; the latter, stereotyping. What the good faith lawyer needs is an orientation to cross-cultural practice which respects differences but does not guess incorrectly how the differences will matter.<sup>42</sup>

Tremblay suggests identifying the areas in which cultures are most likely to differ, learning about those areas, and employing “tentative generalizations accompanied by a disciplined naïveté.”<sup>43</sup> He encourages lawyers to identify some cultural differences in advance and learn about them, but then to open themselves up to learn from the particular client before them.

Other commentators writing about the delivery of legal services have sounded similar themes. In particular, Sue Bryant and Jean Koh Peters, in their seminal work *Five Habits for Cross-Cultural Lawyering*, describe specific exercises that lawyers may undertake to build trust and understanding between lawyer and client in the face of cultural differences.<sup>44</sup> These exercises, or habits, require the lawyer to think critically about the many identities that form her own cultural background and consider how the lawyer’s own culture affects her communication with her clients.<sup>45</sup> With their emphasis on critical thinking and on the importance of refraining from making assumptions about what drives clients’ communication and decisions, the habits provide a useful tool for lawyers confronting the cultural diversity of American legal practice.

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40. See Dean, *supra* note 2, at 624–25.

41. Tremblay, *supra* note 4, at 382.

42. Tremblay, *supra* note 4, at 385.

43. *Id.* at 386

44. See generally Bryant & Peters, *supra* note 1.

45. *Id.*

Preparing lawyers to practice in a diverse landscape is increasingly important. The United States is already home to a dizzying array of different cultures and subcultures, and is becoming even more diverse. The United States Census Bureau projects that by 2043 there will be no majority ethnicity or race in this country.<sup>46</sup> According to the United States Census, in 2007, 55.4 million Americans (20%) spoke a language other than English at home.<sup>47</sup> This constitutes a 140% increase since 1980, during which the population grew by 34%.<sup>48</sup> Legal professionals—who remain largely white and mono-lingual—will have no choice but to engage in cross-cultural communication.<sup>49</sup> This will be true for lawyers working on behalf of people in poverty and for lawyers who serve well-heeled corporate clients. Effective cross-cultural communication requires an understanding of the tenets of cultural humility described above and an acknowledgement and examination of bias.

### III. THE UBIQUITY OF BIAS

When we talk about culture and its effect on human behavior, we are also talking about difference. And where there is difference, frequently there is also bias, both conscious and unconscious.<sup>50</sup> Psychologists have long understood that our unconscious—mental processes of which we are unaware—affects our behavior.

Over the past two decades, there has been an outpouring of research (by psychologists, economists, lawyers, and others) on the concept of unconscious or implicit bias—the idea that people harbor unknown biases against others on the basis of their membership in particular groups or their having particular traits.<sup>51</sup> Implicit biases are different from explicit biases that are concealed.<sup>52</sup> The former

46. Michael Cooper, *Census Officials, Citing Increasing Diversity, Say U.S. Will Be a 'Plurality Nation'*, N.Y. TIMES (Dec. 12, 2012), <http://www.nytimes.com/2012/12/13/us/us-will-have-no-ethnic-majority-census-finds.html> [<https://perma.cc/4BG6-PMD6>]; see also Ortman & Guarneri, *supra* note 7.

47. U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2007 (2010), <http://www.census.gov/prod/2010pubs/acs-12.pdf> [<https://perma.cc/N3K3-TEWB>].

48. *Id.*

49. See ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 11–16 (2010); Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, COLUM. J. RACE & L. 1, 4–14 (2013); Silver, *supra* note 3, at 229–31 (2002).

50. Fiske, *supra* note 6.

51. See generally *supra* note 6 and accompanying text; Tremblay, *supra* note 4; Silver, *supra* note 3.

52. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1133–34 (2012), for a description of biases that are explicit (known) that are concealed—for example, a person who has negative attitudes toward Muslims but hides those attitudes, has an explicit bias that is concealed. On the other hand, a person who has negative attitudes towards Muslims but is unaware of those attitudes has an implicit bias.

affect our behavior without our knowing it, while the latter are biases of which we are aware and that we seek to hide or control.

When people meet, they form initial impressions that are shaped by visible characteristics such as sex, age, race, and bodily appearance.<sup>53</sup> These traits tend to be associated with cultural stereotypes and with bias.<sup>54</sup> And certain stereotypes are so deeply ingrained in our culture that people do not realize that they shape perceptions and behavior.<sup>55</sup> Consequently, people may feel and exhibit bias toward people with darker skin, women, people with disabilities, or members of other groups implicitly.<sup>56</sup> Indeed, implicit bias can take hold even for individuals who consciously reject stereotypes, racism, ethnocentrism, and so on.<sup>57</sup>

Scholars have conducted an array of studies designed to illustrate the pervasiveness of implicit bias in our society. For example, through an effort known as Project Implicit,<sup>58</sup> millions of people have taken one or more computer-administered tests of implicit bias, which often call for takers to associate positive or negative words with images of people fitting into a range of social categories.<sup>59</sup> These tests have revealed widespread bias on the basis of race, gender, and

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53. Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 183, 193 (1981).

54. *Id.*

55. Silver, *supra* note 3, at 231–32 (citing Lawrence III, *supra* note 6, at 323).

56. LEVINSON & SMITH, *supra* note 6, at 17 (citing Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta Analysis of Predictive Validity*, J. PERSONALITY & SOC. PSYCHOL. (2009); Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2008)).

57. See Lawrence III, *supra* note 6, at 322–23 (“Freudian theory states that the human mind defends itself against the discomfort or guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.”); Greenwald & Krieger, *supra* note 6, at 951 (“Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are especially intriguing, and also especially problematic, because they can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”).

58. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> [https://perma.cc/95RQ-BQAE].

59. For example, people taking the IAT are asked to classify a series of faces into two categories, such as African-American and European-American. The subjects are then asked to mentally associate the white and black faces with words such as “joy” and “failure.” All under considerable time pressure. “An analysis of tens of thousands of these tests taken anonymously on the Harvard web site found that eighty-eight percent of white people had a pro-white or anti-black implicit bias; nearly eighty-three percent of heterosexuals showed implicit bias for straight people over gays and lesbians; and more than two-thirds of non-Arab, non-Muslim testers displayed implicit biases against Arab Muslims.” Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections of the Impact and the Origins of The Id, the Ego, and Equal Protection*, 40 CONN. L. REV. 931, 956–57 (2008).

disability, and have shown that these biases take hold even for test-takers who are members of the group against whom the bias is exhibited.<sup>60</sup>

As you would expect, these unconscious biases can lead to unintentional discrimination on the basis of race, national origin, ethnicity, or other group membership.<sup>61</sup> Sometimes the discrimination is subtle. As one psychologist explained: “Automatic reactions to out-group members matter in every-day behavior. Awkward social interactions, embarrassing slips of the tongue, unchecked assumptions, stereotypic judgments, and spontaneous neglect all exemplify the mundane automaticity of bias, which creates a subtly hostile environment for out-group members.”<sup>62</sup> At other times, discrimination rooted in implicit bias can be more overt and can affect obviously important decisions such as the decision to hire or fire an employee.<sup>63</sup> And sometimes the consequences of implicit bias can be downright grave, as in the cases of “shooter bias” by police against people of color,<sup>64</sup> or race-based disparities in physicians’ provision of medical care.<sup>65</sup>

Numerous observers have argued that the best way to surface and dispel implicit bias is by engaging in deep, consistent self-reflection and by taking measures that are specifically designed to address the unique challenges presented by implicit bias.<sup>66</sup> These might include promoting population diversity in workplaces and educational institutions,<sup>67</sup> taking pains to assure that workplace environments not include potentially harmful stereotypical images of particular groups,<sup>68</sup> exposing people to others who exhibit traits and characteristics that run

60. Jolls & Sunstein, *supra* note 6, at 971; Greenwald & Krieger, *supra* note 6, at 955–56. There is also research that demonstrates that biases actually influence the behavior of the target of the biases to conform to the stereotypes. *See generally* Snyder, *supra* note 3.

61. *See, e.g.*, Negowetti, *supra* note 6, at 940–41 (describing an implicit bias study from the medical field and noting that “[p]hysicians with stronger implicit anti-black attitudes and stereotypes were not as likely to prescribe a medical procedure for African Americans compared to white Americans with the same medical profiles.”); JUSTIN D. LEVINSON ET AL., *IMPLICIT RACIAL BIAS: A SOCIAL SCIENCE OVERVIEW*, IN *IMPLICIT RACIAL BIAS ACROSS THE LAW* 9, 19 (2012) (discussing various studies showing how the IAT can “predict discriminatory decision-making and behavior in a broad range of ways”).

62. Fiske, *supra* note 6, at 124.

63. *See* Lawrence III, *supra* note 6, at 343 (“A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. . . . [T]he lesson is not explicit: It is learned, internalized, and used without an awareness of its source. Thus an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race.”); *see also* Negowetti, *supra* note 6, at 941–42 (describing implicit bias studies in the context of legal employment).

64. Levinson et al., *supra* note 6, at 15.

65. *See generally* Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007); Goodwin & Naomi Duke, *supra* note 9; *see also* Elizabeth Tobin Tyler et al., *Medical-Legal Partnership in Medical Education: Pathways and Opportunities*, 35 J. LEGAL MED. 149, 154 (2014).

