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LEARNING THE ADVOCATE'S ART: REFLECTIONS ON THE DOCTORAL DEFENSE IN LAW

Andrij Kowalsky*

I. INTRODUCTION

In 2007, two significant policy reports—*Educating Lawyers: Preparation for the Profession of Law* and *Best Practices for Legal Education: A Vision and A Road Map*—assessed the state of American legal education.[1] Both works recommended law schools improve their teaching practices by integrating practical with academic instruction to graduate ethical and practice-ready lawyers. Several law schools' enthusiasm for immediate teaching and curricular reform, however, waned due to the Great Recession. Lasting from December 2007 to June 2009, the worst economic downtown since the Great Depression offered a harbinger into Susskind's assessment of modernization killing the golden age of American lawyering.[2] Financial crisis exposed an industry reacting to how the diversification of legal service providers, increased outsourcing, and information technology revolution will alter the production and consumption of

*Andrij Kowalsky, PhD is Visiting Research Scholar, Center for Middletown Studies, Ball State University. I thank the members of my doctoral examining committee for interrogating my dissertation. The experience of passing the defense, along with lessons learned from the process, helped shape some of the ideas presented in this paper.

[1] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter *Carnegie Report*]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter *Best Practices*].

[2] RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008).

legal services. Between 2004 and 2008, American law firms eliminated 20,000 positions to offset declining business.[3] During the Great Recession, 250 of America's biggest law firms cut 9,500 jobs.[4] A stagnant market dissuaded students from pursuing an overpriced law degree.[5] Between 2010 and 2014, American law school enrollments nationwide plummeted twenty-four percent.[6] Polemics erupted over fixing law schools. Prescriptions called for tying legal instruction to market realities,[7] modifying curriculum to train lawyer-entrepreneurs,[8] using more adjuncts to teach applied pedagogy,[9] introducing a third-year curriculum involving a paid apprenticeship with legal counsel,[10] and proposing other, more theorized, solutions.[11] In other

[3] William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And May Be a Sign of Lasting Change*, ABA JOURNAL (July 1, 2011), http://www.abajournal.com/magazine/article/paradigm_shift/.

[4] "Law Firms: A Less Gilded Future" ECONOMIST (May 5, 2011), http://www.economist.com/node/18651114.

[5] Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1613 (2011).

[6] Mark Hansen, *Law School Enrollment Down 11 Percent This Year Over Last Year, 24% Over 3 Years Data Shows*, ABA JOURNAL (December 17, 2013), http://www.abajournal.com/news/article/law_school_enrollment_down_11_percent_this_year_over_last_year_data_shows.

[7] Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV 651, 686 (2012).

[8] Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 891 (2012).

[9] Daneil Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education and the New Job Market*, 59 J. LEGAL EDUC. 598, 619 (2010).

[10] Robert J. Rhee, *On Legal Education and Reform: One View Formed From Diverse Perspectives*, 70 MD. L. REV. 310, 338 (2011).

[11] Lauren Carasik, *Renaissance or Retrenchment: Legal Education at the Crossroads*, 44 IND. L. REV. 735, 737 (2011); Deborah L. Rhoode, *Legal Education: Rethinking the Problem, Reimagining the Reform*s, 40 PEPP. L.

words, arguments echoing some of *Carnegie* and *Best Practices* reports' ideas on improving the law degree.[12]

As part of the dialogue on the future of North American law schools, Jukier and Glover addressed graduate legal education and its negligibility in the process of organizational renewal. They questioned preconceived notions by highlighting the primacy of graduate programs to the mission of law schools.[13] Since Griswold, McDowell and Mewett, and Klitzkey's groundbreaking articles on graduate studies in law were published within a decade of each other (1950 to 1960),[14] jurists have overlooked the topic in their investigations of law schools. Studies have only recently addressed a lack of sophisticated research[15] by assessing the state of graduate legal education.[16] The lion's share of output canvasses the masters' degree in law ("LLM")

REV. 437, 438 (2012); B.E. Newton, *The Ninety-Five Theses: Systematic Reforms of American Legal Education and Licensure,* 64 S. C. L. REV. 55, 61 (2012).

[12] For a synopsis of both reports and argument for including a practice component in the first-year legal curriculum *see* Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643, 657-662 (2013).

[13] Rosalie Jukier & Kate Glover, *Forgotten? The Role of Graduate Legal Education in the Future of the Law Faculty,* 51 ALTA. L. REV. 761, 767 (2014).

[14] Erwin N. Griswold, *Graduate Study in Law*, 2 J. LEGAL EDUC. 272 (1950); Banks McDowell Jr. & A.W. Mewett, *What Are Teachers Made of? A Critical Appraisal of Graduate Study in the United States*, 8 J. LEGAL EDUC. 79 (1955); Ramon A. Klitzke, *Post Graduate Legal Education: Who Can Get it and Where,* 5 S. TEX. L. J. 121 (1960).

[15] Eugene Clark, *Preparing UK Legal Education for the 21st Century:'Reviewing Legal Education' Seminar—A Conference Report and Review,* 12 J. PROF. LEGAL EDUC. 95, 102 (1994).

[16] H.D. Gabriel, *Graduate Legal Education: An Appraisal*, 30 S. TEX. L. REV. 129 (1990); Sanjeev S. Anand, *Canadian Graduate Legal Education: Past, Present and Future*, 27 DALHOUSIE L. J. 55 (2004).

by recommending teaching and curriculum improvements,[17] as well as studying its role in credentialing international lawyers.[18] Foreign lawyers obtain an LLM in the United States either to return home more worldly, or gain the skills and qualifications necessary to transition into the American legal workplace.[19] As for the few investigations addressing doctoral legal studies, Hupper's scholarship represents state-of-the-art research. Her trilogy of articles examine the evolution of the Doctor of Juridical Science ("SJD/JSD") at seven premier American law schools by detailing its pre-WWII history,[20] analyzing its contemporary demand,[21] and explaining its popularity among foreigners.[22]

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[17] Frederick E. Snyder & Jerome A. Cohen, *Harvard's Program in Law Teaching—A New Dimension in Graduate Legal Education*, 31 J. LEGAL EDUC. 140, 144 (1981).

[18] Leon E. Trakman, *The Need for Legal Training in International, Comparative and Foreign Law: Foreign Lawyers at American Law Schools*, 27 J. LEGAL EDUC. 509 (1975); Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. LEGAL EDUC. 588 (1994); Teresa Brostoff et al., *English for Lawyers: A Preparatory Course for International Lawyers*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 137 (2001); Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396 (2007).

[19] Mindie Lazarus-Black & Julie Globokar, *Foreign Attorneys in U.S. L.L.M. Programs: Who's In: Who's Out, and Who They Are*, 22 IND. J. GLOBAL LEGAL STUD. 3 (2015); C. Silver, *States Side Story: Career Paths of International LL.M. Students or I Like to Be in America*, 80 FORDHAM L. REV. 2383 (2012); Jeffrey A. Van Detta, A *Bridge to the Practicing Bar of Foreign Nations: Online American Legal Studies Programs as Forums for the Rule of Law and as Pipelines to Bar-Qualifying LL.M. Programs in the U.S.*, 10 S. C. J. INT'L L. & BUS. 63 (2013).

[20] Gail J. Hupper, *The Rise of an Academic Doctorate in Law: Origins Through World War II*, 49 AM. J. LEGAL HIST. 1 (2007).

[21] Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. LEGAL EDUC. 413 (2008).

[22] Gail J. Hupper, *Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, 49 NEW ENG. L. REV. 319 (2015). The article was

The doctoral law degree is a small, but not inconsequential, growth area in North American legal education. Writing in 2002, Haynsworth identified that less than one hundred students annually earn an American SJD.[23] The size of that graduating pool will continue to grow. Crane suggests prestige, money, and intellectual curiosity motivate practicing lawyers to attend graduate school, and these factors are also in play for aspiring faculty.[24] Lawyers wanting to teach law as a career require the intellectual maturity, research skills and writing ability to handle the rigours of the occupation. Some are attempting to distinguish their credentials and stand out in a tight and competitive job market by earning a doctorate. In fall 2013, Yale Law School tapped into a unmet demand for American-trained law graduates interested in academia by offering a PhD in law. The program's expansion was timely as McCrary et al.'s study of thirty-four of America's top law schools' recent recruiting practices found an increase in the number of faculty hires with PhDs

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the feature presentation of the New England Law Review Fall 2014 Symposium held on 5 November 2014 at the New England School of Law. Papers inspired by the symposium were reported in the New England Law Review. They include: Bruce A. Kimball, *The Context of Graduate Degrees at Harvard Law School Under Dean Erwin N. Griswold, 1946-1947: Commentary on Gail Hupper's Educational Ambivalence: The Rise of Foreign-Student Doctorate in Law*, 49 NEW ENG. L. REV. 449 (2015); Carol Silver, *Perspectives on International Students' Interest in U.S. Legal Education: Shifting Incentives and Influences*, 49 NEW ENG. L. REV. 463 (2015); Paulo Barrozo, *A Future for Legal Education: A Reaction to Hupper's Educational Ambivalence: The Rise of Foreign-Student Doctorate in Law*, 49 NEW ENG. L. REV. 485 (2015).

[23] Harry J. Haynsworth, *Post-Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403 (2002).

[24] Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47, 52 (1999).

(representing a variety of disciplines).[25] As for the hiring climate in Canada, Jukier and Glover propose that a majority of the country's law schools require newly hired professors to hold a doctorate.[26] In Canada, at least, this will distinguish a new generation of faculty from their tenured peers, many of whom have not achieved the same degree.

As with most other Canadian and American university programs, a staple of completing an academic doctorate in law involves writing and defending a dissertation. In North America, doctoral defenses are also known as "orals" or "hearings," while in Britain they are called "vivas." A successful dissertation defense is the product of many years of academic apprenticeship and a capstone in doctoral education that marks a candidate's rite of passage into a community of scholars.[27] Yet, despite its importance and function in assessing learning, limited research on the doctoral examination exists,[28] let alone those investigations directed from the candidate's perspective.[29] Even with the guidance of dedicated manuals,[30] the content, demands, and assessment criteria of a doctoral dissertation defense fluster many

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[25] Justin McCreary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does it Mean for Legal Education?*, 65 J. LEGAL EDUC. 543, 545 (2016).

[26] Jukier & Glover, *supra* note 13, at 780.

[27] Candidate refers to the graduate student who has completed all the requirements of the doctoral degree save for completing and defending the dissertation.

[28] VERNON TRAFFORD & SHOSH LESHEM, STEPPING STONES TO ACHIEVING YOUR DOCTORATE: BY FOCUSSING ON YOUR VIVA FROM THE START 201 (2008).

[29] Sue Wallace, *Figuratively Speaking: Six Accounts of the PhD Viva*, QUALITY ASSURANCE IN EDUC. 100, 100 (2003).

[30] PENNY TINKLER & CAROLINE JACKSON, THE DOCTORAL EXAMINATION PROCESS: A HANDBOOK FOR STUDENTS, EXAMINERS AND SUPERVISORS (2004); ROWENA MURRAY, HOW TO SURVIVE YOUR VIVA: DEFENDING A THESIS IN AN EXAMINATION (2d ed. 2009); LEE A. FOOTE, ORAL EXAMS:

candidates.[31] While a few books instruct on writing a law article for publication,[32] Morris and Murphy's *Getting a PhD in Law* is novel.[33] The book details the ins and outs of completing a PhD in law at a British university.

The vagaries of the doctoral defense should not necessarily undermine candidates of their confidence to master the examination. A sound oral presentation of a dissertation can increase the probability of the hearing transforming into a meaningful discussion among experts, full of formative feedback and advice for the candidate on publishing the study. To that end, this study bridges the gap between theory and practice by reflecting on Morris and Murphy's account of examining a dissertation to assess their argument from a comparative, North American perspective and offer an oral advocacy approach for conducting the defense. The exercise is viewed through the prism of my own experience as a lawyer and graduate student. In July 2015, I successfully defended my PhD dissertation at Osgoode Hall

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PREPARING FOR AND PASSING CANDIDACY, QUALIFYING AND GRADUATE DEFENSES (2016).

[31] Clinton Golding et al., *What Examiners Do: What Thesis Students Should Know*, 39 ASSESSMENT & EVALUATION IN HIGHER EDUC. 563, 563 (2014); Jerry Wellington, *Supporting Students Preparations for the Viva: Their Pre-Conceptions and Implications for Practice*, 15 TEACHING IN HIGHER EDUC. 71, 75 (2010).

[32] RESEARCH METHODS FOR LAW (Mike McConville & Wing Hong Chui eds., 2007); MICHAEL SALTER & JULIE MASON, WRITING LAW DISSERTATIONS: AN INTRODUCTION AND GUIDE TO THE CONDUCT OF LEGAL RESEARCH (2007); ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS (4th ed. 2011); EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW (4th ed. 2010); RESEARCH METHODS IN LAW (Dawn Watkins & Mandy Burton eds., 2013).

[33] CAROLINE MORRIS & CIAN MURPHY, GETTING A PHD IN LAW (2011) [hereinafter *Getting a PhD*].

Law School of York University before a five-member examining committee.[34]

The remainder of this article proceeds in four parts. In part II of the work, I contextualize the study by introducing readers to Morris and Murphy's book, and the method I used to analyze their ideas on examining a dissertation. That evaluation is followed by part III, wherein I present a three-stage overview of the doctoral examination process and outline the oral advocacy approach. Part IV, the discussion portion, assesses the implications of study findings and suggests future areas of research. Part V concludes the paper. In sum, this article's purpose is to facilitate understanding of the doctoral law dissertation defense.[35]

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[34] Osgoode Hall Law School is York University's faculty of law and is located in Toronto, Ontario, Canada. Osgoode Hall Law School is a member of Association of Transnational Law Schools, a nine-member consortium of international law schools concerned with connecting faculty and doctoral students to consider academic legal research in a global context. As of early 2016, the member law schools consist of: Osgoode Hall Law School, University of Montreal (Canada); American University Washington College of Law (USA); Bar Ilan University (Israel); Bucerius Law School (Germany); Erasmus School of Law (Netherlands); National University of Singapore (Singapore); Queen Mary University of London (United Kingdom); and University College Dublin (Ireland). For more information about ATLAS *see* ATLAS, http://associationoftransnationallawschools.blogspot.ca/; Phillip G. Bevans & John McKay, *The Association of Transnational Law Schools' Agora: An Experiment in Graduate Legal Pedagogy*, 10 GERMAN L. J. 929 (2009).

[35] For a sample of studies involving doctoral students and program graduates advising others in like situations see Chaya Herman, *Emotions and Being a Doctoral Student, in* THE ROUTLEDGE DOCTORAL STUDENT'S COMPANION: GETTING TO GRIPS WITH RESEARCH IN EDUCATION AND THE SOCIAL SCIENCES 283 (Pat Thomson & Melanie Walker eds., 2010); Brenda Service, *Keeping the Faith: How Reflective Practice Can Turn Emotional Turmoil Into a Positive Outcome in the Context of Doctoral Study*, 13 REFLECTIVE PRAC. 169 (2012); *Joelle* D. Powers & Danielle C. Swick, *Straight Talk From Recent Grads: Tips for Successfully Surviving Your Doctoral Program*, 48 J.

II. CONTEXT

Morris and Murphy sketch the doctoral experience for students enrolled in common law orientated graduate programs. Their discussion draws on the trials and tribulations of doctoral studies, complemented by hortatory advice on managing the crucible. Students, supervisors, and examining committee members will read this work for its insight on the practices and procedures associated with each of the different stages comprising the doctoral journey. At 143 pages, *Getting a Phd* is not a large book.[36] Its manageable length makes for a straightforward account that emphasizes quality of insight over breadth and depth of coverage. The content in each chapter centers on a thesis that a series of research questions or issues develop. Morris and Murphy's presentation of the overall dissertation process can be conceptualized as unfolding across "pre," "during," and "post" study stages.

The "pre-stage" encapsulates the book's first two chapters. The first outlines the intrinsic value and motivation for pursuing doctoral studies; the second covers the administrative side of starting a program. The tasks involve identifying a PhD topic, choosing a university and supervisor, and making a competitive application. The "post-stage" rounds out the work and consists of two chapters that cover publishing a dissertation and launching an academic career. The largest portion of the book, the "during stage," is divided across six chapters, which get down to brass tacks of producing a dissertation.

Morris and Murphy use expository and narrative writing to present a variety of topics covered in the "during phase." As

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OF SOC. WORK EDUC.389 (2012); Julia S. Fuller et al., *Graduates' Reflections on an Online Doctorate in Educational Technology*, 58 TECHTRENDS: LINKING RESEARCH & PRACTICE TO IMPROVE LEARNING 73 (2014); Mandy Edwards, *What Does Originality in Research Mean? A Student's Perspective*, 21 NURSE RESEARCHER 8 (2014).

[36] The page count excludes the pages reserved for an introduction in the preface and index pages.

one example, they outline the different methodologies available to conduct a legal study and highlight the different data collection and analysis procedures each approach uses. As other examples, the authors indicate what an appropriate supervisor-student relationship entails, common problems that arise during the course of studies, and suggestions on researching and writing the thesis. Anecdotes derived from the authors' personal experiences, and those gleaned from colleagues and doctoral students alike, are woven into the discussion. These vignettes affect the reader's sensibilities about the unpredictability of doctoral studies, the importance of perseverance, and occasional need for personal levity. The mini-stories offer edifying moments through vicarious understanding of other candidates' struggles and ordeals, successes and accomplishments.

As for Morris and Murphy's chapter on examining the PhD, its purpose is summarized best using the authors' own words, "we try to provide, as far as possible, a guide to the common aspects of the viva process to help demystify the experience and make it as smooth as possible."[37] Their discussion addresses the viva's purpose, examiners' roles and the candidate's preparation for, and conduct of, the exam (including its wrap-up). To make sense of this content, I organized the material under the themes of administration, preparation, and examination. Each theme, in turn, prompted me to develop a probe question to reflect and comment on. They are: (1) what goes into planning a defense? (2) how to prepare for the defense? and (3) how to execute a strategy? I addressed these questions by: (1) referring to the re-

[37] Morris & Murphy, *supra* note 33, at 93. The context for the authors' discussion originates from the PhD oral examination process being the least studied component of doctoral studies. In British universities, the viva is a closed door affair that excludes everyone but the candidate and members of the examining panel.

search literature; (2) reading Osgoode Hall Law School's Graduate Program Student Handbook,[38] and York University's Faculty of Graduate Studies' Rules and Regulations on oral examinations of doctoral defenses;[39] (3) reviewing notes prepared for my hearing; (4) thinking about my work as a barrister; and (5) following Ellis and Bochner's technique of autoethnography, which is a process of emotional recall that helped me imagine being back at my defense both emotionally and physically.[40] The resulting analysis offers insight into the three stages of the dissertation defense from a theoretical, administrative, and practical perspective.

III. FINDINGS

A. Administration: What goes into planning a defense?

A doctoral defense allows a candidate to publically present his or her dissertation before members of an examining committee. A dissertation is a comprehensive investigation of a research topic in support of a thesis. A thesis is the written component of the dissertation that is, "a position or proposition that a person (as a candidate for scholastic honors) advances and maintains or offers to maintain by argument."[41] At the oral dis-

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[38] Osgoode Hall Law School Graduate Program Student Handbook (n.d) (on file with author) [hereinafter *Handbook*].

[39] York University, Faculty of Graduate Studies, Oral Examination, http://gradstudies.yorku.ca/current-students/thesis-dissertation/oral-examination/ (last visited February 10, 2016).

[40] Carolyn Ellis & Arthur P. Bochner, *Autoethnography, Personal Narrative, Reflexivity: Researcher as Subject, in* THE HANDBOOK OF QUALITATIVE RESEARCH 733, 752 (Norman K. Denzin & Yvonne S. Lincoln eds., 2d ed. 2000).

[41] *Thesis*, Webster's Third New International Dictionary of the English Language Unabridged (2002).

sertation defense, committee members determine whether a dissertation's thesis is credible, defensible, and written by the candidate. As Morris and Murphy note, examiners independently vet a thesis for satisfying the criteria required for a PhD.[42] They evaluate the defense based on the candidate presenting their work and answering questions.[43] After the hearing, examiners vote to either pass or fail the study.

Each university establishes its own rules that govern the dissertation defense.[44] Varying regulations demand that candidates familiarize themselves with their law schools' own protocols. Morris and Murphy's discussion on the format of the British viva underscores the point. They note that the law viva typically lasts between forty-five and ninety minutes.[45] Also, one examiner internal to the school and one from an external university preside over the examination.

Two examiners interrogating a law dissertation that typically consists of roughly 100,000 words (300-350 pages) under a finite period creates its own dynamic. Examiners can probe the candidate only on a few key arguments raised by his or her thesis, as well as seek clarification of sundry points raised throughout the study. By the same token, the smaller the examining panel, the longer each assessor has for sustained questioning. The foregoing observations instruct that a candidate strategizes about his or her doctoral defense by studying its structure in order to gauge the components of the exam.

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[42] Morris & Murphy, *supra* note 33 at 94.

[43] Vernon Trafford, *Questions in Doctoral Vivas: Views from the Inside*, 11 *Quality Assurance in Educ.* 114, 114 (2003).

[44] Shuhua Chen, *The PhD Dissertation Defense in Canada: An Institutional Policy Perspective*, 88 CANADIAN J. OF EDUC. ADMIN. & POL'Y 1, 6 (2008).

[45] Morris & Murphy, *supra* note 33, at 94.

A candidate sows the seeds for reaching the doctoral examination stage by involving his or her supervisor early in the writing process.[46] Difficulties in writing hinder the completion of a dissertation.[47] A candidate flattens the steep learning curve of writing the equivalent of a book-length monograph by providing his or her supervisor with one chapter at a time, rather than a rough draft of a full study. The advisor's feedback provides a heuristic for modelling an expert writer's composition style. Edits diagnose bad prose and identify areas for improvement. Better writing habits can also be learned from self-study guidebooks and through personalized coaching from a writing tutor. Honing the craft of writing is a monotonous exercise in trial and error, but a rewarding endeavour, nonetheless. A polished chapter can even be submitted as an article for publication in a journal. In short, a supervisor who oversees the writing of a dissertation is more likely to pass a completed study along to a candidate's supervisory committee.[48]

A supervisor's endorsement (especially one from a well-respected and senior scholar) helps a supervising committee confirm a dissertation is examinable.[49] Scheduling a dissertation defense triggers the housekeeping matters of recruiting members for an examining committee, forwarding each examiner a

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[46] Supervisor refers to the faculty member who is tasked with personally assisting the candidate navigate the research, writing and scholarly components of producing a dissertation.

[47] BARBARA KAMLER & PAT THOMSON, HELPING DOCTORAL STUDENTS WRITE: PEDAGOGIES FOR SUPERVISION 3 (2006).

[48] The role of a dissertation supervisory committee (and even its existence) will vary from institution to institution. At York University, the primary roles of the three-person supervisory committee (one of whom is the candidate's supervisor) are to examine a doctoral student's dissertation proposal (60-70 pages in length) and approve its conduct. Once the dissertation is completed, the supervisory committee recommends that it can be defended at an oral defense.

[49] Gerry Mullins & Margaret Kiley, '*It's a Phd, Not a Nobel Prize': How Experienced Examiners Assess Research Theses* 27 STUD. IN HIGHER EDUC. 369, 382 (2002).

copy of the dissertation, confirming a date and time for the defense, booking a meeting room, announcing the defense to the public, and submitting all requisite paperwork that clears a candidate to graduate in the event of a successful hearing.

B. Preparation: How to prepare for the defense?

Several weeks, if not months, will pass between the dissertation being approved for examination and the defense date. After several years of taxing research, writing, and teaching, candidates should welcome the interlude. They can reflect on the personal, emotional, and financial demands involved with producing a dissertation, which now stands as a testament to the many sacrifices. They are on the threshold of achieving a university's highest academic designation (a juncture which about half of their program cohort will never reach).[50] The candidate is poised to present and defend the dissertation from a position of strength. He or she is familiar with the study's genesis, relationship to the research literature, and key findings. The candidate has earned a well-deserved break from his or her studies before readying for the crucial defense.

A candidate's supervisor assembles the examining committee of academics who are responsible for conducting the defense. Sometimes, the supervisor solicits the candidate's input on possible assessors. The candidate should not recommend anyone without attempting to "know the audience" that will evaluate the dissertation. They can form a general impression of potential examiners by attending one of his or her university or conference lectures. Another way to learn about examiners is by reviewing their publications. Reading examiners' works informs about their research specialty (e.g. doctrinal, historical, empirical, comparative, etc.) and theoretical orientation (e.g.

[50] The attrition rate for doctoral students ranges between forty and sixty percent. *See* Lucinda C. Spaulding & Amanda J. Rockinson-Szapkiw, *Hearing Their Voices: Factors Doctoral Candidates Attribute to Their Persistence*, INT'L J. OF DOCTORAL STUD. 199, 199 (2012).

Marxist, Law and Economics, Empirical Legal Studies, etc). Clearly, no candidate wants an examiner who is alienated from a dissertation on epistemological grounds. Instead, candidates should consider prospective nominees as people with whom they can share personal research experiences, as exploring relatable topics and themes of mutual interest is a method of communicating the results of a dissertation.[51]

Once the examining committee is formed, the candidate should confirm its composition with his or her supervisor and inquire about each member's function. At British, and some Canadian universities, the external examiner is the primary assessor for the dissertation.[52] Before the defense, they review the study. Their report affirms the dissertation is examinable, identifies findings that will be inquired about, notes editorial suggestions, and recommends an outcome.[53] At American schools, the examining committee provides an evaluation in the absence of an outside examiner.[54] As for other panel members, what about the examining chair? Knowing each panellist's role reveals the length each examiner can question a candidate.

A candidate can sketch an outline of proceedings by compartmentalizing the hearing into smaller wholes. A formula for approximating timeframes requires determining the overall length of the defense. The candidate introducing and outlining his or her study consumes the first phase of the hearing. The second phase of the exam is conceptualized as the maximum

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[51] Trafford & Leshem, *supra* note 28, at 219.

[52] Richard W. Joyner, *The Selection of External Examiners for Research Degrees*, 11 QUALITY ASSURANCE IN EDUC. 123, 123 (2003); Chen, *supra* note 44, at 14.

[53] York University, Faculty of Graduate Studies, External Examiner Roles and Responsibilities, http://gradstudies.yorku.ca/current-students/thesis-dissertation/oral-examination/#section4h (last visited 10 February 2016).

[54] Svein Kyvik, *Assessment Procedures of Norwegian PhD Theses As Viewed By Examiners From the USA, the UK and Sweden*, 39 ASSESSMENT & EVALUATION IN HIGHER EDUC.140, 143 (2014).

time an examiner has to interact with the candidate during a question period. The chart below schematizes the equation:

Exam Length	**Overview allotted to candidate**	**Remaining Length of Exam**
2-3 hours or 120-180 minutes[55]	20-30 minutes (average)	90/100-150/160 minutes (divided by) number of examiners (equals) estimated interaction time with each examiner

With relatively few question periods available in a hearing, the candidate must make the most out of each interchange with an examiner. Morris and Murphy recommend preparing for the defense by "reading, reading, and re-reading" the dissertation for the key points of each chapter, studying how they relate to the thesis, identifying and answering potential exam questions, and holding a mock viva.[56] Reading the dissertation is self-explanatory; answering potential questions and holding a practice defense requires further elaboration.

I prepared for my defense by answering sample questions. I recall little, if any, correlation between the questions I reviewed and those asked by examiners. My strategy entailed searching the internet using Google for common exam questions until I

[55] Bloomberg & Volpe note that a PhD oral examination lasts from two to three hours. They also note that a candidate receives ten to forty-five minutes to provide an overview of their study. LINDA D. BLOOMBERG & MARIA VOLPE, COMPLETING YOUR QUALITATIVE DISSERTATION: A ROAD MAP FROM BEGINNING TO END 233-234 (3d ed. 2013). At Osgoode Hall Law School, PhD dissertation defenses are scheduled for a period of 150 to 180 minutes, thirty minutes of which are dedicated to the candidate's overview. Handbook, *supra* note 38, at 64.

[56] Morris & Murphy, *supra* note 33, at 97-98.

found a weblog hosted by The Open University[57] and an upload from the University of Calgary to study.[58] I determined the discrepancy between practice and procedure was due to the specificity of questions examiners posed. For example, when the external examiner initiated the question period, his queries focussed on particular study findings and sought explanation of specific points. For good measure, several questions organically developed during Socratic questioning. Another examiner asked questions based on his study of a research population similar to mine. The upshot of my experience should invite candidates to consult with their supervisors about the type of questions examiners pose, and the likelihood of generic queries approximating those raised at a hearing.

Morris and Murphy recommend holding a mock defense to gain familiarity with defending a dissertation.[59] The research literature reports mixed support for this suggestion. On the positive side, Hartley and Fox's study reported that twenty-six out of twenty-nine doctoral students who were surveyed about taking both a mock and actual defense found that the trial run offered a worthwhile rehearsal that informed about the nuances of the hearing.[60] Church's study credited mock orals (activities designed to groom doctoral students for their orals by involving them in periodic practice presentations of research) for helping

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[57] Top 40 Potential Viva Questions, http://www.open.ac.uk/blogs/ResearchEssentials/?p=156 (last visited 12 February 2016).

[58] Nasty PhD Viva Questions (Extract), http://pages.cpsc.ucalgary.ca/~saul/wiki/uploads/Chapter1/NastyPhDQuestions.html (last visited 12 February 2016).

[59] The mock viva is a practice run of the candidate presenting the findings of their thesis, followed by typical questions from examiners that might arise during the actual defense.

[60] James Hartley & Claire Fox, *Assessing the Mock Viva: The Experiences of British Doctoral Students*, 29 STUD. IN HIGHER EDUC. 727, 736 (2004).

87.5% of students graduate from one program at a private metropolitan university.[61] Where Watts sees the benefit of mock orals in teaching students about the defense,[62] others, however, see contradictions in an approach that can generate an inflated sense of security. White observes that mock defenses raise the possibility of wide divergence between the practice and actual defense in terms of atmosphere and types of questions asked.[63] Tinkler and Jackson report that the mock defense can be a poor substitute for recreating the content of the actual defense. They reason examiners inherently hold different perceptions on the standard of the thesis being examined and the type of knowledge a candidate should be questioned about.[64] While a mock viva may appeal to some candidates, others will deem it as unnecessary.

Research on the subject informs that a cost-benefit analysis can help determine the value of a mock defense. Mock hearings work best under closely simulated conditions that recreate the event. They draw on institutional resources, rely on the commitment of busy academics, and call on the resourcefulness of a supervisor to book a room and schedule availability among volunteers. Previous engagements and other interests may dissuade more than one person from participating. Candidates must be aware of the purpose of, and their role in, a mock defense and be fully prepared for the event. For those candidates who are competent public speakers because they regularly present papers at conferences, or have developed the skill from legal practice,

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[61] Sarah E. Church, *Facing Reality: What Are Doctoral Students' Chances for Success?*, 36 J. OF INSTRUCTIONAL PSYCHOL. 307, 315 (2009).

[62] Jacqueline H. Watts, *Preparing Doctoral Candidates For the Viva: Issues for Students and Supervisors*, 36 J. OF FURTHER & HIGHER EDUC. 371, 379 (2012).

[63] BARRY WHITE, MAPPING YOUR THESIS: THE COMPREHENSIVE MANUAL OF THEORY AND TECHNIQUES FOR MASTERS AND DOCTORAL RESEARCH 311 (2011).