66. Fiske, *supra* note 6, at 124; Silver, *supra* note 3, at 230.

67. Jolls & Sunstein, *supra* note 6, at 981.

68. *Id.* at 982.

counter to stereotypes, and educating people about unconscious bias.<sup>69</sup> Research further demonstrates that when people are motivated to combat biases, they are more likely to be successful in doing so.<sup>70</sup>

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“Debiasing” takes discipline and practice. But it also takes awareness of the existence and effects of biases. There has been relatively little attention paid in legal scholarship to the pervasive effects of unconscious bias on client service delivery.<sup>71</sup> While legal scholars have written about implicit racial bias in the criminal justice system (tackling, among other things, racial bias in policing,<sup>72</sup> jury decision-making,<sup>73</sup> public defenders’ allocation of resources,<sup>74</sup> prosecutors’ charging decisions,<sup>75</sup> and sentencing<sup>76</sup>) they have largely failed to address the existence and consequences of implicit bias in connection with the mundane delivery of legal services. For example, a lawyer may fail to establish a healthy rapport with her client because the lawyer is unknowingly exhibiting alienating or aloof behaviors that are rooted in bias; she may make assumptions about her client’s values based on an inadequate understanding of her client’s culture; and she may communicate with clients differently depending on their race, sex, national origin, or sexual orientation.<sup>77</sup>

Lawyers and legal scholars have not adequately probed the effects of implicit bias on the ways in which lawyers engage with—and serve—their clients.<sup>78</sup> This has consequences for, and is reflected in, the content of basic legal education as well as the rules that govern lawyers’ professional conduct. Students may graduate from law school and be admitted to a bar without ever being required or encouraged to reflect on their own biases. Classes on cross-cultural communication are not typically required in law school and issues of race, culture,

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69. Basset, *supra* note 6, at 1573 (citing multiple studies in psychology journals that address reducing bias).

70. Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 278, 291–92 (2014) (citing studies by Irene Blair and Mahzarin Banaji on the conditions under which people can control the effects of stereotypes on their judgment and behavior).

71. Levinson et al., *supra* note 61, at 21; Silver, *supra* note 3, at 243; Basset, *supra* note 6, at 1564.

72. Kang et al., *supra* note 6, at 1135–39.

73. See generally Justin Levinson & Daniele Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

74. See generally Richardson & Goff, *supra* note 6.

75. See generally Robert J. Smith & Justin D. Levinson, *The Impact of Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795 (2012).

76. Kang et al., *supra* note 6, at 1148–50.

77. See generally Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 349 (2014); see also Silver, *supra* note 36, at 230 (“[A]ll lawyering is cross-cultural, yet few lawyers perceive it as such.”).

78. Levinson et al., *supra* note 61, at 21.

and bias—explicit or implicit—may not arise in discussions of the ethical obligations of lawyers.

This is less true in other professional disciplines, including health care and social work. In the sections that follow, I offer a comparative analysis of differences in the educational practices and standards of professional ethics that govern doctors and social workers, on the one hand, and attorneys on the other. The goal of this analysis is to call attention to the fact that law lags far behind these other disciplines when it comes to confronting and ameliorating the effects of implicit bias; another goal is to learn and, where appropriate, borrow from the norms and practices of these other professional communities.

#### IV.

#### IMPLICIT BIAS AND CULTURAL COMPETENCE/HUMILITY IN LEGAL, MEDICAL, AND SOCIAL WORK EDUCATION

##### *A. Legal Education*

While the United States is becoming increasingly diverse, the legal profession has not kept pace with this diversity,<sup>79</sup> and neither has the legal education field.<sup>80</sup> Racial diversity among lawyers has actually diminished since 1995 and lawyers remain overwhelmingly Caucasian.<sup>81</sup> Much attention has been paid to the lack of diversity in the ranks of legal professionals. There are loud calls for law schools to increase the diversity of law students and law professors, and equally vociferous cries for law firms and bar associations to offer diversity training and environments that are supportive to attorneys who may deviate from the heterosexual, white, able-bodied, male archetype.<sup>82</sup> The rationale for these pleas

79. ABA, *supra* note 49, at 12 (2010); *see generally* Negowetti, *supra* note 6.

80. MARY LU BILEK ET AL., TWENTY YEARS AFTER THE MCCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 10–12 (2013).

81. *See* ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, SECTION ON CIVIL RIGHTS & SOC. JUSTICE, COMM'N ON DISABILITY RIGHTS, DIVERSITY & INCLUSION 360 COMM'N, COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, COMM'N ON SEXUAL ORIENTATION & GENDER IDENTITY & COMM'N ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 13, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf) [hereinafter REPORT TO THE HOUSE OF DELEGATES RESOLUTION] [<https://perma.cc/UVZ5-4DC8>]. Twenty-two states and the District of Columbia have adopted anti-discrimination rules into their rules of professional conduct. *Id.* at 14 (“According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female. The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.”).

82. ABA, *supra* note 49, at 13 (2010); *see generally* Nicole E. Negowetti, Symposium, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015); Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1 (2013); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in*

lies, at least in part, in the acknowledgement that lawyers cannot be effective in an increasingly diverse United States without further training in bias, cultural competence, and communication across language barriers.<sup>83</sup>

One strategy to address the lack of diversity and the lack of cultural competence of lawyers is to include training in cross-cultural lawyering as part of the law school curriculum.<sup>84</sup> The argument goes as follows: if law schools shape future lawyers—both in terms of imparting substantive knowledge about the law and in conveying the culture of the profession—then law schools should employ diverse faculty to teach a diverse student body and the curriculum should expressly address issues of culture and bias.<sup>85</sup> This strategy remains aspirational in a number of respects.<sup>86</sup>

Currently, training on issues of implicit bias or cultural competence is optional for law students. Some law students may get exposure to these topics through law school clinics.<sup>87</sup> Because students in clinics typically work with clients who differ from them along multiple dimensions (socioeconomic status, race, immigration status, level of educational attainment, to name a few examples), clinics provide a ready opportunity to incorporate discussions of the challenges of cross-cultural lawyering, and strategies to address those challenges.<sup>88</sup> Many clinical faculty members therefore attend to issues of bias and cultural competence/humility in their clinic seminars and in student supervision.<sup>89</sup>

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*the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J.L. ETHICS 1079 (2011).

83. ABA, *supra* note 79, at 31.

84. See generally Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, 89 MICH. B.J. 16 (2010); Bryant & Peters, *supra* note 1; Kimberly E. O’Leary, *Using “Difference Analysis” to Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997); see also Silver, *supra* note 36, at 238–39.

85. ABA, *supra* note 79, at 17–18.

86. See generally ABA, *supra* note 79; MARY LU BILEK AT AL., *supra* note 80.

87. It is difficult to estimate exactly how many law students take clinics. The American Bar Association does not collect this data.

88. Bryant & Peters, *supra* note 77, at 376.

89. While the ABA does not collect data on topics taught in law school clinics, or require that certain topics be addressed at all, it is revealing to look at the prevailing texts that guide clinical professors in designing their clinical courses. These texts include instructions for teaching students to practice law in a cross-cultural environment. See, e.g., Bryant & Koh Peters, *supra* note 77, at 376; Deborah Epstein, Jane H. Aiken, & Wallace J. Mlyniec, *Communication and Assumptions*, in THE CLINIC SEMINAR (West Academic Publishing 2014); see also Michele Jacobs, *People from the Footnotes: the Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

In the Pediatric Advocacy Clinic, the clinic that I direct at the University of Michigan Law School, for example, I infuse multiple classes on the syllabus with reflection on cross-cultural lawyering. In our session devoted to examining the Rules of Professional Conduct, we discuss the ideas raised in this article—the failure of the Rules to address cross-cultural communication, linguistic differences, and the potential for bias to affect everyday lawyering. In our session on cross-cultural lawyering, the students engage in an exercise drawn from the *Five Habits for Cross-Cultural Lawyering* in which they compare themselves to one of their clients, identifying all differences and



It is difficult to know how many students have access to these clinics, or how many take advantage of these opportunities when they are available. What we do know is, of the 204 accredited law schools that offer a juris doctor degree, only six require students to take a clinic and twenty-six require either a clinic or a field placement.<sup>90</sup> This means that students in the remaining 179 law schools may opt to learn about cross-cultural lawyering and bias through a clinical experience (assuming the clinical experience includes such training), but are not required to do so.<sup>91</sup>

It is likely, however, that more law students will begin to seek out clinical opportunities in the coming years, as there has been a recent uptick in requiring experiential learning as a condition for graduation or legal practice. In 2013, the American Bar Association (ABA) voted to require law students to take 6 credits of experiential learning as a condition of graduation.<sup>92</sup> This represented a significant increase from the 1 credit of experiential learning required in the past.

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similarities, and then we discuss the effects of those differences and similarities on client communication and counseling. For that session as well, the students take multiple versions of the Implicit Association Test and we consider their results and their reactions. In supervision meetings with students to discuss their cases—and in case rounds sessions in class as well—we discuss the dynamics of the attorney-client relationship and reflect on differences and potential bias. I also include discussion of the challenges of communicating through cultural difference in our classes on client interviewing and client counseling. Throughout all of these many discussions, I am careful to take an approach that is rooted in cultural humility: I urge the students to treat their clients with respect and compassion and to look to them as the experts on their own experiences. I do not know if these discussions in my clinic leave a lasting impression on the students, but I do know that I seize the opportunity presented by the clinic’s diversity of students and of clients to surface biases and improve communication. I suspect that many of my colleagues do the same.

90. Robert Kuehn, Data Compiled (Aug. 6, 2015) (on file with author). Five law schools have taken the extraordinary step of implementing a 15-unit experiential learning requirement: City University New York School of Law, University of the District of Columbia David A. Clarke School of Law, Washington & Lee University School of Law, and Pepperdine University School of Law, and California Western University School of Law.