[64] Penny Tinkler & Carolyn Jackson, *In the Dark? Preparing for the PhD Viva*, 10 QUALITY ASSURANCE IN EDUC. 86, 95 (2002).

the mock defense may be redundant. Attending another candidate's doctoral defense is an unobtrusive way to visualize a dissertation defense and provide an alternative to staging a trial viva.

C. Examination: How to execute a strategy?

Old lore among graduate students holds that the conduct of the dissertation defense is a dichotomy between expectation and experience. Sternberg explains by indicating that the defense can proceed in one of two ways.[65] In the first scenario, the hearing unfolds as a ceremonial and informal event given that examiners have pre-approved passing the dissertation. The other sees an adversarial proceeding where examiners test the candidate's mettle in defending his or her thesis. Research supports and refines both depictions.

Golding et al. reported that most examiners make their judgments by reading the dissertation prior to the defense and use the hearing to confirm their initial opinion.[66] Trafford's study of questions posed during twenty-five oral defenses showed that examiners probed strong dissertations with discursive questions that stirred conversation, while poor dissertations attracted technical questions that sought explanation and thorough understanding of arguments raised by the thesis.[67] However, as Watts indicates, due to variations in university standards, a candidate can submit a passable thesis, but perform poorly at orals and fail; conversely, a borderline dissertation can pass based on a strong defense.[68] Candidates can assure themselves of the importance and outcomes of the defense by knowing the weight afforded to the hearing in satisfying degree requirements. At Osgoode Hall

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[65] David Sternberg, HOW TO COMPLETE AND SURVIVE A DOCTORAL DISSERTATION 193 (1981).

[66] Golding et al., *supra* note 31, at 565.

[67] Trafford, *supra* note 43, at 117.

[68] Watts, *supra* note 62, at 372.

Law School, for example, a dissertation can be accepted only after a successful examination.[69] Hence, a candidate should not rely on the presumed quality of a dissertation for minimizing the purpose of the defense.

A candidates does not know the results of the external/internal examiners' assessment of their dissertation before the defense.[70] This makes it difficult to predict the direction in which examiners will take the hearing. The candidate can, however, influence examiners' perception that they are knowledgeable about their study and how it relates to the broader methodological, theoretical and substantive research literatures.

Achieving this outcome is possible using a strategy that sees the candidate start strong when introducing the dissertation and respond admirably when questioned. This approach characterizes the candidate as an active participant at the defense. The candidate engages in academic oratory: he or she presents a thesis to an audience of examiners who evaluate the performance and content.[71]

The candidate also adopts an oral advocacy approach, which recognizes the hearing as an opportunity for the candidate to inform examiners about the thesis in ways that encourage the dissertation's approval. Oral advocacy should resonate with law candidates.[72] As a reminder, Sayler and Shadel define the term

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[69] Handbook, *supra* note 38, at 64.

[70] Susan Carter, *Examining the Doctoral Thesis: A Discussion,* 45 INNOVATIONS IN EDUC. & TEACHING INT'L. 365, 371 (2008).

[71] ROBERTO ARON ET AL., TRIAL COMMUNICATION SKILLS 171 (1986).

[72] Law school graduates are familiar with mooting. Mooting is simulated appellate advocacy that involves participants writing legal briefs and presenting oral argument to judges. A mooting exercise typically rounds out student assessment in first-year legal research and writing courses. Competitive mooting is a curricular and extracurricular experiential learning activity that is student organized and faculty supervised.

as, "the ability to verbalize ideas to persuade others."[73] The definition infers that advocacy applies in various contexts.

The oral advocacy metaphor draws on parallels between a candidate defending his or her dissertation and counsel arguing a case at an appellate hearing. Both speakers advocate for their cause. The defense is a unique assessment tool due to its inquisitorial nature.[74] Examiners read the dissertation as a template for generating questions and talking points for the defense. They use questions to facilitate an intellectual conversation with a candidate about his or her thesis and its importance. Questions allow a candidate to refine and illustrate aspects of his or her study that require clarification.[75] Importantly, questions reveal an examiner's thoughts on a topic, and the insight a candidate needs to satisfy a request for information.[76] Throughout the defense, questions test the candidate to think under pressure and speak academically.[77]

Judges (just as dissertation examiners) form tentative determinations based on reading an advocate's written brief, and use a hearing to confirm or vary their assessment.[78] After counsel presents his or her case, judges use questions to probe written

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[73] Robert N. Sayler & Molly B. Shadel, TONGUE-TIED AMERICA: REVIVING THE ART OF VERBAL PERSUASION 7 (2011).

[74] Watts, *supra* note 62, at 375.

[75] Bernie Carter & Karen Whittaker, *Examining the British PhD Viva: Opening New Doors or Scarring for Life?*, 32 CONTEMPORARY NURSE 169, 173 (2009).

[76] Paul H. Anderson, *Fielding Difficult Questions From the Bench, in* THE APPELLATE PROSECUTOR: A PRACTICAL AND INSPIRATIONAL GUIDE TO APPELLATE ADVOCACY 183, 184 (Ronald H. Clark ed., 2005).

[77] Tinkler & Jackson, *supra* note 64, at 89.

[78] Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 (1986).

and oral arguments and seek explanation about the law.[79] Counsel (like the candidate) operates as an information resource to engage the listener and help him or her assimilate information. The dialogue educates the bench and ideally spurs an enlightened conversation—the essence of effective oral advocacy.[80]

A candidate defending his or her dissertation observes careful planning, exercises prudent time and information management, and strives for a smooth delivery of material. The candidate's overview, which opens the defense, is appropriately staged. During the question period, the candidate manages answers in relation to his or her knowledge of the dissertation. Throughout the defense, a candidate engages examiners in spontaneous discussion. Several implications flow from practices that underlie an oral advocacy approach, which, in turn, are addressed next.

Morris and Murphy's discussion on the format of viva openings illustrates a difference in procedures between American, Canadian, and British law schools. They note it is uncommon for a candidate to commence the viva with a presentation. Rather, an examination begins after a candidate briefly introduces his or her study.[81] The oral advocacy approach instructs that, when available, a doctoral law candidate uses his or her overview to demonstrate poise, confidence, and trust in the presentation of information. The idea correlates to Mullins and Kiley's

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[79] William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1021 (1984); Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 27 (1999).

[80] Timothy A. Baughman, *Successful Appellate Oral Advocacy*, *in* THE APPELLATE PROSECUTOR: A PRACTICAL AND INDISPENSABLE GUIDE TO APPELLATE ADVOCACY 157, 162 (Ronald H. Clark ed., 2005); James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 STETSON L. REV. 75, 79 (2008).

[81] Morris & Murphy, *supra* note 33, at 100.

finding that first impressions about a written dissertation influence examiners' viewpoints about the remainder of the work.[82] Similarly, a strong overview reinforces an examiner's positive impression of a study. Along the same vein, a convincing overview may also warm an examiner up to reconsidering his or her assessment of a weaker dissertation.

A candidate does not introduce their study off the cuff. The opening discussion offers them the first chance to persuade examiners to reach the inevitable conclusion that a dissertation should pass. They can emphasize the chief points and importance of their thesis. Their overview can spark examiners' thoughts and provoke ensuing questions that the candidate is positioned to address during the question period.

Effecting a good overview begins with the candidate identifying the time allotted for the opening segment, so that he or she knows the type and amount of information to marshal.[83] The next consideration involves choosing an electronic medium of presentation.[84] PowerPoint and Prezi are two helpful slide-generating software programs. Electronic slides host skeletal notes summarizing key study findings, and display technical and sophisticated data through pictures, charts, and statistics. The visual aid serves to draw examiners into the presentation by piquing their interest in the information. After sourcing the content for the presentation, the remaining task is to practice the talk using simple language, maintaining eye contact with an audience, and

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[82] Mullins & Kiley, *supra* note 49, at 377.

[83] For a sample outline on presenting an overview of a dissertation *see* ALLAN A. GLATHORN & RANDY JOYNER, WRITING THE WINNING THESIS OR DISSERTATION: A STEP-BY-STEP GUIDE 225 (2d ed. 2004). The authors note a discussion can begin by the candidate explaining why they became interested in the problem that motivated their study, and how they conceived it. The dialogue then shifts to a review of methodology, and discussion of the contents of the dissertation's last chapter by summarizing, interpreting, and discussing study findings.

[84] This presumes that the hearing room has a computer that runs the appropriate software and a projector with screen to display the content.

briefly pausing between slides to naturally transition the conversation. Using a recorder to tape the talk captures a speaker's audibility, consistency, and modulation in voice. Videotaping the rehearsal tracks posture, mannerisms, and hand movements. The recordings are used to assess stage presence and improve technique by identifying and correcting faults.

An effective overview of a dissertation offers a candidate an early boost in confidence that quells some of the nerves created by speaking in a pressure situation. I draw on my own experience to illustrate the case. I opened my defense with a PowerPoint presentation. Seventeen slides summarized the core points from the main chapters of the dissertation, answered both research questions, and outlined study implications. The layout of each slide was purposely varied: a few slides contained photos of events, some consisted of data flowcharts, while others were filled only with text. The slides helped me describe and explain my study without needing a script. Careful rehearsing allowed me to deliver a thirty-minute introduction that corresponded exactly to the prescribed time limit. I did not realize the importance of observing a schedule until the chair of my dissertation committee commended the feat. The chair's comment immediately buoyed my spirits to handle the remainder of the defense.

Morris and Murphy address the process of examining by advising on answering questions and describing the questions typically asked at a viva. In terms of advice, they state the candidate should try to create a dialogue with examiners and look for opportunities to use questions in a way that showcases his or her research and ideas.[85] These points support an advocacy approach, but need to be conceptualized further to illustrate how they may be applied. A presentation that influences examiners to approve the dissertation after the defense requires a candidate to attentively listen to the questions being asked, offer intelligent

[85] Morris & Murphy, *supra* note 33, at 101.

answers, and appreciate that difficult questions are a facet of orals.

Examiners ask questions because the dissertation interests them. Before a candidate can provide a focussed answer, however, they first need to know what they are being asked. Attentive listening helps a candidate hone in on an examiner's question. A method to isolate the crux of a query is to jot its key components on paper (the paper also provides the space to adumbrate points that form a response). Close listening also helps a candidate follow and parse an examiner's discourse. The skill is vital when a question is prefaced with a story or experience, or a statement is made that functions as a question. Candidates should not be afraid to ask for a question to be clarified, and they should certainly feel free to take a moment to respond. These interactions signal a mutual engagement in the conversation.

Candidates who appreciate that examiners use questions to test knowledge about a thesis are better equipped to consider tactics that advance the goal of passing the defense. They can use the open-endedness of answers as the leeway for directing the conversation. After a candidate directly addresses a question, he or she can expand the response with complementary ideas. They can remark on the issues triggered by the examiner's question, make a point that expands a thought, or relate concepts to the research literature. The exchange invites the examiner to comment in reply. Other examiners may feel naturally inclined to participate in the discussion. The interaction transforms questioners into conversationalists.[86]

During the defense, a candidate may encounter vexing questions. Unexpected questions can be tackled by brainstorming a few ideas to stimulate thinking. A quick review of the dissertation may also yield a response. Nonetheless, examiners sense verbose responses that miss the mark. Their unusual facial expressions may tip-off a candidate to a roundabout answer and

[86] DOUGLAS S. LAVINE, QUESTIONS FROM THE BENCH 138 (2004).

the need to curtail it. Though unsettling, unanswerable questions require a frank acknowledgment of the fact. What the candidate loses by not answering a question, he or she gains by demonstrating honesty. The candidate can always suggest that if an answer does not materialize during the defense, he or she can address the examiner at a later time. Sternberg assures candidates that passing the defense is not contingent on adequately responding to every question.[87] A few minor information slips should not derail an otherwise adequate defense of a dissertation.

IV. DISCUSSION

This article is not a substitute for a book review of *Getting a PhD.* Morris and Murphy's work is an important contribution in its own right for expanding the field of applied studies on the doctoral dissertation in law. An analytical book review essay can provide a fuller investigation and more definitive assessment of Morris and Murphy's work.[88] Doctoral students and new faculty are ideal appraisers as the importance of conducting book reviews to building a writing portfolio is documented.[89] As one method of evaluation, the reviewer can consider the content of *Getting* a *PhD* in relation to Paltridge's critique of handbooks on dissertation writing and postgraduate research. Paltridge's review of eight popular resources determined that most paid little attention to informing about the overall structure and organization of a thesis and the different range of thesis options

[87] Sternberg, *supra* note 65, at 206.

[88] Bonnie Holligan, *Caroline Morris & Cian Murphy, Getting A PhD in Law*, 2 EDINBURGH L. REV. 90 (2013) (book review) exemplifies a short book review.

[89] Tim Hatcher & Kimberly S. McDonald, *How to Write Editorials and Book Reviews, in* THE HANDBOOK OF SCHOLARLY WRITING AND PUBLISHING 222, 228 (Tonette S. Rocco & Tim Hatcher eds., 2011).

available to students.[90] A well-crafted critical review essay can, ideally, spark the research cycle by instigating other readers to expand their own thinking on doctoral dissertations in law by conducting additional research.

In this study, the expectations of a doctoral candidate in law being examined in a British context (illustrated by Morris and Murphy's work) in relation to a North American context (represented by my experience) were compared and contrasted. The findings identify that, despite some common generalities between jurisdictions in exam procedures (requirement for oral defense), there are discrepancies (size of examining committee, formal introduction and overall length of defense, public vs. private event). These observations affirm that even in the same discipline, the conduct of the doctoral defense varies among countries and law schools.[91] Variable approaches reflect universities placing different emphasis between the dissertation and the defense for evaluating the skills necessary for earning a PhD or SJD.

This study also conceptualized an approach to carrying out a doctoral defense using the techniques of oral advocacy. The study's applied dimension builds on the small amount of literature dedicated to the pedagogy of preparing candidates for oral examinations,[92] and relates to the extant research literature in three ways. First, Brause's clarion call to graduates is that they have a responsibility to help other candidates by reconceptualising the entire dissertation process.[93] Second, as Kelley notes,

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[90] Brian Paltride, *Thesis and Dissertation Writing: An Examination of Published Advice and Actual Practice*, 21 ENGLISH FOR SPECIFIC PURPOSES 125, 137 (2002).

[91] Kyvik, *supra* note 54, at 140.

[92] Wellington, *supra* note 31, at 71.

[93] Rita S. Brause, WRITING YOUR DOCTORAL DISSERTATION: INVISIBLE RULES FOR SUCCESS 142 (2000).

experiences of recent PhD graduates are, "perhaps the most effective means of demystifying the event (oral examination)."[94] The observation suggests that a cadre of young scholars possess holistic and insider knowledge of a process that warrants expression through research and writing. Third, discipline-specific studies are required to translate abstract themes of examination assessment into practical applications useful to candidates.[95] It is true that a method that partly draws on the subjective experience of one doctoral law candidate contained to a single law school may not necessarily be generalizable to other candidates' circumstances. Based on a comparison between similar situations, readers can reflect on the information presented in this article and determine its utility.

Other lines of inquiry exist for investigating the doctoral defense in law. When Anand assessed Canadian doctoral studies as of 2004, only a handful of schools formed the research population.[96] After his article was published, law schools at the University of Victoria, University of Alberta, University of Calgary, and Queen's University established doctoral programs. Surely, these developments invite a reassessment of Stagers and Arthurs' finding that between eight and ten candidates earn a doctorate in law from Canadian law schools.[97] Moreover, since the doctoral law degree is slowly gaining prominence, a study can measure the standards of earning one in comparison to the requirements developed in other disciplines.[98]

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[94] Frances Kelley, *Reflecting on the Purpose of the PhD Oral Examination*, 45 NEW ZEALAND J. OF EDUC. STUD. 77, 77 (2010).