91. This is not to say that law students fail to learn about discrimination and bias in other classes. Any constitutional law class will teach students about unconstitutional discrimination, for example. And it is possible for law school faculty to include discussions about bias and discrimination in nearly every course. A property class could generate a discussion of housing discrimination, including the power of implicit bias; a contracts class could generate a discussion of unequal bargaining power, etc. I do not have the data to know how frequently this happens in traditional law school classes throughout the country. I will simply assert that there is a difference between learning about laws related to discrimination or conditions and attitudes that give rise to discrimination, and confronting one’s own biases and learning how to manage them. My focus in this paper is on developing skills for practicing law in a multi-cultural society.

92. 2016–2017 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 303(A)(3), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf) [https://perma.cc/S2P6-DPJR] (requiring “one or more experiential course(s) totally at least six credit hours”); *see also* ABA, MANAGING DIRECTOR’S GUIDANCE MEMO (Mar. 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_standards\\_303\\_304\\_experiential\\_course\\_requirement\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf) [https://perma.cc/MN8M-WB5L] (explaining the new requirements).

Beginning with students entering law schools in the 2016–17 academic year, students will spend more time engaged in the practice of law either through clinics, externships, or simulation courses.<sup>93</sup> To the extent that these opportunities allow students to interact directly with clients (either real or simulated), these educational experiences are exceedingly likely to expose students to the challenges of cross-cultural lawyering. As noted above, students in clinics frequently work on behalf of clients who differ from themselves in many important ways.<sup>94</sup> The addition of experiential learning requirements to legal education presents an opportunity to facilitate student reflection on how to address these cross-cultural challenges as legal practitioners, as a fundamental component of experiential education (particularly clinical legal education) is reflection.<sup>95</sup>

As the ABA places greater emphasis on the value of skills-based education for law students, it has also revised its standard regarding learning outcomes for law students.<sup>96</sup> The ABA issued a guidance memo in June 2015 that explains the standard.<sup>97</sup> That standard provides:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

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93. ABA, TRANSITION TO AND IMPLEMENTATION OF THE NEW STANDARDS AND RULES OF PROCEDURES FOR APPROVAL OF LAW SCHOOLS, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_august\\_transition\\_and\\_implementation\\_of\\_new\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf) [https://perma.cc/WLA4-LWJ2].

94. Susan Bryant & Conrad Johnson, *Fieldwork: The Experience that Sparks the Learning*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY (Susan Bryant et al. eds., 2014) at 258–59.

95. Susan Bryant, Elliott Milstein & Ann Shalleck, *Learning Goals for Clinical Programs*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 23–24 (Susan Bryant et al. eds., 2014).

96. 2014–2015 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS ch. 3 (AM. BAR ASS'N 2014), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf) [https://perma.cc/QF4C-L4QF].

97. MANAGING DIRECTOR'S GUIDANCE MEMO Sections 301, 302, 314, 315, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_learning\\_outcomes\\_guidance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf) [https://perma.cc/B8SW-92Y6].

## Interpretation 302-1

For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, *cultural competency*, and self-evaluation.<sup>98</sup>

The inclusion of “cultural competency” in the interpretation is new. And while there is no requirement that law schools teach “cultural competency,” its presence on the list of professional skills may send a signal to law schools to include some instruction on how to manage cultural differences (ideally through a cultural humility lens) in the law school curriculum. The combination of the additional experiential learning requirements and the inclusion of “cultural competency” in the ABA guidance should thus inspire law schools to devote more time to the topic of cross-cultural communication or cultural competence.<sup>99</sup>

To better understand the potential of experiential learning to provide enhanced understanding of the challenges of cross-cultural communication and bias, it is important to understand what experiential learning entails. One commentator describes experiential learning in the law school context as courses that:

place law students in one or more of the many roles that lawyers play in society: litigator, counselor, mediator, legislative lawyer, public policy advocate, and so on. Identifying issues from a role-based perspective provides a kind of learning that often is more immediate and has a greater impact on the student than more traditional classroom-based learning.<sup>100</sup>

Faculty designing experiential learning opportunities should be mindful to generate occasions for cross-cultural communication and, crucially, reflection on that communication. These opportunities are likely to occur for students working with indigent clients, but students working in transactional contexts could just as easily engage in cross-cultural communication and reflection.<sup>101</sup> As noted above in Section I, difference takes many forms: it can be rooted in age, sex, gender identity, immigration status, ethnicity, and race. Such traits are not limited to the

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98. *Id.* (emphasis added).

99. *Id.*; see also Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. L. REV. 1, 13–14 (2014). It is important to note that there has been the call to add more experiential learning to the law school curriculum for decades, but only now is it actually being implemented.

100. Robert Dinerstein, *Experiential Legal Education: New Wine, New Bottles*, [http://www.americanbar.org/publications/syllabus\\_home/volume\\_44\\_2012-2013/winter\\_2012-2013/experiential\\_legealeducation.html](http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/experiential_legealeducation.html) [<https://perma.cc/B2HW-BSUC>].

101. It may be more likely that students in clinic practice these skills when working with low-income clients. In Michigan for example, the student practice rules restrict clinical work to work on behalf of “indigent persons.” See MICH. CT. RS. 8.120 (2013).

poor. Teaching students to actively reflect on the ways in which difference affects their lawyering practices, and to incorporate humility into their client communication, will produce attorneys who are better able to function in a diverse society.

Some state bar associations are going further than the ABA and requiring additional credits of “competence” training or experiential learning as a condition of practicing law in the state.<sup>102</sup> The State Bar of California recommended in 2014 that the rules for admission to the bar be amended as follows:

Pre-admission Competency Training: New applicants for admission must certify the following: (a) at any time in law school, he or she has taken at least fifteen units of practice-based, experiential course designed to develop law practice competency, and (b) in lieu of some or all of the fifteen units of practice-based, experiential course work, a candidate for admission may opt to participate in a Bar-approved externship, clerkship or apprenticeship at any time during or following completion of law school.<sup>103</sup>

The California State Bar includes “cultural competency” on a list of nineteen competencies and courses that count towards this requirement.

California’s possible move to requiring 15 credits of experiential education could have a profound impact on the legal education of students who intend to practice in that state. These recommendations have not yet been adopted (and may never be adopted).<sup>104</sup> But they have caused some controversy. The Association of American Law Schools (AALS) Deans Steering Committee released a statement in opposition to the proposed changes to California’s competency requirements to practice in the state.<sup>105</sup> Following the Deans Steering Committee letter, the Executive Committee of AALS’s Section of Clinical Legal Education released a

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102. New York, for example, enacted a new “skills competency requirement,” which took effect for students commencing their law study after August 1, 2016. One way to satisfy the requirement is to complete 15 credits of experiential learning. *See* New York Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law 520.18 (Skills Competency Requirement for Admission).

103. *See* STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE II FINAL REPORT, [http://www.calbar.ca.gov/Portals/0/documents/bog/bot\\_ExecDir/2014\\_TFARR\\_PhaseIIFinalReport\\_092514.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_TFARR_PhaseIIFinalReport_092514.pdf) [<https://perma.cc/USD5-XMFV>].

104. To date, the Admissions and Education Committee of the State Bar of California, following a feasibility study, recommended requiring six credits of experiential education prior to admission to the California bar, which is in line with the new ABA requirements. *See* Elizabeth R. Parker, Executive Director, ADMISSIONS & EDUCATION COMMITTEE, ABA, EXCERPTS FROM A STATE BAR OF CALIFORNIA COMMITTEE AGENDA (2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August2016CouncilOpenSessionMinutes/2016\\_california\\_bar\\_admissions\\_requirements.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2016CouncilOpenSessionMinutes/2016_california_bar_admissions_requirements.authcheckdam.pdf) [<https://perma.cc/WK62-466K>].

105. *Statement by the AALS Deans Steering Committee on the California Task Force on Admissions Regulation Recommendations (TFARR)* (July 6, 2015), ASS’N OF AM. LAW SCH., <http://www.aals.org/tfarr-statement/> [<https://perma.cc/CVW6-HPBT>].

statement in support of the pending California rules.<sup>106</sup> That letter emphasized the view that “the legal profession has lagged far behind every other profession in regards to required pre-licensing professional skills education[]” and that California’s proposal actually reflects an increased demand for experiential opportunities.<sup>107</sup> The letter stressed that the proposal would help to “ensure that law graduates have doctrinal knowledge and professional and interpersonal skills needed to effectively and ethically” practice law.<sup>108</sup> The statement in opposition by the Deans Committee exposed the rift between traditional legal education and more practice-oriented legal education.<sup>109</sup>

While the purpose of this article is not to elevate one type of educational approach above another (traditional “doctrinal” classes versus experiential learning), I hope to call attention to a deficit in legal education, namely the lack of focus on the ways in which culture and bias influence everyday lawyering. Students can certainly have productive classroom discussions on these topics in the context of more traditional law school courses. It seems clear, however, that experiential courses—whether they are clinics or externships—are more likely to produce these conversations because they expose students to cross-cultural experiences and employ pedagogy that includes reflection on these experiences.<sup>110</sup> In contrast to legal education, medical and social work education, with their emphasis on clinical rotation and on-site learning, provide greater opportunity for students to reflect on their own biases—both explicit and implicit.

### B. Medical Education

Medical schools require medical students to spend substantial time learning through practice. In fact, half of a medical student’s education takes place via clinical rotation which puts medical students in direct contact with patients.<sup>111</sup> Like lawyers, doctors rely both on patient narratives and their own listening skills to obtain relevant patient information to diagnose a problem and identify possible solutions.<sup>112</sup> Physicians need to know and understand the patient’s perception of

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106. *Statement of Position Regarding the State Bar of California Task Force on Admissions Regulation Reform (TFARR) Experiential Education Requirement* (Aug. 18, 2015), ASS’N OF AM. LAW SCH., <https://www.aals.org/scle-tfarr/> [<https://perma.cc/H5X3-XQ89>].

107. *Id.*

108. *Id.*

109. See MARY LU BILEK ET AL., *supra* note 80.

110. See generally SUSAN BRYANT ET AL., *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* (2014).

111. Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. L. REV. 1, 43 (2015).

112. Lisa Bliss et al., *Client and Patient Relationships: Understanding Cultural and Social Context*, in POVERTY HEALTH AND THE LAW 125 (ELIZABETH TOBIN TYLER ET AL. EDs., 2011); see also Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson, *Interventions: Cross-Cultural Education in the Health Professions*, in UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 199 (NATIONAL ACADEMIES PRESS 2003).

her illness as “[I]llness is subjective and open to cultural impact.”<sup>113</sup> Research shows that the physicians who employ active listening skills will gain a better understanding of their patient’s illness and, in turn, will enhance patient satisfaction, adherence to treatment, and positive health outcomes.<sup>114</sup> The ability for a doctor to communicate effectively with her patient has significant consequences for patient health outcomes. As we have noted above, effective communication requires awareness of cultural differences and potential biases as well as strategies to employ humility in the face of these differences and biases.<sup>115</sup>

The field of medicine has recognized the significant role that culture—with its many facets—plays in the effective delivery of healthcare, and has engaged in research and documentation of racial and ethnic disparities in healthcare.<sup>116</sup> As an outgrowth of this research and to help reduce disparities, the Liaison Committee on Medical Education (LCME)<sup>117</sup> established standards in the United States and Canada for faculty and students to learn and understand how people of different cultures perceive illness.<sup>118</sup> The LCME standards address “Cultural Competence and Health Care Disparities” and state:

The faculty of a medical school ensure that the medical curriculum provides opportunities for medical students to learn to recognize and appropriately address gender and cultural biases in themselves, in others, and in the health care delivery process. The medical curriculum includes instruction regarding the following:

- The manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments
- The basic principles of culturally competent health care

113. Bliss *supra* note 112, at 132.

114. Betancourt, *supra* note 14, at 560.

115. *See supra* Parts I and II.

116. *See* Goodwin & Duke, *supra* note 9, at 95–97 (describing multiple medical studies documenting disparities in healthcare along racial lines in areas such as diagnostic screening and medical care, mental health diagnosis and treatment, pain management, HIV-related care, treatments for cancer, heart disease, diabetes, and kidney disease. Because these disparities cannot be explained by patient education, income, health status, or insurance coverage, Goodwin and Duke locate these disparities, in part, in implicit bias of physicians.); Elizabeth Tobin Tyler, *Medical-Legal Partnerships in Medical Education: Pathways and Opportunities*, 25 J. LEGAL MED. 149, 154 (2014) (citing multiple studies on health disparities based on race and ethnicity and describing medical schools’ varied efforts to address the problem in the curriculum).

117. The LCME is the body that provides accreditation to medical schools in the United States. To achieve and maintain accreditation, a medical education program leading to the MD degree must meet the LCME standards. *See* Liaison Comm. on Med. Educ., *Functions And Structure of A Medical School* (2014), [https://med.virginia.edu/instructional-support/wp-content/uploads/sites/216/2015/12/2015\\_16\\_functions\\_and\\_structure\\_march\\_2014.pdf](https://med.virginia.edu/instructional-support/wp-content/uploads/sites/216/2015/12/2015_16_functions_and_structure_march_2014.pdf) [<https://perma.cc/BFJ6-6YRC>].

118. *Standards, Publications, & Notification Forms*, LCME, <http://lcme.org/publications/> [<https://perma.cc/7BU8-N5LF>]; *see also* Lisa Bliss et al., *supra* note 112, at 138.

- The recognition and development of solutions for health care disparities
- The importance of meeting the health care needs of medically underserved populations
- The development of core professional attributes (e.g., altruism, accountability) needed to provide effective care in a multidimensional and diverse society.<sup>119</sup>

With this standard in place, healthcare institutions and medical schools implemented cultural competence training as part of the curriculum, with some states requiring this training as a condition of receiving a medical degree.<sup>120</sup> Additionally, the American Association of Medical Colleges (AAMC) developed a project, “Medical Education and Cultural Competence: A Strategy to Eliminate Racial and Ethnic Disparities in Health Care” and created “Tools for Assessing Cultural Competence Training” (TACCT) in medical schools.<sup>121</sup> Between the LCME standards and the tools to assess cultural competence training in medical school, medical education takes seriously the charge to make sure that doctors understand the cultural context of their patients’ lives. Medical education differs from legal education in its more rigorous attempt to root out stereotyping and cultural bias on the part of medical professionals and in its focus on practice, which puts these problems in context.

It is difficult to know what kind of impact this training has on practicing physicians, and indeed there is new data published that shows that discrimination in medicine on the basis of race, gender, and ethnicity persists.<sup>122</sup> One might conclude that it is unlikely that messages communicated in medical school will—on their own—cause lasting behavior changes. Common sense dictates that for a

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119. STANDARDS FOR ACCREDITATION OF PROGRAMS LEADING TO THE MD DEGREE 7.6 (LIAISON COMM. ON MED. EDUC. 2014), [https://med.virginia.edu/ume-curriculum/wp-content/uploads/sites/216/2016/07/2017-18\\_Functions-and-Structure\\_2016-03-24.pdf](https://med.virginia.edu/ume-curriculum/wp-content/uploads/sites/216/2016/07/2017-18_Functions-and-Structure_2016-03-24.pdf) [<https://perma.cc/4C7M-79SK>].

120. Bliss et al., *supra* note 112, at 138. The Joint Commission on the Accreditation of Healthcare Organizations and the National Committee for Quality Assurance both support standards for linguistic and cultural competence in the provision of health care. ABA, *supra* note 49, at 15; *see also* Wong, *supra* note 10, at 460–61.

121. *See Tool for Assessing Cultural Competence Training*, ASS’N MED. CS. (Aug. 5, 2016), <https://www.aamc.org/initiatives/tacct/> [<https://perma.cc/6N2M-6B9Y>]; *see also* ASS’N AM. MED. CS., CULTURAL COMPETENCE EDUCATION (2005), <https://www.aamc.org/download/54338/data/culturalcomped.pdf> [<https://perma.cc/N4BV-WLVX>].

122. *See, e.g.*, Maya Dusenberry, *Is Medicine’s Gender Bias Killing Women?*, PACIFIC STANDARD (Apr. 22, 2015), <https://psmag.com/is-medicine-s-gender-bias-killing-young-women-4cab6946ab5c#.g5skjv9gp> [<https://perma.cc/YTC6-SURC>] (discussing recent public health studies that link gender bias to disparities in health care for women); Diane E. Hoffman & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain*, 29 J.L., MED. & ETHICS 13 (2001) (reviewing studies regarding differences between men and woman in the way they experience pain and concluding that women receive less aggressive treatment for their pain than men); Peter A. Clark, *Prejudice in the Medical Profession: A Five-Year Update*, J.L., MED. & ETHICS (2009).

message to stick, it requires reinforcement. The medical field reinforces the message by explicitly addressing the problems with bias in the code of ethics for doctors (discussed in Part IV, below). Codes of ethics provide important reinforcement for the core values of a profession. Like physicians, social workers also receive training on addressing stereotypes and bias as part of their professional education.

### *C. Social Work Education*

Perhaps even more than doctors, clinical social workers depend on patient communication and an awareness of the patient's cultural background to deliver services.<sup>123</sup> The concepts of cultural awareness and cultural competence therefore pervade social work education.

The Council on Social Work Education uses the Educational Policy and Accreditation Standards to accredit both masters and baccalaureate social work programs.<sup>124</sup> These accreditation standards link the competencies described in the social work code of ethics, which explicitly include cultural competence, to the values inherent in the social work profession.<sup>125</sup> The standards list ten competencies that social work students should be able to demonstrate upon completion of a social work degree.<sup>126</sup> One of the competencies is "Educational Policy 2.1.4 Engage Diversity and Difference in Practice." It states:

Social workers understand how diversity characterizes and shapes the human experience and is critical to the formation of identity. The dimensions of diversity are understood as the intersectionality of multiple factors including age, class, color, culture, disability, ethnicity, gender, gender identity and expression, immigration status, political ideology, race, religion, sex, and sexual orientation. Social workers appreciate that, as a consequence of difference, a person's life experiences may include oppression, poverty, marginalization, and alienation as well as privilege, power, and acclaim. Social workers

- recognize the extent to which a culture's structures and values may oppress, marginalize, alienate, or create or enhance privilege and power;
- gain sufficient self-awareness to eliminate the influence of personal biases and values in working with diverse groups;

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123. See NAT'L ASS'N OF SOC. WORKERS, STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE 4 (2015), <https://www.socialworkers.org/practice/standards/naswculturalstandards.pdf> [<https://perma.cc/2N6E-BSX8>] (describing standards governing "Self-Awareness[.]" "Cross-Cultural Knowledge[.]" and "Cross-Cultural Skills").