[95] Golding et al., *supra* note 31, at 573.

[96] Anand, *supra* note 16. The law schools are University of British Columbia, University of Toronto, Osgoode Hall Law School, University of Ottawa, McGill University, and Dalhousie University.

[97] DAVID A.A. STAGER & HARRY W. ARTHURS, LAWYERS IN CANADA 93 (1990).

[98] *See, e.g.*, K. Dally et al., *The Process and Parameters of Fine Art PhD Examination*, 41 INT'L. J. EDUC. RES. 136 (2004).

Several works investigate how examiners assess a written doctoral dissertation, leaving their experience during orals as another avenue for investigation. Law faculty are recruited to serve on examining committees because of their expertise. At orals, do they examine from a practitioner or academic perspective (or both)? What other particular skills does examining call on? Do the criteria for assessment differ among law faculty with variable backgrounds? A qualitative investigation that explores these questions, and others on the practices of law faculty, would shed insight on the profile of examiners and reveal their expectations of candidates.

V. CONCLUSION

A successful dissertation defense immeasurably advances one's personal development and professional standing. Using Morris and Murphy's discussion on the doctoral examination in law as an overarching evidentiary framework, this article outlined three stages associated with conducting a doctoral defense in law and advanced an oral advocacy strategy. Candidates who are indifferent to using extrinsic sources as part of their defense preparations may still benefit from reading this article if it fosters a reconsideration of suggestions. This article has argued for candidates to prepare for their doctoral defenses as an interactive and informative learning experience. Wallace found that even when a hearing is passed, dissonance between what candidates anticipated as the purposes of the defense and examiners' behaviors during orals is a source of dissatisfaction.[99] Surely, that is a misgiving most candidates want to avoid on their big day of celebration.

[99] Wallace, *supra* note 29, at 107.

THE PENTALECTIC SPHERE AS MEANS FOR QUESTIONING LEGAL EDUCATION – TOWARDS A PARADIGM SHIFT

Yael Efron*

I. INTRODUCTION

"The future is a foreign country", said Graham Ferris, claiming it is infeasible to rely upon traditional practices of legal education.[1] The world is rapidly changing; it is dynamic and becoming more and more complex.[2] Our access to infor-

* Yael Efron is a faculty member at the Zefat Academic College School of Law in Israel. An earlier version of this paper was included in Dr. Efron's dissertation as part of her LL.D. thesis, under the supervision of Prof. Barak Medina and Prof. Michael Karayani, at the Hebrew University Law Faculty. The author wishes to extend her gratitude to Prof. Michelle LeBaron for her invaluable assistance to conceptualizing the ideas presented in this paper

[1] Graham Ferris, *The Legal Educational Continuum That Is Visible Through A Glass Dewey*, 43(2) THE L. TCHR. 102, 102 (2009).

[2] Prof. Louise Diamond, one of the world's leading complex systems theorists, claims that our human systems at all levels of organization exhibit the common dynamics of living systems. Understanding the nature and dynamics of living systems, therefore, can shed light on how we think about our problems and our resources, and about the assumptions and the choices we make. In the fall of 2008, she facilitated an extensive dialogue among a number of prominent systems thinkers. What followed were twelve basic concepts about living systems and their implications for policy considerations when dealing with difficult challenges. *See* Louise Diamond, *Twelve Simple Rules of Systems Thinking for Complex Global Issues*, http://www.louisediamond.com/TwelveSimpleRules.pdf. *See also* JAN FOOK & FIONA GARDNER, PRACTISING CRITICAL REFLECTION: A RESOURCE HANDBOOK 6 (Open University Press, 2007).

mation is greater than ever; we are able to perform tasks and communicate simultaneously with more ease and comfort.[3] Technology has transformed our relationships; it has made globalism a fact of life. Our dependence on it ensures its continuous effect and enhances our ever-growing networks.[4] The constant need to rethink processes,[5] to understand elaborate systems—the way they are designed and how they function—calls for reliance on advanced systems theory.[6] Scientific breakthroughs in neuroscience lend us empirically proven explanations for what seemed, in previous years, heuristic and intuitive.[7]

Law itself, as an academic discipline, has undergone significant transformation over the last few decades,[8] and it has tried to keep up with trends in society.[9] New areas of legal scholarship lend us novel perspectives of our world, with the advancement of other disciplines and their relationship to law, such as Gender Law, Race Law,[10] Queer Law,[11] Socio-legal

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[3] DAVID SHIPLEY & WILL SCHWALBE, SEND: THE ESSENTIAL GUIDE TO EMAIL FOR OFFICE AND HOME (Alfred A., Knopf, 2007).

[4] Philip Thomas, *Legal education: Then and now*, 40(3) L. TCHR., 239, 248 (2006).

[5] *See*, *e.g.*, global initiatives to rethink negotiation teaching: http://law.hamline.edu/rethinkingNegotiation.html; to rethink management: http://rethinkingmanagement.org/; rethinking economics: http://www.rethinkeconomics.org/ and more.

[6] FOOK & GARDNER, *supra* note 2.

[7] Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die From Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 807 (2014).

[8] RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (Oxford University Press, 2013).

[9] *Megatrends in Law*: *Carrie Menkel-Meadow speaks on megatrends involving the law at the Keystone Conference, October, 2006.* MEDIATE.COM (Oct. 2010), *http://www.mediate.com//articles/Megatrends_Menkel-Meadow.cfm*.

[10] *See*, *e.g.*, National Black Law Journal, established in 1970 at UCLA, USA, and Michigan Journal of Race and Law.

studies,[12] Law and economics,[13] and more. The new lawyer is charged with graver and more complex tasks,[14] and as the market of legal services is becoming more competitive,[15] law graduates must demonstrate expert competencies to survive it. When the law and the way we understand and interpret the law change, the nature of the legal profession must be transformed equivalently. If our understanding of legal education cannot keep up with the change, it is faulty.[16]

Finally, the student body in academia has changed dramatically in the twenty-first century. Law school students have grown in number and changed in terms of gender balance, social class, ethnicity, nationality, and social composition.[17] Stu-

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[11] *See*, *e.g.*, the Arts and Humanities Research Centre on Law, Gender and Sexuality, based in Kent University Law School, UK. KENT LAW SCHOOL, HTTPS://WWW.KENT.AC.UK/LAW/KENTCLGS/ (last visited April 30, 2016).

[12] Sally Wheeler & Philip A. Thomas, *Socio-Legal Studies*, *in* LAW'S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY 267 (David Hayton ed. 2001).

[13] Anothony Ogus, *Law and Economics in the Legal Academy, or, What I Should Have Said to Discipulus*, 60 U. TORONTO L. J. 169 (2010).

[14] JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (University of Washington Press, 2008).

[15] Thomas, *supra* note 4, at 248; *see also* CANADIAN BAR ASSOCIATION, THE FUTURE OF LEGAL SERVICES IN CANADA: TRENDS AND ISSUES 19 (2013), http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/trends-isssues-eng.pdf?ext=.pdf.

[16] Diamond, *supra* note 2 at 4 ("11. The parts of living (human) systems cohere around a common shared purpose. Therefore: Define and revisit goals and purpose. . . . 12. Living systems are learning systems. That is, they adapt from the feedback they receive from their internal and external environments. Therefore: Learn and change from inner and outer messages.").

[17] Thomas, *supra* note 4. *See also* Alison Bone, *The Twenty-First Century Law Student*, 43(3) L. TCHR. 222, 224-26 (2009). *See also* Yael Efron & Yaron Silverstein, *Arab Law Students in Israel as Agents of Change*, 19

dents' objectives for choosing to study law come today from a much more vocational need than from attraction to liberal or critical thinking.[18] Students' demands on their time lead them to adopt 'cost-efficient' practices of study, and thus, affect their learning styles in ways which are more assessment-driven,[19] multi-tasked, teamwork-based, simultaneous, and technology-mediated[20] than before. Failure to address these learning trends in law school teaching sets these students up for failure.

Legal educators' interest in educational processes also seems to have increased recently,[21] and they are more aware of its challenges today. One of these challenges has to do with the fact that any educational process entails constant deliberation and adaptation.[22] These fundamental transformations in

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HAMISHPAT (COLLEGE OF MANAGEMENT LAW REVIEW) 333, 336-37 (2014) (Hebrew) for comparison of ethnic diversity in Israeli law schools.

[18] *Cf.* Bone *supra* note 17, *and* David Watson, *What is University For?*, THE GUARDIAN (Jan. 14, 2002), www.guardian.co.uk/education/2002/jan/15/highereducation.news, *with* ANTHONY KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE (2007); *see also* Yaron Silverstein & Yael Efron, *Law Students as Agents of Social Change – Moral Values and Attitudes in Zefat College School of Law*, 7 MAASEI MISHPAT (TEL-AVIV UNIVERSITY J. L. & SOC. CHANGE) 105 (2014)) (Hebrew) (reinforcing this notion in Israel as well).

[19] ASSESSMENT, LEARNING AND JUDGEMENT IN HIGHER EDUCATION: A CRITICAL REVIEW (Gordon Joughin ed., 2009) [hereinafter ASSESSMENT].

[20] Bone, *supra* note 17, at 244.

[21] Many blogs discussing legal education can be easily found online. *See Legal Education, ADR and Problem Solving (LEAPS) Project*, AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION, http://leaps.uoregon.edu/; *About this blog*, A PLACE TO DISCUSS THE BEST PRACTICES FOR LEGAL EDUCATION, http://bestpracticeslegaled.albanylawblogs.org/about/; LEGALED, http://legaledweb.com/.

[22] Ferris, *supra* note 1, at 105 (discussing Dewey's view that "the educational process is one of continual reorganization, reconstructing, transforming.").

the field of legal education raise new questions and the need for deliberation. A framework intended to assist with these deliberations is essential, and offers motivation for extensive scholarship, analyzing and criticizing legal education throughout the years and across nations. Yet it seems we are wandering aimlessly, battling more unknowns than predictables. In the midst of uncertainty, what we are missing is, perhaps, the right set of questions, rather than a kit of answers, which are deemed irrelevant over time.[23]

A new paradigm for questioning legal education is called for in order to meet the changing world of law, academia, and the legal profession.[24] Legal education today must be viewed through lenses that are appreciative of this era's increasing velocity of change, [25] globalization, [26] interdisciplinary knowledge,[27] and complexity.[28] The law student of the third decade of the twenty-first century has different capacities and is expected to endure different challenges than the law student of the 1990s, when many of the canon critiques of legal education were published. Understanding legal education towards the mid-twenty-first century entails a multi-dimensional perspective. We need a framework that incorporates multidisciplinary thinking, includes neuroscience, complexity and dyna-

[23] Diamond, *supra* note 2, at 3 ("8. Systems move between various degrees of stability and instability, order and disorder. When the disorder, or chaos, becomes too great, things fall apart. When the order is too rigid, things cannot grow or develop. Yet a certain degree of instability, or the edge of chaos, can also be a powerful moment of creative change. Therefore: Seek coherence within chaos. . . . 9. All living systems exist within a single field of potential, where the observer is a player, our thoughts have consequences, and creative solutions emerge. Therefore: Look to the intangible as well as the concrete to see the potential.").

[24] MACFARLANE, *supra* note 14.

[25] SUSSKIND, *supra* note 8.

[26] Thomas, *supra* note 4, at 248, 251.

[27] *Id.* at 252.

[28] FOOK & GARDNER, *supra* note 2; Diamond, *supra* note 2.

mism, and reflects current and future conditions for legal practice and work into legal education.

The new paradigm suggested in this paper is illustrated by a Pentalectic Sphere, as shown in Figure 1. The sphere encompasses five elements of legal education (and perhaps of legal scholarship as well) that are believed to be essential to the process: knowledge, skills, values, capacity-building, and cultural fluency. These are illustrated as nodes within the sphere and are interconnected. The Pentalectic Shpere is also surrounded by a membrane, representing technology, which touches on each of the nodes, and is thus significant to every element in the educational process. The Pentalectic Sphere is hovering in a space, representing the socio-political context, which, according to this new paradigm, always affects the law school environment.

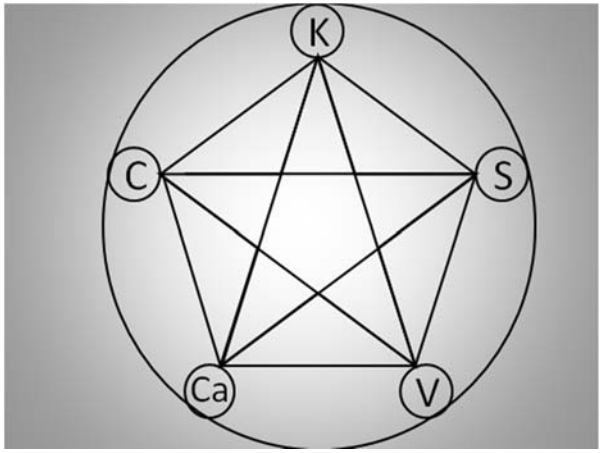

Figure 1 - Legal Education Pentalectic Sphere

The paradigm illustrated by the Pentalectic Sphere is inquiry based, and therefore focuses on the questions produced by each node, the relationship of each node to another, as well

as the effects of technology and the socio-political context. This paper fleshes out some of these questions, although many more may be still exist. The answers to these questions differ, of course, from one law school to another, as well as from one educator to another. This signifies the diversity of institutions, faculty, and students, and thus honors a pluralistic, flexible, and dynamic approach to legal education. Therefore, any attempt to prescribe comprehensive answers to the questions produced by the elements and their interconnectivity contradicts the purpose of this paper. Any answers suggested here are merely an exemplification of the relevance of the questions asked, and should be regarded as such. The Pentalectic Sphere framework invites different scholars to suggest different answers to these questions.

The first part of this paper describes the need for a new framework for understanding legal education. It claims that linear thinking regarding legal education failed to provide comprehensive understanding of it, and it is constantly challenged due to its lack of dynamism and flexibility. In the second part, the new paradigm is introduced and outlined, detailing the sources of inspiration for the Pentalectic Sphere. Then, a detailed explanation of the components of the Pentalectic Sphere is illustrated. This part focuses on the questions produced by each of the elements of legal education and each of their connections with the others. A Pentalectic Sphere inspired curriculum—this part suggests—produces a non-symmetric, dynamic, and flexible representation of the model, according to the answers to the questions asked. Finally, the application of the new framework and its implications are discussed, addressing its challenges and resistance to change, typical to any reform. Invitation to further research on these applications is also extended in the last part.

II. WHY A NEW PARADIGM?

Legal education has been often thought of as a linear process.[29] The students, charged with their personal and cultural backgrounds, are expected to follow a route of sequential teaching of knowledge and technical implementation of skills, then come out on the other side equipped with all they need for the professional legal world. This process, as it is often described, entails the introduction of theoretical and doctrinal knowledge, the acquisition of practical skills, and the absorbance of values—whether intentionally or not. This linear process may be abstractly described in Figure 2 as such: students enter law school at t_1 and come out as law graduates at t_2. Students, educators, the institution, and others treat this process of education as a line of production, aimed to produce competent lawyers (whether as counsel, advocates, judges or scholars). During their stay in law school, students first learn knowledge, then acquire skills, and eventually undergo socialization[30]—whether explicitly or tacitly—until their academic graduation. It is even called *curriculum*—Greek for *running lane*—suggesting that staying on course and persevering will ensure students get from point t_1 to point t_2.

[29] *See* Ferris, *supra* note 1, at 109 (describing legal education as a continuum).

[30] Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60(2) VAND. L. REV. 515 (2007).