124. See COUNCIL ON SOC. WORK EDUC., EDUCATIONAL POLICY AND ACCREDITATION STANDARDS 1 (2012), <http://www.cswe.org/File.aspx?id=41861> [<https://perma.cc/UP9T-3FM7>].

125. *Id.* at 2.

126. *Id.* at 3.



- recognize and communicate their understanding of the importance of difference in shaping life experiences; and
- view themselves as learners and engage those with whom they work as informants.<sup>127</sup>

It is difficult to imagine legal education and ethics embracing a similar statement. There is a humility evident in this standard—particularly in the description of the professional as a “learner”—that seems foreign to the way lawyers see themselves.<sup>128</sup> Zeal and humility are not natural partners. Nevertheless, lawyers depend on their clients for the information necessary to fuel their zealous representation. If the legal profession acknowledged this dependence more explicitly, there would likely be both greater acceptance, and formal recognition, of the importance of cultural humility.

In contrast to law students, but similar to medical students, social work students divide their time between the classroom and “field education.”<sup>129</sup> The idea behind field education is to connect what is learned in the classroom to real-world experiences, and to exercise the core competencies of the profession.<sup>130</sup> The social work accreditation standards address the “implicit curriculum,” or the educational environment, alongside the “explicit curriculum,” and stress the equality in importance of these aspects of social work education.<sup>131</sup> Part of the implicit curriculum in schools of social work is the “program’s commitment to diversity[.]” and “support for difference and diversity[.]”<sup>132</sup> At the University of Michigan School of Social Work, for example, each course, regardless of its subject or concentration, is required to address “privilege, oppression, diversity and social justice[.]” as well as the Council on Social Work Education core competencies.<sup>133</sup> In this way, cultural awareness is consciously and comprehensively integrated into the social work curriculum.

The differences between legal education on the one hand and medical and social work education on the other—at least with regard to deliberate training on cultural awareness—is stark. Both the medical school and social work school curricula are required to address the role of culture in the lives of patients/clients, while the law school curriculum contains no such requirement. I suspect the difference is rooted primarily in the persistently theoretical nature of legal

127. *Id.* at 4–5.

128. The preamble to the MODEL RULES OF PROFESSIONAL CONDUCT describe the lawyer’s role in serving clients and seeking justice without referencing cultural differences between attorneys and clients or the possibility that lawyers will learn from their clients in or to better represent them. *See* MODEL RULES OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 2016).

129. COUNCIL ON SOCIAL WORK EDUCATION, *supra* note 124, at 8.

130. *Id.*

131. *Id.* at 10.

132. *Id.*

133. UNIV. OF MICH. SCH. OF SOC. WORK, <http://ssw.umich.edu/programs/msw/concentrations> [<https://perma.cc/AEH9-8LNV>].

education as opposed to the more practical nature of medical and social work education. Law schools, particularly highly ranked law schools, do not self-identify as trade schools. Members of the law faculty see themselves as charged with the task of training students to “think like lawyers,” which has traditionally meant developing sharp analytical skills and the ability to interpret and distinguish cases.<sup>134</sup> Much criticism has been directed at law schools for hiring faculty with little experience in legal practice.<sup>135</sup> This may contribute to an educational culture that is intellectually rigorous but lacking in skills-training.<sup>136</sup> And while discussions about bias and the way it is addressed by legal doctrine can be both intellectually rigorous and valuable, the impetus for the discussion is more likely found in practice-oriented courses such as clinics that bring students into direct contact with clients and therefore force reckoning with cultural differences.

## V.

### RULES OF ETHICS FOR LAW, MEDICINE, AND SOCIAL WORK

Having established that bias, often rooted in cultural differences, remains a persistent problem in our society,<sup>137</sup> and that professional training grounds such as medical schools and schools of social work are systematically engaged in a deliberate effort to acknowledge and reduce the effects of this bias,<sup>138</sup> in what ways can the legal profession change to catch up to medicine and social work along this dimension? One place to start is in the Rules of Professional Conduct for lawyers. In contrast to the discretionary attention to culture and bias in legal education generally, professional responsibility is a required part of the law school curriculum.<sup>139</sup> Infusing the Rules of Professional Conduct with guidance for

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134. See, e.g., Stephen Wizner, *Is Learning to “Think Like a Lawyer” Enough?*, 17 YALE L. & POL’Y REV. 583, 587 (1998) (explaining that thinking like a lawyer requires “adopting an emotionally remote, morally neutral approach to human problems and social issues; distancing oneself from the feelings and suffering of others; avoiding emotional engagement with clients and their causes; and withholding moral judgment.” Wizner critiques this approach and encourages a greater emphasis on educating lawyers to be compassionate and moral); Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, or Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004).

135. Bilek, *supra* note 80, at 7. See also ABA *supra* note 49, at 20.

136. Wizner, *supra* note 135, at 590–91.

137. See *supra* Part II.

138. See *supra* Part III.

139. Standard 303(a)(1) of the ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS states, “A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members[] . . . .” ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016 16 (2015), [http://lcme.org/wp-content/uploads/filebase/standards/2016-17\\_Functions-and-Structure\\_2016-09-20.docx](http://lcme.org/wp-content/uploads/filebase/standards/2016-17_Functions-and-Structure_2016-09-20.docx) [<https://perma.cc/E7BN-C6YD>].

Medical students are likewise required to study professional responsibility. See LIAISON COMM. OF MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR

attorneys in addressing the dangers of cultural bias will help the profession move forward with respect to this issue.

The preamble to the Rules of Professional Conduct makes clear that lawyers consider themselves to be “public citizen[s] having special responsibility for the quality of justice.”<sup>140</sup> This declaration implies that adherence to the Rules should promote the administration of justice. Unfortunately, the Rules as currently written are not quite up to this task.

Unlike the ethical rules of client-based professions such as medicine and social work (more on this below), the Rules of Professional Conduct for lawyers do not mention culture, linguistic competence, or potential bias against clients. In this section, I will explore the ethical rules for lawyers in which one might expect culture and bias to receive attention, and contrast them to the ethical rules for doctors and social workers. In so doing, it will become clear that the Rules of Professional Conduct for lawyers do not take as seriously the potential shortcomings of the professionals adhering to the rules when it comes to biased communication as do the rules of ethics for physicians and social workers. Later in this section, I will propose modifications to the Rules of Professional Conduct that account for the likelihood that implicit bias affects every-day lawyering.

#### A. Rule on Competence

Once retained, lawyers have an obligation to provide “competent representation” to their clients.<sup>141</sup> The Model Rules use few words to guide attorneys on the definition of competence. Model Rule 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for

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ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE 11 (2016), [https://med.virginia.edu/ume-curriculum/wp-content/uploads/sites/216/2016/07/2017-18\\_Functions-and-Structure\\_2016-03-24.pdf](https://med.virginia.edu/ume-curriculum/wp-content/uploads/sites/216/2016/07/2017-18_Functions-and-Structure_2016-03-24.pdf) [<http://perma.cc/4F56-SFTE>] (“7.7 Medical Ethics: The faculty of a medical school ensure that the medical curriculum includes instruction for medical students in medical ethics and human values both prior to and during their participation in patient care activities and requires its medical students to behave ethically in caring for patients and in relating to patients’ families and others involved in patient care.”).

Social work students must study professional ethics as well. See COUNCIL ON SOC. WORK EDUC., EDUCATIONAL POLICY AND ACCREDITATION STANDARDS 3–4 (2008), <http://www.cswe.org/File.aspx?id=41861> [<https://perma.cc/UP9T-3FM7>] (“Educational Policy 2.1.2—Apply social work ethical principles to guide professional practice. Social workers have an obligation to conduct themselves ethically and to engage in ethical decision-making. Social workers are knowledgeable about the value base of the profession, its ethical standards, and relevant law. Social workers recognize and manage personal values in a way that allows professional values to guide practice; make ethical decisions by applying standards of the National Association of Social Workers Code of Ethics and, as applicable, of the International Federation of Social Workers/International Association of Schools of Social Work Ethics in Social Work, Statement of Principles; tolerate ambiguity in resolving ethical conflicts; and apply strategies of ethical reasoning to arrive at principled decisions”).

140. MODEL RULES OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 2016).

141. *Id.* r. 1.1.

the representation.”<sup>142</sup> The comments to the rule make clear that the boundaries of competence reside in legal knowledge and adequate preparation.<sup>143</sup> When lawyers have been found to violate this rule, the violations are rooted in deficits such as lack of knowledge of legal principles, inadequate research, lack of knowledge of procedure, and poor legal analysis.<sup>144</sup> It is clear from the rule and from the cases that have interpreted the rule that “competence” does not include cultural or linguistic competence, nor does it include competence to recognize and address biases.

Model Rule 1.1 stands in stark contrast to the National Association of Social Work’s rule on Cultural Competence and Social Diversity. That rule, Rule 1.05, states:

(a) Social workers should understand culture and its function in human behavior and society, recognizing the strengths that exist in all cultures.

(b) Social workers should have a knowledge base of their clients’ cultures and be able to demonstrate competence in the provision of services that are sensitive to clients’ cultures and to differences among people and cultural groups.

(c) Social workers should obtain education about and seek to understand the nature of social diversity and oppression with respect to race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, and mental or physical disability.<sup>145</sup>

The Model Rules of Professional Conduct for lawyers lack similar affirmative ethical obligations to engage in cultural understanding of clients.

I would not expect as elaborate a discussion of cultural competence or acknowledgement of the role of culture in people’s lives in the Model Rules of Professional Conduct given the differences between the legal profession on the one hand, and social work on the other. Lawyers tend to focus on identifying an external wrong to a client (e.g., a breach of contract) and then zealously advocating for a client’s interests in remedying that wrong. In theory at least, it might be sufficient for a lawyer to verify that the contract exists, understand the terms, and demonstrate the breach. Social workers, in contrast, seek to obtain a more holistic

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142. *Id.*

143. *Id.*, cmt.

144. *See, e.g., In re Lee*, 85 So. 3d 74 (La. 2012) (suspending a lawyer for, *inter alia*, lacking thoroughness and preparation); *In re Richmond’s Case*, 872 A.2d 1023 (N.H. 2005) (suspending lawyer for misrepresenting his competence to a client and inadequately preparing documents); *People v. Beecher*, 350 P.3d 310 (Colo. 2014) (suspending lawyer for giving incompetent advice to client); *In re Alexander*, 300 P.3d 536 (Ariz. 2013) (suspending lawyer, for representing a client in a complex RICO lawsuit despite limited legal experience, knowledge, and skill in the area); *Atty. Grev. Comm’n v. Zhang*, 100 A.3d 1112 (Md. 2014) (attorney disbarred for, in part, failing to conduct adequate legal research prior to giving advice to a client).

145. CODE OF ETHICS r. 1.05 (NAT’L ASS’N. OF SOC. WORKERS 2008).

understanding of underlying causes to the problem so that they can help to advance the client's best interests.<sup>146</sup> Advancing a person's best interests requires understanding those interests; and interests are inextricably linked to culture, values, and identity.<sup>147</sup> It follows that social workers, especially those providing psychotherapy, need to understand the ways in which their clients function in the world to facilitate effective treatment. This requires some form of cultural knowledge, perhaps to a greater extent than that required for lawyers to assess a contracts case and advocate for appropriate legal remedies.

Nevertheless, consider the following case example from my clinic at the University of Michigan Law School: the 8-year-old child of a Somali refugee, a clinic client, requires special education services in his Michigan elementary school. The child is struggling in school, both behaviorally and academically. The Individualized Education Program (IEP) team conducts some academic testing of the child and makes a recommendation regarding supports that may be appropriate. The student attorney representing the parent has done her legal research and knows that the parent could request an independent educational evaluation at public expense. The student believes that an independent educational evaluation, specifically a neuropsychological evaluation, would be beneficial to the IEP team in better understanding the child's struggles and his resulting needs. With the help of a Somali interpreter, the student attorney mentions this possibility to the mother. The mother adamantly opposes it. She instead blames the child's father for the child's misbehavior in school. After some questioning, however, it becomes clear that the mother mistakenly believes that a neuropsychological evaluation would entail sticking a needle into her son's brain.

In a case like this, it is insufficient for the lawyer to exhibit "competence" as described in Rule 1.1 and the comments by understanding federal and state special education laws and the special education process, and by preparing to make the necessary legal arguments at the IEP meeting. Competence in this case requires the patience, time, and skills to listen to the concerns of the parent, discuss her understanding of why her son is struggling in school, examine the cultural and language barriers for the client in understanding the special education process, her rights, and the components of a neuropsychological evaluation, clarify misunderstandings (by both lawyer and client), represent the client's interests, and refrain from substituting the lawyer's judgment for the client's judgment. And competence doesn't fully capture what is necessary either: what is additionally necessary in this scenario, and others, is the humility to understand that the lawyer depends on the client as much as the client depends on the lawyer. Without cultural understanding, communication is compromised and there is no competence.

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146. Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism, and Mandated Reporting*, 13 CLINICAL L. REV. 659, 666 (2007).

147. Bryant *supra* note 3, at 42–43.

Rule 1.1, as currently written and explained by the comments, does not therefore adequately describe what it means to be competent. As social science research has demonstrated, any time two people interact, there is potential for bias and misunderstanding.<sup>148</sup> When a professional interacts with a client, and when there is a requirement that the professional communicate effectively with that client, professional competence must include cross-cultural communication skills, skills that are rooted in cultural humility. The preamble to the Model Rules of Professional Conduct describes the unique role of lawyers in ensuring justice. It is difficult to conceive of justice that does not account for culture and bias.<sup>149</sup>

Perhaps the Model Rules do not address a lawyer's understanding of a client's culture because there is an assumption that lawyers, as "public citizens," would not discriminate against their clients, whether knowingly or unknowingly. The possibility of a lawyer exhibiting bias against his or her own client or failing to understand his or her own client is anathema to a lawyer's self-conception as the guardian of justice. However, given the pervasive nature of bias,<sup>150</sup> the legal profession should take note of the lessons learned by other client-based professions (namely medicine and social work) and address culture in the Rules of Professional Conduct.

This could be accomplished by adding a paragraph on cultural competence to the comments of Rule 1.1 that is, at bottom, rooted in humility. The paragraph could borrow the theme from the social work rule on competence and state: "Competence and preparation include an understanding that people's culture and identities shape their behavior and their choices. Lawyers should seek knowledge of their clients' cultures from their clients, and be able to demonstrate competence in the provision of legal services that is sensitive to clients' cultures." Such an addition would be useful in cases where cultural difference and barriers are stark—such as with the Somali client and her entrée into the world of special education law and neuropsychological evaluations—and where they are less apparent as well.

### B. Communication

The Rules of Professional Conduct acknowledge the importance of communication between a lawyer and client and address it in rules 1.2 and 1.4.<sup>151</sup> Rule 1.2 deals with the scope of representation and allocation of authority between client and lawyer while 1.4 addresses communication. Pursuant to these rules, a

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148. See discussion *supra* Part II.

149. MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2016) ("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 . . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.").

150. See *supra* note 6.

151. MODEL RULES OF PROF'L CONDUCT r. 1.2, 1.4 (AM. BAR ASS'N 2016).

lawyer must “abide by a client’s decisions concerning the objectives of representation”<sup>152</sup> and keep a client “reasonably informed about the status of [a] matter.”<sup>153</sup>

The comments to the rules clarify that lawyers must give their clients “sufficient information to participate intelligently in decisions concerning the objectives of the representation[.]”<sup>154</sup> The comments focus on the quantity of information and the promptness of information as opposed to the quality or clarity of the information.<sup>155</sup> The comments are centered on the lawyer’s perspective—they dictate when a lawyer must provide details about trial strategy or proposals made during negotiation. They address client comprehension only in the situation of a client who is a minor or has a disability.<sup>156</sup> The comments do not address a scenario in which a client speaks a primary language other than English. Nor do they address how to communicate with someone from a culture that differs from that of the lawyer.

In contrast, the code of ethics for social workers explicitly addresses client understanding in the context of obtaining a client’s informed consent for services.<sup>157</sup> Rule 1.03(b) states: “In instances when clients are not literate or have difficulty understanding the primary language used in the practice setting, social workers should take steps to ensure clients’ comprehension. This may include providing clients with a detailed verbal explanation or arranging for a qualified interpreter or translator whenever possible.”<sup>158</sup>

Medicine likewise maintains ethical rules and opinions that govern communication in the physician-patient relationship. Opinion 8.5, addresses “Disparities in Health Care” and offers ethical guidance to physicians so that they may deliver healthcare without bias.<sup>159</sup> The opinion is clear that communication is a crucial component of this effort. The opinion states:

Stereotypes, prejudice, or bias based on gender expectations and other arbitrary evaluations of any individual can manifest in a variety of subtle ways. Differences in treatment that are not directly related to differences in individual patients’ clinical needs or preferences constitute inappropriate variations in health care. Such variations may contribute to health outcomes that are considerably worse in

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152. *Id.* at r. 1.2.

153. *Id.* at r. 1.4.

154. *Id.* at r. 1.4, cmt. 5.

155. *Id.* at r. 1.4. cmts. 1–7.

156. *Id.* at r. 1.4 cmt. 6.

157. CODE OF ETHICS r. 1.03 (NAT’L ASSOC. OF SOCI. WORKERS, 2008).

158. *Id.*

159. The Code of Medical Ethics includes the principles of medical ethics as well as the Opinions of the American Medical Association’s Council on Ethical and Judicial Affairs. CODE OF MED. ETHICS, <https://www.ama-assn.org/sites/default/files/media-browser/principles-of-medical-ethics.pdf> [<https://perma.cc/NLW9-63W7>].

members of some populations than those of members of majority populations.

This represents a significant challenge for physicians, who ethically are called on to provide the same quality of care to all patients without regard to medically irrelevant personal characteristics.

To fulfill this professional obligation in their individual practices physicians should:

- (a) Provide care that meets patient needs and respects patient preferences.
- (b) Avoid stereotyping patients.
- (c) Examine their own practices to ensure that inappropriate considerations about race, gender identify [sic], sexual orientation, sociodemographic factors, or other nonclinical factors, do not affect clinical judgment.
- (d) Work to eliminate biased behavior toward patients by other health care professionals and staff who come into contact with patients.
- (e) Encourage shared decision making.
- (f) Cultivate effective communication and trust by seeking to better understand factors that can influence patients' health care decisions, such as cultural traditions, health beliefs and health literacy, language or other barriers to communication and fears or misperceptions about the health care system.<sup>160</sup>

With its emphasis on trust, cultural understanding, and reduction of language barriers, the above ethical opinion for physicians differs from the communication rule for lawyers. The lack of attention both to the matter of trust and cultural competence as well as to linguistic differences between lawyers and clients is a significant defect in the Rules of Professional Conduct for lawyers. We cannot assume that lawyers will take it upon themselves to hire interpreters when they do not speak the same language as their clients.<sup>161</sup> And with the increasing diversity of the United States, the issue of linguistic competence, on top of cultural competence, is sure to affect the attorney-client relationship.<sup>162</sup> It is important to note here that, in light of the many factors that shape culture—such as socioeconomic status, level of education, and race—even people who were born in the same country and speak the same language can come from vastly different cultures and can have trouble understanding one another. Given differences

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160. CODE OF MED. ETHICS Opinion 8.5, <https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-8.pdf> [<https://perma.cc/Z7N8-AVAX>].