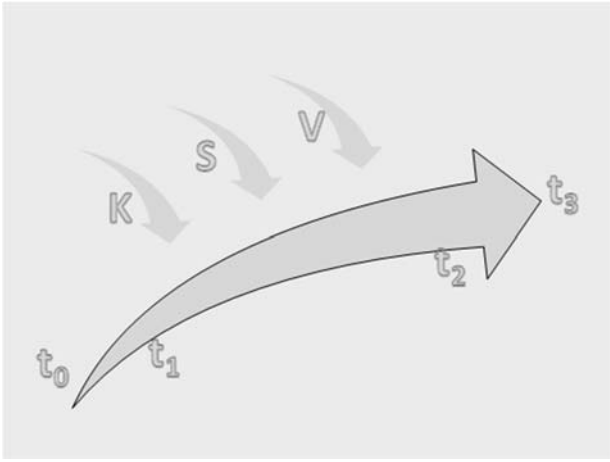

Figure 2 – legal education as a linear process

This linear process has been subject to worldwide and decades-long critique from the bench,[31] the bar,[32] and academia.[33] The outcome of this process seems to be unsatisfying for all, including graduates themselves, who report on their frustration.[34] Scholars and professionals alike have attempted to analyze the process, suggested amendments to it, and provided

[31] Harry T. Edwards, *The Growing Disjunction Between Legal Education And The Legal Profession*, 91 MICH. L. REV. 43 (1992).

[32] Press Release, Israeli Bar Association (May 26, 2014) (Isr.) (publically condemning the "Flood of the Profession"), http://www.israelbar.org.il/article_inner.asp?e=1&catId=3082&pgId=196026.

[33] *See* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25(1) OHIO ST. J. ON DIS. RESOL. 247, 256-259 (2010) (For extensive review of legal education critique).

[34] Kennon M. Sheldon & Lawrence S. Kreiger, *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-Being*, 22 BEHAV. SCI. L 261 (2004); *see also* Efron & Silverstein, *supra* note 17.

insight for redesigning the curriculum and its pedagogy. The critiques for this linear process spread throughout its entire route. Some scholars claim that law schools' disregard of the students' background (t_0) as they enter its gates creates a frustrating gap between the values absorbed at home and the values underlining the legal curriculum and law school culture.[35] Some protest against a lesser emphasis on the teaching of certain knowledge,[36] skills,[37] or values[38] that they believe are essential for the education of lawyers. Others suggest a reform in pedagogy, which they believe is more helpful in preparing graduates for the real professional world (t_3).[39] Some scholars stress that socialization is key for professional and academic growth,[40] while others believe that legal education should follow a strict, systematic, pragmatic model, grounded in experience.[41]

However, it seems that all of these critiques are still bound by the same linear thinking. The literature on legal education,

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[35] Efron & Silverstein, *supra* note 17.

[36] MENACHEM MAUTNER, ON LEGAL EDUCATION (2002) (Hebrew).

[37] ROBERT MACCRATE, LEGAL EDUCATION AND THE PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM; REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (American Bar Association, 1992).

[38] Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929 (2002); Neta Ziv, *Legal Education and Social Responsibility: on the Link Between the Law Faculty and the Community in Which it is Placed*, 25(2) THEORETICAL INQS. IN L. 385 (2001) (Isr.); Yuval Elbashan, *On the Absence of Social Justice from the Legal Education in Israel*, 3 ALEI MISHPAT: L. REV. ACAD. CTR. L. & BUS. 7 (2003) (Isr.).

[39] John Lande, *Teaching Students to Negotiate Like a Lawyer*, 39 WASH. U. J. L. & POL'Y 109 (2012); STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (Clinical Legal Education Association, 2007).

[40] ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (First Harvard University Press, 1995).

[41] Ferris, *supra* note 1, at 102.

so it seems, does not often recognize the spherical nature of the process, allowing elements of legal education to coexist simultaneously on several planes. Most scholarship presents the process as one-dimensional, rather than multilayered. Although most scholars do relate to the process as developmental, it is often regarded as a static process, not stressing enough dynamic nature, allowing meaningful learning to take place in loops.[42] Disregarding the importance of recognizing different cultural views with regard to time, the concept of time in this process is often viewed as sequential, rather than synchronous.[43] This leads to endless battles over tardiness and discipline. Most initiatives for legal curricular reform are insufficiently focused on "who" and "why,"[44] and more focused on "what" and "how."[45] They are notoriously political and difficult, and they often result in few substantial changes.[46]

It is time to adopt a new understanding of the process of legal education, as it is quite obvious that various factors affect it in a non-linear way. It is known today that meaningful learn-

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[42] Michelle LeBaron & Mario Patera, *Reflective Practice in the New Millennium*, RETHINKING NEGOTIATION TEACHING 45, 50 (Giuseppe De Palo et al. eds., 2009).

[43] FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS (2nd ed., 1997) [McGraw-Hill] (defining this concept and other concepts that relate to the Seven Dimensions of Culture). Further discussion of this concept can be found in part 4.1.5.

[44] Although scholars certainly do. *See* Brent Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation With Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010) (for critique on common practices for recruiting and promoting faculty).

[45] *See* MACCRATE, *supra* note 37.

[46] AMERICAN BAR ASSOCIATION, A SURVEY OF LAW SCHOOL CURRICULA, 1992-2002 (2004).

ing is spiral, rather than linear,[47] and is dynamic and flexible, rather than static.[48] Learning is affected not only by material taught but also by how it is taught and with which underlying values, as well as by its environment. Regarding educational processes as lists of boxed categories that need to be checked is inefficient, since educational processes are relational and are affected by the learner, the teacher, and their unique interaction.[49] The Pentalectic Sphere, as demonstrated in Figure 1, offers an analytical framework, which incorporates what we know today about learning, the law, and their interconnectivity.

III. WHAT NEW PARADIGM?

Graham Ferris's work on John Dewey,[50] a forefather of curricular studies,[51] stresses inquiry as basis.[52] It is axiomatic that asking the right questions is crucial for understanding. In search for a model that would produce relevant questions to the field, entail enough complexity and richness of detail, be flexible and dynamic enough to adapt to the velocity of change, yet clear and concise enough to produce effective deliberation, this paper turns outside the traditional scholarship of legal education. It lends perspective and borrows inspiration from a combination of fields that deal with similar challenges. Ferris recognizes the need for a pragmatic model of learning because traditional practices cannot be reproduced reliably under the stresses of changing circumstances.

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[47] CHRIS ARGYRIS & DONALD A. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (Jossey-Bass, Inc., 1974).

[48] *See* LeBaron & Patera, *supra* note 42.

[49] JOHN DEWEY, EXPERIENCE AND EDUCATION (Touchstone, 1938).

[50] Ferris, *supra* note 1.

[51] DEWEY, *supra* note 49.

[52] Ferris, *supra* note 1, at 104.

A. The Pentalectic Sphere

The framework for questioning legal education suggested in this paper is illustrated as a Pentalectic Sphere, as demonstrated in Figure 1. A "Pentalect" could be regarded as a five-way discourse, as the dialect is regarded as a two-way discourse. The Pentalectic Sphere includes five nodes—representing elements of legal education—in a non-hierarchical order, which exist synchronically on different planes and are interconnected. The core of this sphere, illustrated as a pentagon, represents the Espoused theory[53] of legal curricular design. The matter of fact is that the hidden-curriculum,[54] which is the Theory-in-use,[55] is far from being so symmetrical and sterile, since its boundaries are shifted and fragmented by what is actually happening in law school reality. The Pentalectic Sphere is surrounded by the circle of technology, mediating the teaching and learning to a large extent, and touching on each of the five nodes. The entire Sphere is hovering in the socio-political context in which legal education takes place, both affecting it and being affected by it.

Figure 1 illustrates the elements of legal education demonstrated by the Pentalectic Sphere. *K* stands for knowledge, the subject matter of teaching law, what we expect law students to know by graduation. *S* stands for skills, the know-how of law, what we expect students to be able to perform by graduation. *V* stands for values, the meaning of the law, how we wish the students to regard the effects of the law and its implementation. *Ca* stands for capacities, the being of a lawyer, what we wish the students to be by graduation. *C* stands for culture, what

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[53] ARGYRIS & SCHON, *supra* note 47.

[54] SAMUEL BOWELS & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (Basic Books, 1976) (coining the term); Efron & Silverstein, *supra* note 17, at 345 (discussing the term).

[55] ARGYRIS & SCHON, *supra* note 47.

society is—either within or outside law school—and how the students should fit into it by graduation. All nodes are interconnected, relating closely to one another.

The pentagon created in the center by the connecting lines, representing the formal curriculum, should not be mistaken for being symmetric or static. The connecting lines are dynamic, shifting their place by the changing weight and place of each node over time or developments in the socio-political climate. These dynamic relationships amongst the nodes are what constitute the curriculum. The formal curriculum is a reflection of what the institution declares about the "what, how, when, where, who, and why" that is being taught. There is always a hidden curriculum that ties together the different nodes based on the nature of their interconnectivity. It represents the actual implicit sum of law school teaching, doing, and being. The outer circle stands for technology—a fast growing factor in education and in law. The background represents the socio-political context surrounding the law school, which influences the curriculum, and, at the same time, is also influenced by it.

Although a bi-dimensional figure is mistakenly illustrated in print as symmetrical, the elements—both nodes and their connections—are not. The Sphere allows for a pluralistic approach to legal education, where an accent put on one node or another, or if one connection is broken while others remain intact, is what makes legal education in one institute different from another. Also, the static nature of a drawing might lead one to regard the model as static, though it certainly is not. It changes over time, according to shifts in the socio-political context surrounding it, advancements in technology, and even preferences of influences within or outside the law-school. This non-linear framework is useful for analyzing developmental and meaning-making processes, since it is intuitive and easy to retract and revisit previous steps in the analytic process.

Following the nodes and connections of the Pentalectic Sphere, it serves as a roadmap for navigating legal education in

the twenty-first century. It directs the questioning process needed for understanding it. One might ask what values are important to today's field; another might be intrigued by the effect of cultural fluency on these values. One might question the balance between skills and knowledge in the curriculum, while another would contemplate whether a certain capacity can or should be nourished in a law school. Every node raises questions, as does every relation amongst them.

B. Sources of inspiration

The model suggested here lends concepts from multiple disciplines in order to create a new framework for understanding legal education. The analysis can be informed and can profit from input from other disciplines that share similar complexities. Any educator with some experience teaching in diverse cultural contexts is sure to realize the limitations of any one lens and the old paradigm. The old paradigm leaned on Cartesian thought, which claims that the study of the parts is needed in order to understand the whole. Capra advocates that Western culture abandons this conventional linear and mechanistic school of thought. He encourages a more holistic approach. In *The Web of Life*,[56] Capra focuses on systemic information generated by the *relationships* among all parts, as a significant additional factor in understanding the character of the whole. His work on systems theory and complexity theory (which emphasizes the web-like structure of all systems and the interconnectedness of all parts) may be a useful framework for understanding legal education.

Learning systems are complex and often conflict-habituated. A new paradigm for understanding, teaching, and learning must entail web-like thinking, which stresses the tensions amongst its elements. Borrowing from multidisciplinary

[56] FIRTJOF CAPRA, THE WEB OF LIFE (Anchor Books, 1997).

education, when designing and analyzing education, one must create and relate to inherent tensions in the system. Palmer offers these following tensions that he builds into a teaching and learning space in general education.[57] A Pentalectic Sphere-inspired curriculum proposes utilizing these tensions in legal education as well:

- *The space should be open and bounded*. Traditionally, the study of law was bound to the space within the classroom walls. A new paradigm respects clinical work in the community and even adventure learning.[58]
- *The space should be hospitable and "charged."* Science is formed by problematics. Creating a space for students to struggle with these problematics is the academy's role. However, to foster scientific knowledge, scientists need a safe place to make mistakes. The Socratic Method,[59] widely used in American law schools, when it is not abused by the teacher, can create the space for the students to contemplate charged problematics in law in a hospitable atmosphere, nourished by their teacher.

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[57] PARKER PALMER, THE COURAGE TO TEACH, 74 (John Wiley & Sons, 1998).

[58] Aaron Doering, *Adventure Learning: Transformative hybrid online education*, 27(2) DISTANCE EDUC. 197, 197 (2012) ("Adventure learning . . . is a hybrid distance education approach that provides students with opportunities to explore real-world issues through authentic learning experiences within collaborative learning environments."). This method had been successfully deployed in negotiation teaching. *See* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES (Christopher Honeyman et al. eds. 2010).

[59] STUCKEY, *supra* note 39, at 121.

- *The space should invite the voice of the individual and the voice of the group*. The classic paradigm governing the sociology of knowledge regards knowledge produced individually as traditionally more prestigious than communally produced knowledge.[60] However, in current times, acknowledging group synergy, honoring teamwork, and respecting heterogeneity is essential to meet social and educational goals.[61] Richer music is produced by an orchestra made up of more than only violins. The fringe voice is meaningful to the discourse as is the voice of the hegemony, if not more so.
- *The space should honor the "little" stories of the students and the "big" stories of the discipline and tradition*. Since law touches everyone's lives, everyone has a relevant perspective to learn from. Knowledge is more than black-letter law. It is also what law means, how it affects people's lives, and what the law is missing. This knowledge is held by all participants in the educational process, not just the teacher. Legend says that just before the Titanic hit the iceberg, the deck-boy alerted the Captain, advising him to change course. The Captain sternly ordered the boy off the bridge, to keep concentrating on sweeping the deck, and let him do his job.

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[60] Michael F. D. Young, *An approach to the study of curricula as socially organized knowledge*, KNOWLEDGE & CONTROL 19-46 (1971).

[61] Nellie Munin & Yael Efron, *Role Plays Bring Theory to Life in a Multicultural Learning Environment*, J. LEGAL EDUC. (forthcoming).

- *The space should support solitude and surround it with the resources of community*. The practice of study groups is one of the lesser-researched methods of learning in law schools. Since achievements are assessed individually, solitude is required from both students and teachers. Although highly prominent in law school culture, this form of communal study is a form of tacit knowledge, not formally discussed, but very commonly practiced. A new paradigm should honor these resources and teamwork capacities should be acknowledged and enhanced.
- *The space should welcome both silence and speech*. Western culture is generally not at ease with silence. Law students that have taken mindfulness meditation instruction on campus, sometimes as part of law school courses, are usually few and anecdotal. But meditation retreats, which are designed for Yale and Columbia law students with law students from Denver, Hastings, Miami, Missouri-Columbia, North Carolina, Stanford, and Suffolk, demonstrate that value is found in silence.[62] New developments in neuroscience now support mindful and contemplative practices, like meditation, relaxation, and even yoga, as complementary to the study and practice of law.[63]

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[62] Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002) (listing benefits of appreciating silence in law school curricula).

[63] Austin, *supra* note 7, at 838-47.

Complex systems analysis, which inspired the Pentalectic Sphere, can also be found in conflict resolution literature. Many parallels can be drawn from conflict resolution theory into legal education.[64] It is one of the few areas of legal education that has arisen more recently (unlike black-letter law doctrines such as property law, torts or contract law). Therefore, it does not carry the same loaded symbolism or resistance to change. It has evolved in the "new world," and thus reflects newer thinking and is highly adaptive to change.[65] It is also highly interdisciplinary and appreciative of complimentary research methods. Due to the tense context in which it usually occurs, conflict resolution analysis stresses relational thinking that is required for understanding complex systems, like legal education. Conflict resolution theory is recognized as an applied theory, much like legal education generally. Therefore, it is quite open to incorporating what we know about neuroscience[66] and about complexity theory.[67] These elements of thought are crucial for understanding legal education.

Frameworks that have attempted to explain complex systems that lean on similar concepts, such as conflicts for example, face the same challenges. The analytical model that describes the multiple layers of conflict[68] is sophisticated enough to relate to two dimensions: the layers (material, relational and symbolic) and how they are relevant to the origin of the conflict and to the measures needed to address it. The grid created by crossing these two dimensions lent much needed richness to the understanding of an abstract concept as conflict. However,

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[64]Lande & Sternlight, *supra* note 33.

[65] MACFARLANE, *supra* note 14.