161. Interpreters can be very expensive. *See, e.g.*, Federal Court Interpreters, U.S. COURTS, <http://www.uscourts.gov/services-forms/federal-court-interpreters> [<https://perma.cc/UYE8-CNXW>].

162. *See supra* notes 45–46.



between people, pairing the admonishment not to rely on stereotypes in communicating with patients with the charge to minimize language barriers in the code of ethics regarding the physician-patient relationship makes sense. It would behoove the legal profession to add similar language to the Model Rules of Professional Conduct.

It is difficult to come up with meaningful distinctions in the fields of medicine and social work on the one hand, and law on the other, that would lead to the differences in the ethical codes as they relate to client communication and understanding. Doctors and social workers are charged with treating their patients, while lawyers are charged with representing their clients. Each of these professions is focused on patient-centered<sup>163</sup> or client-centered<sup>164</sup> care and considered to be a helping profession.<sup>165</sup> These approaches actively involve the patient or client in information-gathering and decision-making (in contrast to more paternalistic and traditional approaches to patient care).<sup>166</sup> The communication rule for attorneys should thus be modeled after the rule for physicians and revised to include language that addresses trust, cultural competence, and linguistic differences. The addition to Rule 1.4 could read:

Participatory decision making should be encouraged with all clients. This requires trust, which in turn requires effective communication. Lawyers should seek to gain greater understanding from their clients of cultural or ethnic characteristics that can influence client's decisions. Lawyers should not rely upon stereotypes when communicating with clients or when seeking this understanding.

Lawyers should recognize and take into account linguistic factors that affect clients' understanding of legal information. In particular, language barriers should be minimized so that information is exchanged in a manner that both parties can understand.

A revision of this sort would be a dramatic and welcome departure from our current, spare communication rule and would make progress in including notions of cultural humility into the ethos of the profession.

163. See generally Charles L. Bardes, *Defining "Patient-Centered Medicine"*, 366 NEW ENG. J. MED. 782 (2012), <http://www.nejm.org/doi/full/10.1056/NEJMp1200070> [https://perma.cc/TTK3-NF32]; VICTORIA MAIZES ET AL., INTEGRATIVE MEDICINE AND PATIENT-CENTERED CARE (2009), <http://www.nationalacademies.org/hmd/~media/Files/Activity%20Files/Quality/IntegrativeMed/Integrative%20Medicine%20and%20Patient%20Centered%20Care.pdf> [https://perma.cc/R39N-ZS5E].

164. See generally *NASW Standards for the Practice of Clinical Social Work*, NAT'L ASS'N SOC. WORKER, [https://socialworkers.org/practice/standards/clinical\\_sw.asp](https://socialworkers.org/practice/standards/clinical_sw.asp) [https://perma.cc/J3QT-S324]; Binder et al., *supra* note 28.

165. This principal is equally applicable across the full socioeconomic spectrum.

166. See *supra* notes 155–156.

### C. Counseling

The Rule of Professional Conduct that deals with the role of lawyers as advisors to their clients also exhibits deficiencies. Rule 2.1 requires lawyers to “exercise independent professional judgment and render candid advice.”<sup>167</sup> The rule states that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”<sup>168</sup> It is this rule that comes closest to acknowledging a client’s embeddedness in his/her own culture, but does not explicitly acknowledge it. Comment [2] states that “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.”<sup>169</sup> The comments stop short of considering the effect that culture has on people’s decision-making process or capacity, however.

That this rule declines to mention culture is a missed opportunity. For a lawyer to advise her client appropriately, it is crucial to understand the client’s values. And values are often linked to culture. For example, a client who wants to accept a relatively small settlement rather than litigate against a family member over a larger sum of money from a contested will may do so for a number of reasons: she may come from a culture that values family harmony over money, she may not trust the lawyer’s assurances of success if she goes to trial, she may be afraid of the legal system, etc.<sup>170</sup> Sensitivity to values generally, and to values rooted in culture specifically, will help a lawyer render more effective advice. I would therefore propose adding the word “culture” to the list of factors in the comments to the rule that the lawyer may consider in rendering advice.

As it reads currently, Model Rule 2.1 stands in contrast to the ethical opinion for physicians that strongly recommends that doctors “seek[] to better understand factors that can influence patients’ health care decisions, such as cultural traditions, health beliefs and health literacy, language or other barriers to communication and fears or misperceptions about the health care system.”<sup>171</sup> The differences in the rules may stem from differences in self-understanding between the fields of medicine and law. The field of medicine has undertaken significant self-examination on the topic of health care disparities along racial, socioeconomic, and ethnic lines.<sup>172</sup> Health care disparities may result from a variety of factors, but physicians’ own interaction with their patients is one of those factors. Doctors therefore acknowledge their role in perpetuating health care

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167. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2016).

168. *Id.*

169. *Id.* at r. 2.1 cmt. 2.

170. *See generally* DEBORAH EPSTEIN ET AL., THE CLINIC SEMINAR CH. 2 (2014).

171. CODE OF MED. ETHICS Opinion 8.5, *supra* note 160.

172. *See, e.g.*, Goodwin & Duke, *supra* note 9, at 95.

disparities.<sup>173</sup> Lawyers, at least through legal scholarship, have not engaged in as much self-reflection.<sup>174</sup> There is attention in legal scholarship to systemic injustice in American society, but far less to lawyers' own role in this injustice.<sup>175</sup> There is no reason to believe, however, that the effects of bias are less pervasive in legal decision-making compared to medical decision-making, or that lawyers would somehow be immune to the implicit bias that affects the rest of society.<sup>176</sup> The Rules of Professional Conduct should acknowledge that reality.

#### D. Professional Misconduct

While the Rules of Professional Conduct for lawyers differ from the rules for social workers and doctors by not creating affirmative obligations for lawyers to understand their clients' cultural backgrounds when communicating with them or advising them, the rules for lawyers address bias in the profession. Rule 8.4 states that it is "professional misconduct for a lawyer to[] . . . (d) engage in conduct that is prejudicial to the administration of justice[.]"<sup>177</sup> Here we find the first acknowledgement that lawyers themselves have the capacity to participate in injustice.

For many years, the text of the rule said only that with regard to justice. The comments to the rule specified that "knowingly" manifesting by "words or conduct" "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" constitutes a violation of 8.4(d). The requirement that manifestations of bias take place *knowingly* before the rule was considered violated constituted a failure to recognize that much bias exists beneath the surface of "knowledge" and still finds expression through words

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173. See Nelson, *supra* note 9, at 667; Clark, *supra* note 9, at 119–20; Jacobs et al., *supra* note 9, at 350.

174. There have been some articles about implicit bias in the legal profession, though not many. See, e.g., Jerry Kang et al., *supra* note 6; Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40 (2014); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014). The ABA Report on Diversity in the Profession recommends that lawyers "[f]ollow the lead of the medical profession, which analyzed racial and ethnic health disparities based on a Congressional mandate with funding, and analyze the justice disparities caused by a legal profession that is not diverse." See ABA, *supra* note 49, at 18.

175. A handful of articles have been written about lawyers' own involvement in perpetuating injustice through exercising bias. See, e.g., Bassett, *supra* note 6, at 1578 nn. 60–64; Richardson & Goff, *supra* note 6 at 2634–41; Kang et al., *supra* note 6, at 1139–42; Levinson & Young, *supra* note 174, at 13–17; ABA, *supra* note 49 at 18.

176. We are not always aware of our own limitations. In a study cited by Jerry Kang et al. in *Implicit Bias in the Courtroom*, researchers administered a survey to judges and found that "97 percent of judges . . . believed that they were in the top quartile in 'avoid[ing] racial prejudice in decisionmaking' relative to judges attending the same conference." See Kang, *supra* note 6, at 1172 (citing Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009)) (alteration in Kang).

177. MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4 (AM. BAR ASS'N 2016).

or conduct.<sup>178</sup> In this way, the Rules of Professional Conduct differed from the ethical codes of other professions and fell short.

In August 2016, however, Rule 8.4 was amended to incorporate language regarding bias into the black letter text of the rule, and not just in the comments.<sup>179</sup> The ABA Standing Committee on Ethics and Professional Responsibility (Standing Committee) proposed changes to the language of Rule 8.4 to incorporate a modified version of the comment that addresses knowing discrimination, and delete that section from the comments, and the ABA House of Delegates voted in favor of the resolution.<sup>180</sup>

The newly revised Rule reads:

It is professional misconduct for a lawyer to:

....

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.<sup>181</sup>

This new paragraph in Rule 8.4 tempers the knowledge requirement, but fails to eliminate it. In drafting the Rule, the Standing Committee considered removing the knowledge requirement. It reasoned that the word “knowingly” was appropriate when the admonishment in the comment was to refrain from “bias” or

178. See, e.g., Lawrence III, *supra* note 6, at 322 (“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

179. ABA *Strengthens Provision Making Harassment, Discrimination “Professional Misconduct”*, ABA (Aug. 9, 2016), [http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/aba\\_strengthens\\_prov.html](http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/aba_strengthens_prov.html) [<http://perma.ccn4AG-UXFQ>]; Karen Rubin, *ABA Amends Model Ethics Rule to Prohibit Discrimination, Harassment*, LAW FOR LAWYERS TODAY (Aug. 11, 2016), <http://www.thelawforlawyerstoday.com/2016/08/aba-amends-model-rule-to-prohibit-discrimination-harrasment/> [<https://perma.cc/5HAT-8ZLNQ>].