[66] Emily Beausoleil & Michelle LeBaron, *What Moves Us: Dance and Neuroscience Implications for Conflict Transformation*, CONFLICT RESOL. Q. 133-58 (2013).

[67] Diamond, *supra* note 2.

[68] Cynthia F. Cohen et al., *Managing Conflict in Software Testing*, 47(1) COMM. OF THE ACM 77, 79 (2004).

this too is a bi-dimensional framework, still missing depth and dynamics essential for understanding complex systems.

Craig Darling's elegant concept of the Pentalectic Circle, described in Figure 3, introduced as a way of deepening capacity for the design and implementation of decision-making processes in public-policy arenas,[69] seems to lend a generous framework for analysis. It had been used for the design and analysis of dispute resolution systems for the Attorney General in British Columbia, Canada. Since Darling's Pentalectic Circle allows a rich framework for analyzing complex concepts and systems, it has been used for rethinking various disciplines, such as environmental dispute resolution and public policy.[70]

[69] CRAIG R. DARLING, WORKING TOGETHER: DESIGNING SHARED DECISION-MAKING PROCESSES (Continuing Legal Education Society of B.C. and Dispute Resolution Office, B.C. Ministry of Attorney General, 1998).

[70] Carol Elizabeth Murray, Transforming Environmental Dispute Resolution in Jasper National Park (Jan. 1, 1991) (unpublished thesis, University of Alberta) (on file with the University of Alberta Library system), https://era.library.ualberta.ca/downloads/d504rn507.

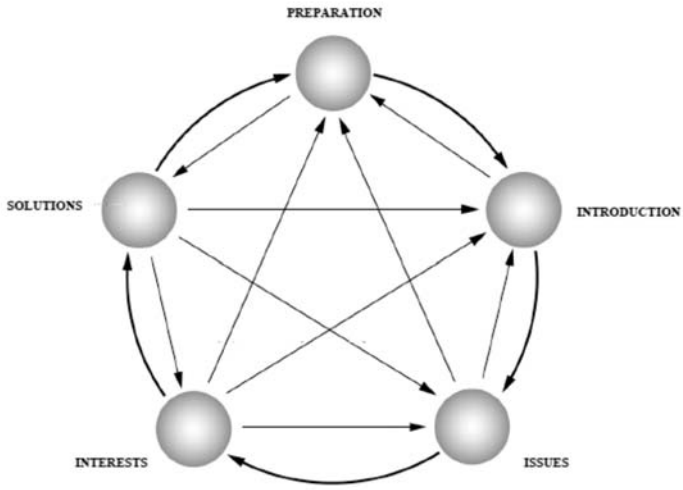

Figure 3 - Darling's Pentalectic Circle

The richness of Darling's Pentalectic circle served as a source of inspiration for further development. It sparked the idea for the multidimensional aspect needed to illustrate rich, dynamic, non-hierarchical framework for analysis of complex concepts. Furthermore, as Darling describes the elements of his concept, the rotation of the circle is illustrated by one-way arrows. This inspired the notion of the need to highlight some of the synchronistic, non-sequential nature of a learning process. The connections between the nodes are also illustrated by Darling as one-way arrows, suggesting causal relationships. This triggered the need to emphasize tension, rather than cause, which is more representative of educational processes. Therefore, lending from Darling's Pentalectic Circle, it is suggested that legal education be viewed as a Pentalectic Sphere.

According to Parker Palmer, artistry in teaching arises from engaging paradoxes.[71] These paradoxes focus on the faculty's ability to deliberate their teaching, rather than reproducing it meaninglessly.[72] Palmer's paradoxes inspired the components represented by the nodes of the Pentalectic Sphere and the interconnectivity characteristic of the model derives inspiration from some of Diamond's "12 Simple Rules."[73]

- *Knowledge* – "The knowledge I have gained over years of experience goes hand in hand with being an amateur at the beginning of each new class."

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[71] PALMER, *supra* note 57 at 63.

[72] Diamond, *supra* note 2, at 2 ("5. All living systems develop patterns. Often these patterns are self-reinforcing and become deeply embedded and difficult to change. Many of these patterns in human systems are common and recognizable. Patterns also show up in similar forms at different scales or levels of the system. Therefore: Re-pattern for sustainability and well-being of the whole.").

[73] Diamond, *supra* note 2, at 1-3 ("1. In complex systems, all the elements or agents are interconnected, as in a giant web. They are also interdependent – what happens to one affects all others. Therefore: Connect the disconnected. . . . 2. Complexity is the nature and condition of living systems and the world we live in. What we know about complex systems is that there are multiple agents or elements, combining and interacting in unpredictable and non-linear ways. This means decisions often lead to unintended consequences. Therefore: Ground yourself in unpredictability. . . .3. In that giant web of interconnectedness, the points or nodes where the agents meet are the relationships, or opportunities for interaction. These interactions determine what will happen to the system. The nature and quality of these relationships, therefore, are critically important. Therefore: Create conditions for quality engagements. . . . 7. Living systems organize themselves through the interactions of their agents or parts. The basic format of that organization is networks – that is, groups of parts joined together in a de-centralized way for some period of time. Therefore: Pay attention to emerging networks.").

- *Culture* – "My inward and invisible sense of identity becomes known, even to me, as it manifests itself in encounters with external and visible 'otherness.'"
- *Skills* – "Good teaching comes from identity, not technique, but if I allow my identity to guide me toward an integral technique, that technique can help me express my identity more fully."
- *Values* – "Teaching always takes place at the crossroads of the personal and the public, and if I want to teach well, I must learn to stand where these opposites intersect."
- *Capacities* – "Intellect works in concert with feeling, so if I hope to open my students' minds, I must open their emotions as well."

The summation of what this Pentalectic Sphere model brings into the scholarship discussing legal education contains both outer and inner perspectives as an overview. Looking within legal education scholarship, all involved voice a great distress: students, educators, scholars, lawyers, judges, and policy-makers. The linear school of thought had failed to produce substantial reform. Looking outside legal education scholarship, richer frameworks hold promise in rethinking and developing the field. Multidisciplinary education, conflict resolution, complex systems theories, and neuroscience justify a multi-dimensional, non-hierarchical, asymmetric, synchronistic, and dynamic model for analysis, design and implementation of the legal curriculum. The Pentalectic Sphere and its components—the nodes, the connections, the hidden curriculum and the socio-political context—are intended to do just that.

IV. DETAILED EXPLANATION OF THE PENTALECTIC SPHERE'S COMPONENTS

The Pentalectic Sphere is a questioning tool, not a guide for answers. It is designed to assist those who contemplate legal education in figuring out what, how, why, when, where, by whom and to whom is being taught and learned; what, how, why, when, where, by whom and to whom *ought* to be taught and learned; and which components of the legal education are consciously addresses and which are overlooked. If inquiry is the base of knowledge,[74] then this paper suggests adapting a systematic, yet flexible model of inquiry. It is intended to invite scholars, educators, and students—past and present—to inquire about their own legal education. Hopefully, such reflective practice will ease the introduction of change and reform where it is needed, and conserve (or even enhance) the efficient and satisfying elements that work well in legal education.

[74] Ferris, *supra* note 1, at 104.

A. Questions produced by the nodes

1. Knowledge

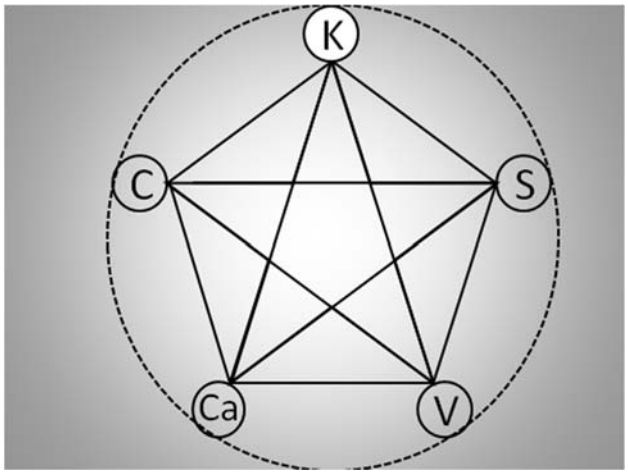

Figure 4 - Knowledge

The role of academia in society is producing and disseminating knowledge through research and scholarship. The academic discipline of law is a traditional part of liberal education in the modern universities. A distinctive trait of liberal education is the value that it ascribes to knowledge.[75] The term "knowledge" is different from information. Newman describes "knowledge" as "something intellectual, something which grasps what it perceives through the senses; something which takes a view of things; which sees more than the senses convey; which reasons upon what it sees, and while it sees; which invests it with an idea . . . ."[76] The influx of law students suggests that perhaps many of them are not interested in the

[75] JOHN HENRY NEWMAN, THE IDEA OF THE UNIVERSITY, 77 (University of Norte Dame Press, 1960).

[76] *Id.* at 85.

knowledge, but rather in the diploma.[77] This needs to be addressed carefully. Perhaps, a new inquiry is needed. Should academia ask students "what do you want to know?" Is academia reluctant to ask this question because a possible answer in the twenty-first century might be, "as little as I need to pass this hurdle on my way to financial independence"? There should be no surprise that academic legal knowledge can also have a utilitarian character.[78]

Regardless of whether knowledge has a utilitarian character or is an end in itself, as Bradney proposes,[79] we find predominance that knowledge is predominant in the legal academy over the other components in the model. The practices of recruiting and promoting faculty in legal education heavily rely on demonstration of knowledge.[80] The faculty's contribution to the development of their students' skills, values, or capacities, is rarely regarded as a factor in their career advancement. Faculty's cultural fluency and teaching technology competency are not usually not considered at all, unless they are represented in their scholarship.

This naturally leads the discussion to the hierarchies of knowledge.[81] What knowledge is considered worthy of note? What is compulsory to teach and what is not? What knowledge is omitted or ignored despite its relevance and importance to the students?[82] What knowledge is still being

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[77] This is supported by empirical data. *See, e.g.*, ASSESSMENT, *supra* note 19; Bone, *supra* note 17.

[78] Anthony Bradney, *Elite Values in Twenty-First Century*, 42(3) L. TCHR. 291, 297 (2008).

[79] *Id.*

[80] Newton, *supra* note 44.

[81] Young, *supra* note 60.

[82] *See, e.g.*, Lande & Sternlight, *supra* note 33, at 251 (claiming law schools miss out on the opportunity to teach students insights such as: facts are often contested, some disputes are not best resolved through litigation;

transferred, although it is deemed irrelevant in the twenty-first century?[83] Perhaps one of the most intriguing questions should be, "who decides this?"[84] It is interesting to note that only in the United Kingdom, law schools are instructed explicitly to teach certain areas of law.[85] In the United States, it is the American Bar Association, the professional regulator, that states the rules for approving law schools graduates to practice law.[86] In Israel, no such public or state-wide statement exists,

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not all disputes boil down to money; emotions should not necessarily be ignored; and other disciplines can be very helpful to attorneys).

[83] Should law schools still focus on teaching about checks and bonds rather than about credit cards, Bitcoin, digital wiring transfers, etc.?

[84] For example, in 1989, the UN General Assembly issued Resolution 44/24 declaring the 1990s as the decade of international law and called to enhance the learning and teaching of international law. In light of this declaration, it recommended that "(e)very school and faculty of law offer a foundation course or courses on public and private international law" and that "[n]o law student graduate from schools or faculties of law or enter the practice of law and the judicial or diplomatic service without having had a foundation course or courses on public and private international law." THE INSTITUTE OF INTERNATIONAL LAW, THE TEACHING OF PUBLIC AND PRIVATE INTERNATIONAL LAW, 2 (1997), http://www.idi-iil.org/idiE/resolutionsE/1997_str_01_en.PDF. But isn't it intriguing how Hebrew law - an ancient, rarely practiced legal system - has become (and still is) a mandatory course in Israeli law schools?

[85] The Joint Academic Stage Board, a quasi-governmental entity issued a joint statement in 1999 stating that one of the requirements to qualify for a law degree is to pass 7 courses: public law (including constitutional law, administrative law and human rights), EU law, criminal law, contract and torts law, property law, equity, and trusts law. https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/academic-stage/joint-academic-stage-board/jasb-documents/. Naturally, these areas of study have become mandatory knowledge.

[86] ABA Standards for Approval of Law Schools 2013-2014, ABA, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf .

and each law school designs its curriculum according to internal regulations.[87]

Whether state entities, professionals, or law schools themselves decide what knowledge is crucial for learning, there is also a question of detail. Should the knowledge needed to practice law be articulated explicitly to the law school, conditioning their recognition in fulfilling this duty, such as is the case in the United Kingdom? This is resonant with the need for coherence, standardization and certainty. But perhaps the knowledge required in 1999, is now–or will be in fifteen more years–obsolete and irrelevant. Then perhaps only the general framework should be stated, allowing space for interpretation and adaptation throughout times, as is the case in the United States?[88] This leaves plenty of flexibility, yet vagueness that impairs the monitoring of quality, thus inviting criticism over the preparation of law graduates for the profession.

Increasing ease of access to knowledge is also a factor to consider. When the question of what *is* the law becomes a matter of search skills, then the role of the academy should shift to focus on other questions, such as *how* to apply the law, or what does the law *means*. Convenient access to information allows scholars to share ideas and integrate them with less effort. Perhaps this is why interdisciplinary developments are evolving in academia in general and are quite in abundance in today's law school. If decades ago, specialized knowledge held more prestige than related knowledge,[89] today there is a new

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[87] With the exception of newly established programs, which are supervised for a number of years by a professional committee, advising the Israeli Commission of Higher Education, whether to approve their LL.B. degree.

[88] Standard 302(a) CURRICULUM reads: A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession. ABA Standards, *supra* note 86.

[89] Young, *supra* note 60.

appreciation of interdisciplinary and multidisciplinary developments. [90]

2. Skills

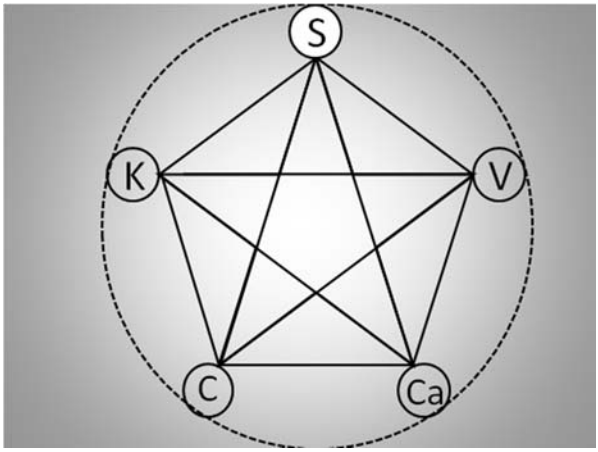

Figure 5 - Skills

The place of skill-building in legal academia has not always been obvious. The traditional teaching of law has been mainly theory-oriented for years, and the teaching of professional skills was perceived as the professional bar's responsibility.[91] The growing critique regarding the gap between the academic training phase and the profession's requirements[92] led to multiple attempts for reform. In the United Kingdom, explicit benchmarks for legal competencies expected from law

[90] Avrom Sherr, *Legal Education, Legal Competence and Little Bo Peep*, 32(1) L. TCHR. 37, 42 (1998). *See also* Lande & Sternlight, *supra* note 33, at 251.

[91] *See generally* Yael Efron, *Legal Education in Israel: Where is it Headed*, 9 ALEY MISHPAT 45 (2011) (Isr.).

[92] *See* Edwards, *supra* note 31.

graduates, were articulated.[93] In the United States, the McCrate Report impacted the bar's accreditation standards for law school.[94] The question whether training for the profession falls within the role of academic law schools is pretty essentially moot nowadays. More complex questions are now at the heart of the discussion. What skills *are* being taught in law schools? How are they resonant with the skills required for professional competency? What skills *should* be taught in the academy, as opposed to skills that should be trained by the profession, post-graduation? Finally, *how* are skills best taught?

It is evident from experience and from the literature that legal analysis is at the heart of law schools' curriculum.[95] This is also one of the skills that legal employers expect to find in law graduates.[96] Analysis is at the heart of the "black letter law" tradition in academic law–often described as the "application" of the law.[97] Most law schools emphasize the priority of analytic thinking, in which students learn to categorize and discuss events in generalized terms. This emphasis on analysis leads students to understand the law as a formal and rational system, despite the fact that much many of its doctrines and rules may

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[93] THE QUALITY ASSURANCE AGENCY FOR HIGHER EDUCATION, LAW 2007, 8-10, app. A (2007), http://www.qaa.ac.uk/en/Publications/Documents/Subject-benchmark-statement-law.pdf.

[94] MACCRATE, *supra* note 37.

[95] MACCRATE, *supra* note 37, at 138 ("Skill§ 2: *Legal Analysis and Reasoning* . . .In order to analyze and apply legal rules and principles, a lawyer should be familiar with the skills and concepts involved in: 2.1 Identifying and Formulating Legal Issues; 2.2 Formulating Relevant Legal Theories; 2.3 Elaborating Legal Theory; 2.4 Evaluating Legal Theory; 2.5 Criticizing and Synthesizing Legal Argumentation.").

[96] Susan C. Wawrose, *What Do Legal Employers Want to See in New Graduates?: Using Focus Groups to Find Out,* 39 Ohio N.U. L. REV. 505, 538 (2012-2013).

[97] Ferris, *supra* note 1, at 111.

diverge from the common sense understandings of the lay person.[98]

Another key skill predominating law school is the skill of legal research.[99] Like legal analysis, this is a crucial skill expected from law graduates by their prospective employers.[100] Research skills seem to naturally inhabit legal education since it is so inherent to academia in general, and serves as an undebated objective of academic life. Perhaps this is why contemporary questions regarding legal research are mainly focused on the role of technology in the research.[101] Yet, most literature and professional reports agree that neither legal research nor legal analysis suffice as proper skill-building goals in legal education, and advocate to introduce many more.

Contemplating "what is a law school," Stephen Wizner suggests that if we knew "what lawyers do—or ought to do—we should be able to design a curriculum that will prepare law students to carry out that professional role in a competent, ethical, socially responsible manner."[102] However, we do know what lawyers do. Extensive literature and professional reports survey lawyers' tasks and required skills. This non-exhaustive list of examples include: problem-solving,[103] interviewing,[104]

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[98] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, 5 (2007).

[99] MACCRATE, *supra* note 37, at 138 ("Skill§ 3: *Legal Research* . . . In order to identify legal issues and to research them thoroughly and efficiently, a lawyer should have: Knowledge of the Nature of Legal Rules and Institutions; Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research; Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design.").

[100] Wawrose, *supra* note 96, at 532.

[101] As discussed hereinafter.

[102] Stephen Wizner, *What Is a Law School?*, 38 EMORY L. J. 701, 701 (1989).

[103] MACCRATE, *supra* note 37, at 138 ("Skill § 1: *Problem Solving* . . . In order to develop and evaluate strategies for solving a problem or accomplishing an objective, a lawyer should be familiar with the skills and con-

counseling,[105] process-selection, [106] negotiating,[107] advocacy,[108] and more.[109]

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cepts involved in: Identifying and Diagnosing the Problem; Generating Alternative Solutions and Strategies; Developing a Plan of Action; Implementing the Plan; Keeping the Planning Process Open to New Information and New Ideas."); *see also* Lande & Sternlight, *supra* note 82, at 260 for a rich list of resources on the role of lawyer as problem-solver.

[104] Lande & Sternlight, *supra* note 82, at 261 (stressing the important competency of interpersonal communication skills when describing the lawyer as an interviewer); MACCRATE, *supra* note 37, at 139 ("Skill § 5: *Communication* . . . In order to communicate effectively, whether orally or in writing, a lawyer should be familiar with the skills and concepts involved in: Assessing the Perspective of the Recipient of the Communication; Using Effective Methods of Communication.").

[105] MACCRATE, *supra* note 37, at 139 ("Skill § 6: *Counseling* . . . In order to counsel clients about decisions or courses of action, a lawyer should be familiar with the skills and concepts involved in: Establishing a Counseling Relationship That Respects the Nature and Bounds of a Lawyer's Role; Gathering Information Relevant to the Decision to Be Made; Analyzing the Decision to Be Made; Counseling the Client About the Decision to Be Made; Ascertaining and Implementing the Client's Decision."); *see also* Lande & Sternlight, *supra* note 82, at 261.

[106] Lande & Sternlight, *supra* note 82, at 261; MACCRATE, *supra* note 37, at 139 ("Skill § 8: *Litigation and Alternative Dispute-Resolution Procedures* . . . In order to employ-or to advise a client about-the options of litigation and alternative dispute resolution, a lawyer should understand the potential functions and consequences of these processes and should have a working knowledge of the fundamentals of: Litigation at the Trial-Court Level; Litigation at the Appellate Level; Advocacy in Administrative and Executive Forums; Proceedings in Other Dispute-Resolution Forums.").

[107] MACCRATE, *supra* note 37, at 139 ("Skill§ 7: *Negotiation* . . . In order to negotiate in either a dispute-resolution or transactional context, a lawyer should be familiar with the skills and concepts involved in: Preparing for Negotiation; Conducting a Negotiation Session; Counseling the Client About the Terms Obtained From the Other Side in the Negotiation and Implementing the Client's Decision."); *see also* Lande & Sternlight, *supra* note 82, at 262.

[108] *See* Lande & Sternlight, *supra* note 82, at 262.

[109] STUCKEY, *supra* note 39, at 50-3 (2007) (providing additional lists of lawyering skills); Carrie Menkel-Meadow, *Narrowing the Gap by Nar-*

But an answer to the question "what do lawyers do" is not necessarily the answer to the question "what skills should be taught in law school." The fact the lawyers take on a certain task does not necessarily justify its place in the academic curriculum. For example, organization and management of legal work is a fundamental lawyering skill, recognized in the MacCrate report.[110] A legitimate question could be whether organizing a law office should be taught in law school or at a law office. On the other hand, focusing law school teaching on adversarial advocacy and appellate argumentation skills seems unreasonable when it's it is the least practiced task of a lawyer.[111]

How should skills be taught in an academic setting? Experiential courses are of course an excellent way to teach skills. Stuckey's *magnum opus* on legal education,[112] offers a detailed manual for constructing experiential courses. But experiential pedagogy is also used in non-experiential courses as well. The most widely used in American law schools is the Socratic dis-

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rowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being, 69 WASH. L. REV. 593, 600–02 (1994).

[110] MACCRATE, *supra* note 37, at 140 ("Skill § 9: *Organization and Management of Legal Work* . . . In order to practice effectively, a lawyer should be familiar with the skills and concepts required for efficient management, including: Formulating Goals and Principles for Effective Practice Management; Developing Systems and Procedures to Ensure that Time, Effort, and Resources Are Allocated Efficiently; Developing Systems and Procedures to Ensure that Work is Performed and Completed at the Appropriate Time; Developing Systems and Procedures for Effectively Working with Other People; Developing Systems and Procedures for Efficiently Administering a Law Office.").

[111] Lande & Sternlight, *supra* note 33, at 251-252 (providing data that on average only 5% of filed cases in the US go to trial, and many of lawyers' tasks do not result in filing litigation at all); MACFARLANE, *supra* note 14, at ix (pointing out a 98% civil settlement rate).

[112] STUCKEY, *supra* note 39, at 121.

cussion.[113] But other teaching methods are available as well, such as explained demonstrations;[114] instructional videos;[115] roleplays[116] and feedback;[117] exemplars: contracts, IP products, pictures, maps;[118] analyzing popular culture: newspapers, movies, songs;[119] and other creative ideas.

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[113] *Id.* at 153.

[114] Alan Collins, *Cognitive Apprenticeship*, THE CAMBRIDGE HANDBOOK OF LEARNING SCIENCE, 47 (2006).

[115] Lande & Sternlight, *supra* note 33, at 285.

[116] *Id.* at 286.

[117] ELLEN E. DEASON ET AL., DEBRIEFING THE DEBRIEF, EDUCATING NEGOTIATORS FOR A CONNECTED WORLD, VOL. 4 IN RETHINKING NEGOTIATION TEACHING SERIES 301 (Christopher Honeyman, James Coben &Andrew Wei-Min Lee eds., 2013).

[118] *See* Noam Ebner & Yael Efron, *Little Golano: An International Conflict Management Simulation* (2009), http://ssrn.com/abstract=2237985 or http://dx.doi.org/10.2139/ssrn.2237985 (using such props in public international law courses); *see also* Noam Ebner, Yael Efron & Nellie Munin, *Flashpoint: Syria, 2014 – An International Conflict Management Simulation* (2014), http://www.maxwell.syr.edu/parcc/eparcc/simulations/FlashPoint__Syria,_2014_%E2%80%93%E2%80%93_An_International_Conflict_Management_Simulation/.

[119] Lande & Sternlight, *supra* note 33, at 283.

3. Values

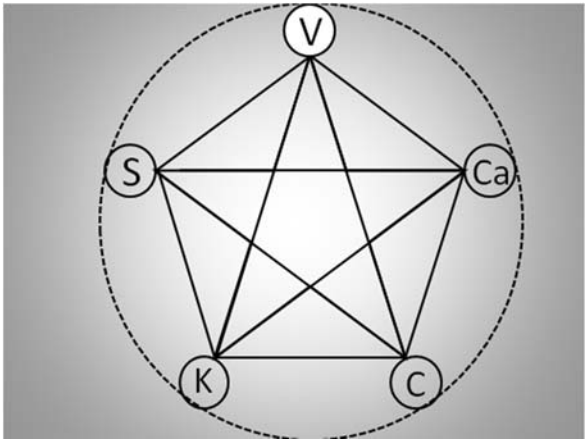

Figure 6 - Values

Values are inherent to the law. The law is a means to project and apply values in society.[120] How is the fact that the law educates society about the state's preferred values applied in law schools? Should law schools educate law students about these preferred values so they can reinforce them throughout their legal careers? Should it rather focus on critically examining them, providing room for deliberation and calls for reforms? Whatever the role of academia ought to be in this regard, one should wonder if academic study has an actual effect on student's values.

The ability to affect students' values throughout their law school experience has been subject to several studies, which were concluded with conflicting results. Some scholars who have been intrigued by the effect of the law school experience on students' values and moral attitudes concluded that legal

[120] Bradney, *supra* note 79, at 295.

education has no significant effect,[121] while others found that it does have.[122] While it is plausible that both conclusions are correct and incorrect at the same time, the common conclusion is that values *are* present in legal education. Perhaps, then, the focus of our interest could shift to the question *which* values are conveyed in law school. What values are declared explicitly? What are transferred implicitly?

Liberal thinking assumes that there is no mechanism that can be used to identify what is the best choice for individuals in matters of value. Some view legal education as neutral in concern with the value of differing notions of the good. It therefore follows that a liberal legal education is not an education in values. This does not mean, however, that values are absent from the law school.[123]

Moral values are conveyed explicitly in criminal law, as the instruction of the law refers clearly to the human behaviors which are punishable. Values which are more particular to the legal profession are also presented explicitly in professional responsibility courses. Clinical legal education also exposes students to both societal and professional values, as they encounter social and ethical predicaments. By dealing with these values directly, students are exposed to the moral agenda of the law school and of the profession. In several cases, this moral agenda is dictated by the bar, such as the case in the United States, where the MacCrate Report identified four "fundamen-

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[121] Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 L. & SOC. REV. 11 (1996); J. D. Droddy & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000,* 53 J. LEG. EDUC. 33 (2003).

[122] Sheldon & Kreiger, *supra* note 34; Efron & Silverstein, *supra* note 18.

[123] Bradney, *supra* note 79, at 293.

tal values of the profession"[124] and required law schools to apply them to the curriculum.

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[124] MACCRATE, *supra* note 37, at 140-41:

> Value § 1: *Provision of Competent Representation.* As a member of a profession dedicated to the service of clients, a lawyer should be committed to the values of:
>
> 1.1 Attaining a Level of Competence in One's Own Field of Practice;
>
> 1.2 Maintaining a Level of Competence in One's Own Field of Practice;
>
> 1.3 Representing Clients in a Competent Manner.
>
> Value§ 2: *Striving to Promote Justice, Fairness, and Morality.* As a member of a profession that bears special responsibilities for the quality of justice, a lawyer should be committed to the values of:
>
> 2.1 Promoting Justice, Fairness, and Morality in One's Own Daily Practice;
>
> 2.2 Contributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them;
>
> 2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.
>
> Value § 3: *Striving to Improve the Profession.* As a member of a self-governing profession, a lawyer should be committed to the values of:
>
> 3.1 Participating in Activities Designed to Improve the Profession;
>
> 3.2 Assisting in the Training and Preparation of New Lawyers;
>
> 3.3 Striving to Rid the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, or Disability, and to Rectify the Effects of These Biases.
>
> Value§ 4: *Professional Self-Development.* As a member of a learned profession, a lawyer should be committed to the values of:
>
> 4.1 Seeking Out and Taking Advantage of Opportunities to Increase His or Her Knowledge and Improve His or Her Skills;
>
> 4.2 Selecting and Maintaining Employment That Will Allow the Lawyer to Develop As a Professional and to Pursue His or Her Professional and Personal Goals.

Some moral attitudes are delivered tacitly, folded in the teaching of law. Concepts taught in doctrinal law, such as private property, freedom of contracts, duty of care, etc. are deeply embedded in a liberal-capitalistic worldview, which assumes a free market and rational autonomous players.[125] The absence of public housing from property law courses or of social rights from constitutional law sends students a clear message about the hierarchy of values.[126] There is clearly a "hidden agenda of values,"[127] which is often resonant with the hidden curriculum.[128] Students' first encounter with this hidden moral agenda perpetuates these implied values as an undebated conceptual foundation. This should burden law schools with the need to pay sufficient attention to the values that are implicit in what they are doing.[129]

Another concern of law schools should be the well-being of their students.[130] Studies report that students experience a decline in motivation, subjective well-being, and values in the course of their legal education, and those changes correlated with decreases in community service values.[131] Other studies resonate with these conclusions and report on students' frustration with the gap between the power of the law to promote social change and a notion that an average lawyer (or a student) can afford promote social causes.[132] These studies suggest that explicit attention is required in the legal curriculum to socially conscience values.

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[125] Bradney, *supra* note 79, at 293.

[126] Elbashan, *supra* note 38, at 8.

[127] Ziv, *supra* note 38, at 401.

[128] BOWELS & GINTIS, *supra* note 54.

[129] Bradney, *supra* note 79, at 297.

[130] Shmuel Becher & Nofar Asselman, *Students' Well-being and Legal Education: Imperative Lessons from Positive Psychology*, 19 HAMISHPAT 145 (2014).

[131] Sheldon & Kreiger, *supra* note 34.

[132] Efron & Silverstein, *supra* note 18.

4. Capacities

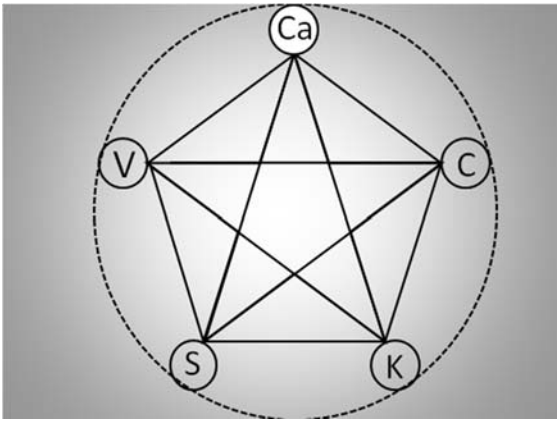

Figure 7 – Capacities

Legal competence has been treated as an organizing principle for legal education.[133] It is useful not only because it provides practical and intellectual coherence, but also because it seems to transcend national and jurisdictional boundaries.[134] But what does it mean to be legally competent? It certainly entails being knowledgeable and skillful, and it implies honing certain values. Yet, there are traits that make a lawyer competent, which are neither classified as knowledge, skills, nor values. They have to do with what a lawyer *is*. When considering legal education, especially in light of the social and professional critique on lawyers, the attention is often drawn to the question: what should a lawyer *be*? Battling with this question brings about an even more difficult one: how can *being* be taught?