180. *Id.* Under the ABA Constitution, the Standing Committee on Ethics and Professional Responsibility has six primary responsibilities, including recommending amendments to, or clarifications of, the Model Rules of Professional Conduct (MRPC) or the Model Code of Judicial Conduct. ABA, CONSTITUTION & BYLAWS 35–36 (2013), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/aba\\_constitution\\_and\\_bylaws\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2013.authcheckdam.pdf) [<https://perma.cc/2A3S-FBZ6>].

181. MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4 (AM. BAR ASS’N 2016).

“prejudice,” but is not necessary when prohibiting “harassment” or “discrimination.”<sup>182</sup> The logic is that intentionality is inherent in discriminatory or harassing conduct, and thus knowledge is naturally incorporated into those terms.

I disagree with that reasoning in light of the data regarding implicit bias and the ways in which it manifests in behavior without the knowledge of the person engaging in the behavior, and would have supported the elimination of the word “knowingly” from the prohibition. Lawyers should be held to the same ethical standards as other professionals to refrain from manifestations of bias, whether those manifestations come from their conscious or unconscious bias. This slight modification would better align the Rules of Professional Conduct for lawyers with those for physicians, who are told that they should “[a]void stereotyping patients[]” and that they should “[e]xamine their own practices to ensure that inappropriate considerations about race, gender identify [sic], sexual orientation, sociodemographic factors, or other nonclinical factors, do not affect clinical judgment.”<sup>183</sup>

The Standing Committee also revised comment [3] which defines discrimination. The new comment reads (in part): “Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.”<sup>184</sup>

There is no question that these revisions to Rule 8.4 represent a step forward for the legal profession. Indeed, the chair of the ABA Standing Committee on Ethics and Professional Responsibility stated at the end of the report to the House of Delegates: “As the premier association of attorneys in the world, the ABA should lead anti-discrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law.”<sup>185</sup> This statement, and the amendment to Rule 8.4, give hope that the legal profession is moving down the path away from bias and toward cultural humility, a path well-worn by medicine and social work.

Taking the safeguard against manifestations of bias a step further would entail incorporating some of the language from the ethical rules for social workers (that underscore the potential for unconscious bias to affect every day professional life) into the Rules of Professional Conduct for lawyers. Recall from Section IV.A. that the NASW code of ethics states that:

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182. REPORT TO THE HOUSE OF DELEGATES RESOLUTION, *supra* note 81, at 6–7.

183. CODE OF MED. ETHICS Opinion 8.5, *supra* note 160.

184. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2016).

185. REPORT TO THE HOUSE OF DELEGATES RESOLUTION, *supra* note 81, at 16.

Social workers should obtain education about and seek to understand the nature of social diversity and oppression with respect to race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, and mental or physical disability.<sup>186</sup>

I suggest adding similar language to the comment [3] of Rule 8.4 along with a sentence that states: “research shows that most people harbor unconscious biases against traditionally disadvantaged groups.” By pairing the new language in comment [3] to rule 8.4 with an affirmative statement of lawyers’ obligations to learn about diversity and oppression, we would have a rule designed to raise awareness, root out bias, and elevate lawyers’ conduct in the profession. The new comment would thus read:

Research shows that most people harbor unconscious biases against traditionally disadvantaged groups. Lawyers should obtain education about, and seek to understand, the nature of social diversity and oppression with respect to race, sex, gender, religion, national origin, disability, age, sexual orientation, and socioeconomic status.

Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.

For those who may grow concerned that this proposal—along with my other proposals to infuse the Rules of Professional Conduct with language that highlights a lawyer’s responsibility to acknowledge cultural difference and the potential for bias—could subject attorneys to grievance procedures for unknowingly manifesting bias, I refer first to Model Rule 1.0: Scope and Applicability of Rules and Commentary. That Rule makes clear that it is the text of the rule that is authoritative, not the commentary to the rule. “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”<sup>187</sup> The comments are viewed as guides to the interpretation of the rules by most states which have adopted the Model Rules.<sup>188</sup>

Even with the recent amendment of Rule 8.4, however, we are still unlikely to see an explosion of grievance procedures filed under the rule. Some states have already experimented with adding non-discrimination provisions into their rules

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186. See CODE OF ETHICS r. 1.05(c) (NAT’L ASS’N. OF SOC. WORKERS 2008).

187. MODEL RULES OF PROF’L CONDUCT Preamble and Scope [21] (AM. BAR ASS’N 2016).

188. ABA CPR POL’Y IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/adoption\\_mrpc\\_comments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_mrpc_comments.authcheckdam.pdf) [<https://perma.cc/UN2U-NESM>].

of professional conduct.<sup>189</sup> In Colorado, for example, the text of the rule prohibiting misconduct states that it is professional misconduct to:

[E]ngage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that persons race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process[.]<sup>190</sup>

The comments to that rule specify that the rule prohibits “knowing” manifestations of bias. The text of the rule, however, does not require knowledge. Another example is Florida’s Rule 4–8.4, which also includes a provision that prohibits lawyers from “knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity[] . . . .”<sup>191</sup> The inclusion of these rules into Colorado’s and Florida’s rules of professional conduct has not resulted in an outpouring of grievances filed against lawyers in those states.<sup>192</sup> In Colorado, there are no cases against an attorney under rule 8.4 (misconduct) alleging that an attorney exhibited bias against a client. In Florida, cases regarding misconduct have involved lawyers found to have publicly disparaged their clients and third parties and knowingly making false statements of material fact against their clients.<sup>193</sup> Neither state has seen broad interpretation of these rules or large-scale enforcement of them.

This lack of enforcement raises the question of whether it is valuable to amend the Rules of Professional Conduct at all. It is difficult to prove that a person knowingly manifested bias and even more difficult to prove that they manifested bias unknowingly. What, then, is the point? Revising the Model Rules of Professional Conduct represents an important public acknowledgement that lawyers, too, are human beings influenced by their unconscious biases and, like other professionals, must work to dispel these biases for the sake of their clients and for principles of justice generally. The new modification, along with my additional proposed modifications to the Rules, will not solve the problems of implicit bias or inadequate attention to culture, but such revisions will guarantee that the concepts of implicit bias and cultural competence and humility is taught to every lawyer in the country so long as professional responsibility remains a required part of legal education.

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189. See REPORT TO THE HOUSE OF DELEGATES RESOLUTION, *supra* note 81, at 5. Twenty-five jurisdictions have adopted anti-discrimination rules into their rules of professional conduct. *Id.*

190. COLORADO RULES OF PROF’L CONDUCT r. 8.4(g) (COLO. BAR ASS’N 2016).

191. FLORIDA RULES OF PROF’L CONDUCT r. 4–8.4 (THE FLA. BAR 2016).

192. See REPORT TO THE HOUSE OF DELEGATES RESOLUTION, *supra* note 81, at 6.

193. Fla. Bar v. Forrester, 916 So. 2d 647 (Fla. 2005); Fla. Bar v. Knowles, 99 So. 3d 918 (Fla. 2012).

VI.  
CONCLUSION

The fields of law, social work, and medicine have many similarities, and yet their treatment of the significance of culture in communications between professionals and clients differs markedly. Social work and medicine—via their educational approaches and their codes of ethics—have done a better job than the law in training their professionals to function in a multi-cultural society. The law is moving in the right direction, though.

As legal scholarship continues to draw attention to the broad effects of implicit bias in the legal system, and as experiential education becomes a larger part of the law school curriculum bringing students into direct contact with clients from all walks of life, it is likely that there will be more opportunities for education that acknowledges the challenges of cross-cultural communication and the pernicious effects of implicit bias. Teaching concepts such as cultural humility in law school, and then emphasizing the importance of effective cross-cultural communication again in the Rules of Professional Conduct, will help lawyers deliver truly competent legal services to their clients.

The change to Rule 8.4 in the Model Rules of Professional Conduct for lawyers represents real progress in raising awareness of the problem of bias in members of the profession. And raising awareness of biases should work to change the norms around biases. As one commentator has warned, “[m]oderate biases are indirect, relying on norms for appropriate responses. If norms allow biases, they flourish.”<sup>194</sup> Additionally, and crucially, the willingness to adapt the Rules along this dimension signals that the time may be right to make the other changes proposed in this article. Explicitly including language that recognizes the role of culture and identity in human interactions, as well as the dangers of unconscious bias, into the Rules of Professional Conduct will begin a conversation in the legal community about lawyers’ relationships with—and obligations to—their clients and should help nudge the norms in the profession.

I am not the first to suggest that law has something to learn from medicine’s treatment of culture and diversity. A commentator to the ABA Report on Diversity wrote: “[t]he same benefits of cultural and linguistic competence which the medical profession has experienced are transferable to the legal profession. Cultural and linguistic competence could be instituted as required coursework in law school and [continuing legal education] requirements, similar to ethics.”<sup>195</sup> By expanding experiential learning opportunities, and by revising our Rules of Professional Conduct, the legal profession can begin to catch up to medicine and social work and root out cultural bias from the profession.

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194. Fiske, *supra* note 6, at 125.

195. ABA, *supra* note 79, at 47.