[133] Sherr, *supra* note 91, at 55.
[134] *Id.* at 56.

It has been a matter of observation that certain capacities are being enhanced by the law school experience. The Carnegie Report observed that "[w]ithin months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules." [135] Other capacities are as well embedded in the academic experience, such as charisma, which is deemed inherent to the modern university.[136] Other capacities which are associated with the legal profession and conveyed in legal education are the formation, storage, and retention of knowledge, which include various types of memories. What neurobiology tells us is that emotions have a crucial role in the formation, storage, and retention of knowledge.[137]

Anthony Kronman, former dean of Yale Law School, paints a grim picture of legal education reality in regards to its ideals, pointing out a list of capacities which are required for the profession but not sufficiently addressed.[138] Some of them are statesmanship,[139] leadership and character,[140] prudence or practical wisdom,[141] collegiality, [142] and a special kind of ability to deliberate, which includes both compassion and detachment.[143]

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[135] SULLIVAN, *supra* note 99, at 5.

[136] WILLIAM CLARK, ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY (University of Chicago Press, 2006).

[137] Austin, *supra* note 7, at 808-14.

[138] KRONMAN, *supra* note 40.

[139] *Id.* at 11.

[140] *Id.* at 14.

[141] *Id.* at 53.

[142] *Id.* at 93.

[143] *Id.* at 72.

Law school's emphasis on rational analysis is usually resulted results in a neglect of a whole realm of considerations. Very little attention is drawn to the fact that people usually seek legal advice at dire times. Legal education rarely addresses the fact that lawyers meet clients with difficulties and more often than not, lawyers must deal directly with people's distress. From the field of neurobiology, we learn how emotions affect our rational thinking,[144] our decision making processes,[145] and even our bodily functions.[146] Law students that are not equipped with the emotional tools to deal with anxiety, with grief, with anger, or even with overwhelming enthusiasm, are ill-prepared for the profession, and are set up for frustration.[147]

Daniel Goleman has articulated the concept of emotional intelligence,[148] which entails five "basic emotional and social competencies:"[149] self-awareness, self-regulation, motivation, empathy, and social skills. These capacities are the basis of a lawyer-client relationship[150] because they allow the lawyer to simultaneously relate and detach emotionally to the person-in-need whom they serve.[151] It is claimed that enhancing law stu-

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[144] Austin, *supra* note 7, at 808.

[145] *Id.* at 816.

[146] *Id.* at 815.

[147] KRONMAN, *supra* note 40, at 2 (pessimistically arguing that many lawyers today believe that law practice cannot offer "fulfillment to the person who takes it up").

[148] DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (Bantam Books, 1995).

[149] DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 318 (Random House Publishing Group, 1998) ("Knowing what we are feeling in the moment, and using those preferences to guide our decision making; having a realistic assessment of our own abilities and a well-grounded sense of self-confidence.").

[150] Riskin, *supra* note 62, at 17.

[151] KRONMAN, *supra* note 40, at 131 (". . . [W]hile it may be true that the client is paying for sympathy, it also is true that he is paying for calm-

dents' emotional intelligent capacities would not only assist them professionally but would also contribute to their well-being.[152] Law students' well-being has been subject to empirical research that concluding concluded that legal education has undermining effects due to neglect of emotional capacities and other motivations.[153]

5. Culture

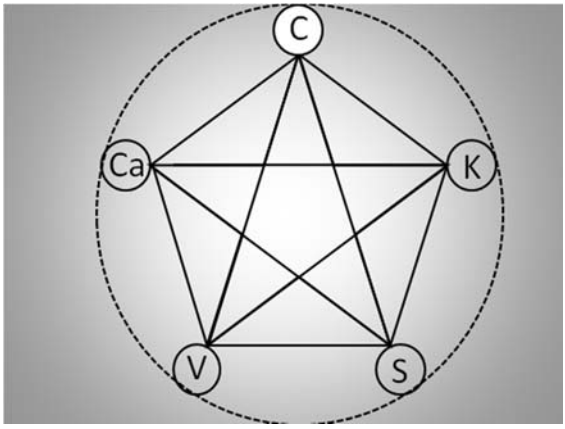

Figure 8 – Culture

The educational process—just as the law[154]—operates in a social setting, and is justified by social needs. The development of the individual learner is an aspect of the reproduction of society and its distinctive culture.[155] Therefore, culture

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ness and distance as well. Only those lawyers who are able to combine the qualities of sympathy and detachment are thus able to give an impetuous client the advice he needs. . . .").

[152] Riskin, *supra* note 62, at 10.

[153] Sheldon & Kreiger, *supra* note 34.

[154] Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2010-2011).

[155] Ferris, *supra* note 1, at 104.

plays a crucial role in curricular design and pedagogy. In legal education, culture should be regarded in two distinct directions, not always overlapping: the societal culture of the individual learner's (and teacher's) community and the law school culture of the specific academic institute. The law school culture is not necessarily the accumulation of cultural traits portrayed in all individuals. It is distinct, sometimes even contradictory, to the societal culture of the individual.

Individual culture affects the motivation to study law,[156] the way law and the practice of law are perceived by the student,[157] the participation in certain didactics,[158] learning abilities or learning-style preferences,[159] and more. Learning abilities and likely, their reinforcement have taken place in the context of a culture. Studies that have examined this feature suggest there are in fact culturally-based variations.[160] The law school culture affects the curricular choices, pedagogic decisions, and assessment methods.[161] When law school culture and the individual learner's (or teacher's) cultural background contradict, educational tensions are created.

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[156] Efron & Silverstein, *supra* note 17.

[157] *Id.*

[158] Nadja Alexander & Michelle LeBaron, *Death of a Role-Play*, RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179 (Christopher Honeyman, James Coben, & Giuseppe De Palo eds. 2009).

[159] Recent empirical data clearly support the notion that one's culture directly impacts learning preferences. *See, e.g.*, Glauco De Vita, *Learning styles, culture and inclusive interaction in the multicultural classroom: A business and management perspective*, 38(2) INNOVATIONS EDUC. & TEACHING INT'L 165 (2001).

[160] Kimberlee K. Kovach, *Culture, Cognition and Learning Preferences*, RETHINKING NEGOTIATION TEACHING INNOVATIONS FOR CONTEXT AND CULTURE 343, 348-349 (Christopher Honeyman, James Coben, & Giuseppe De Palo eds. 2009) (providing examples of culturally categorized learning styles).

[161] Sturm & Guinier, *supra* note 30, at 537.

The possible contradictions can be understood using Trompenaars & Hampton Turner's analysis of the difference in cultural societies, which they refer to as the seven dimensions of conflict.[162] Although Trompenaars & Hampton Turner stress the divide, it is probably more realistic to view cultural differences, certainly in law school setting, along continua. A Pentalectic Sphere inspired curriculum should consider these continua in its design and application:

- **Universalism – Particularism continuum** distinguishes societies based on the relative importance they place on rules and laws as opposed to personal relationships. universalist societies believe that rules, codes, values and standards take preference over the needs and claims of friends and family; that rules and laws determine what is right and apply to everyone; and that precisely defined contracts are means to conduct business and should not be changed. Particularistic societies focus more on human relationships than formal rules and laws; rely on circumstances to determine what is ethically acceptable; and believe that business is best based on personal friendships and that contracts may be changed according to a situation. Generally, western law school cultures may be classified on the more universalist side of the continuum. This is one claim of the realist movement in law against legal education.[163] Members of faculty who belong to a more particularistic society would probably find hardships within their colleagues and certainly stand out for the students

[162] TROMPENAARS & HAMPDEN-TURNER, *supra* note 43.
[163] Mautner, *supra* note 154, at 857.

in their teaching. Students who are more particularistic than universalist might struggle with the contradictions between black letter laws and familiar situations in their lives.

- **Individualism – Collectivism (Communitarian) continuum** distinguishes societies based on the relative importance they give to individual versus group interests. Individualists place individual interests before the group's; believe that achievements are best gained alone, but also assume personal responsibility; and personal fulfilment is highly important to the individualist and members of society are expected to be take care of themselves. Collectivist (sometimes called communitarian) societies place the group before its individuals. They tend to make decisions as a group; achievements are reached and regarded collectively and they assume joint responsibility; members of collectivist societies are expected to act according to the best interest of the group and by doing so their personal needs would be served. Law school culture is highly individualist. Not only that admissions and assessments are based on individual achievements and collective work is deemed immoral at best, but also because hierarchies of knowledge allot higher prestige to individually gained knowledge than to the knowledge of the group.[164] Although team work is crucial for good lawyering and indeed is usually practiced, it is mostly absent from legal education.

[164] Young, *supra* note 60.

- **Achievement – Ascription continuum** distinguishes societies based on how they distribute power and authority. Achievement-oriented societies respect authority when it is granted on merits; status is gained by accomplishments; and titles are used to indicate achievements or to describe authority to perform specific tasks. Ascription-oriented societies ascribe status based on social position, age, gender, wealth, etc.; extensive use of titles serves the need to reinforce hierarchy; and seniority is associated with power. Law school culture is extremely achievement-oriented. The more research-intensive young faculty, who depend on publication for promotion, draws scholarly attention much more than senior professors if they are not intensely published anymore. Law students are highly achievement-driven, perhaps due the growing competitiveness of the legal job market, but also because law school culture itself is highly competitive, and status is placed in students' grades. In this environment, members of ascription-oriented societies are sure to be frustrated. On the other hand, it is also probably one of the only settings where middle-aged white men don't have an advantage.
- **Neutral - Affective continuum** distinguishes societies based on how they display emotions. Neutral societies' conduct is cool and self-possessed; display of emotions is usually accidental; they lack physical contact, gesturing or obvious facial expressions; and messages are usually delivered in monotone, whether orally or in writing. On contrast, affective societies tend to verbally and physically express their

feelings; they admire and display heated, animated and vital expressions and gestures; and their statements are fluent and dramatic. This continuum poses a paradox in law schools, sending mixed signals to students. The sterile approach to a law case, analyzed solely by legal rules and logic, contradicts the importance of rhetoric, which clearly involves pathos, requiring animated intonation and dramatic body language. It is also ignoring the importance of the client's point of view, and the essentiality of lawyers' emotional intelligence capacities.

- **Specific – Diffuse continuum** distinguishes societies based on how they engage colleagues in their lives. Members of specific-oriented societies are reluctant to share multiple elements of their lives, thus carefully defining their interactions. Diffuse-oriented societies see the different components of their lives as interrelated, and therefore there is no clear distinction amongst them. They are comfortable engaging social elements in their work lives and vice versa. Most law school cultures present a clear boundary between school life and other aspects of students' and faculty lives. There is a distinct power distance between students and faculty; students who use class time to engage in personal activities (even if related to class) are frowned upon; and even legally analyzing a personal issue in a relevant course (such as an employment contract of a student, or even a disciplinary complaint) is extremely rare. However, personal experience suggests that the divide between "life" and "school-life" is perhaps less distinct in smaller institutions.

- **Internal – External continuum** distinguishes societies based on the control members feel they have over the environment. Internal societies appreciate the complexity of nature, but believe it can be controlled given the proper effort and expertise. This is why internal societies have more dominating attitudes, and are less comfortable with change. External societies have an organic view of nature and are less concerned with trying to control it. They would rather live in harmony and adapt themselves to changes, and therefore are more flexible. The law as a system struggles along this continuum, between the need for certainty and stability and the need for adaptation according to circumstances. This mixed message is also evident it the teaching of law, constantly undergoing change and at the same time resisting it.
- **Sequential – Synchronistic time continuum** distinguishes societies based on how they regard time. Sequential societies prefer to do one activity at a time, and strictly follow schedules. Synchronistic societies are more flexible; perform several tasks simultaneously; and prioritize activities based on needs rather than schedules. Law school culture is sequential. It is evident by the curriculum design, carefully scheduling courses across years, semesters, days and hours; it is not allowed, and quite impossible to learn all courses in parallel. Schedules also govern assessment: late submission of an assignment or tardiness in classes or exams result in a cut-down of students' grades. It is probably highly challenging for students from more synchronistic societies.

The role of culture (whether ethnic cultures, legal cultures, or law-school cultures) should be minded, and questions regarding its effects on legal education ought to be raised constantly. Law schools should possess an understanding of how individuals' prior education and experience in their cultures impacts preferences for learning. Tensions created by contradiction are not necessarily harmful to the learning process. They can support it, and the negating aspects of individual verses law school cultures can sometimes complement each other and beneficiate the educational process. Disregarding tensions on the cultural continua means missing important aspects of the individual learner. Missing the individual is not only detrimental to the person's well-being, but a missed opportunity for educational coherence, productive pluralism, and promotion of social changes.

B. Questions produced by the interconnectivity of the nodes

1. The curriculum – formal and hidden

The framework for analysis which is illustrated by the Pentalectic sphere is conscious not only of the different elements of legal education but rather also of their interconnectivity. The relationships between the elements represented by the five nodes form the curriculum, as depicted in Figure 9. It is shaped according to the nature of each connecting line, its durability and its consistency, thus affecting the content, structure and coherence of law school curriculum. It is quite natural for law schools to claim that they regard each element represented in this model as equally important. They certainly aspire for a well-rounded legal education for their students. Therefore, the formal curriculum may include courses, activities, and scholarship that address all elements.

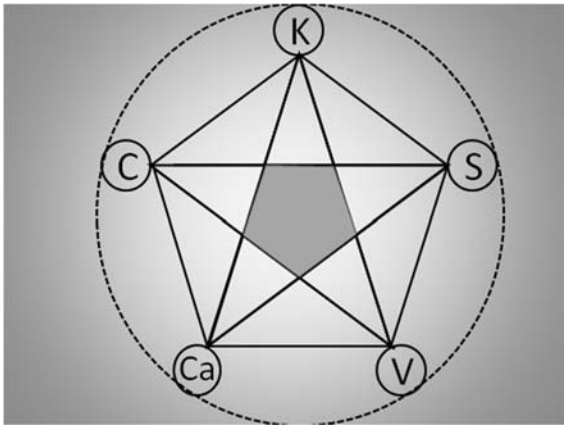

Figure 9 - The formal curriculum

Although law schools aspire to equally address in their curriculum each of the elements, they in fact do not. Argyris and Schon[165] differentiate the Espoused theory–what is *said* to be done—from the Theory-in-use—what is *actually* done. The formal curriculum would be law schools' Espoused theory of legal education and it is often described and justified as carefully thought of and deliberated. It is presented to students (or potential ones) as comprehensive and stable. However, the educational messages that are actually being delivered in law schools, Argyris and Schon's Theory-in-use, reflect the disconnection between some of the elements, or the different accent given to them. These messages, usually unspoken yet distinctly projected are regarded in education literature as the "hidden curriculum."[166] These messages are dynamic, and change according to the law school socio-poitical environment, budgetary constraints or incentives, personal preferences of the faculty, and more. In terms of the Theory-in-use, the pentagon cre-

[165] ARGYRIS & SCHON, *supra* note 47.
[166] BOWELS & GINTIS, *supra* note 54.

ated by the connecting lines at the heart of the Pentalectic Sphere is more kaleidoscopic than it is static and symmetric. See for example Figure 10, illustrating a hypothetic curriculum of a law school that stresses mostly knowledge, some skills, capacities and values, but is not conscience much of culture.

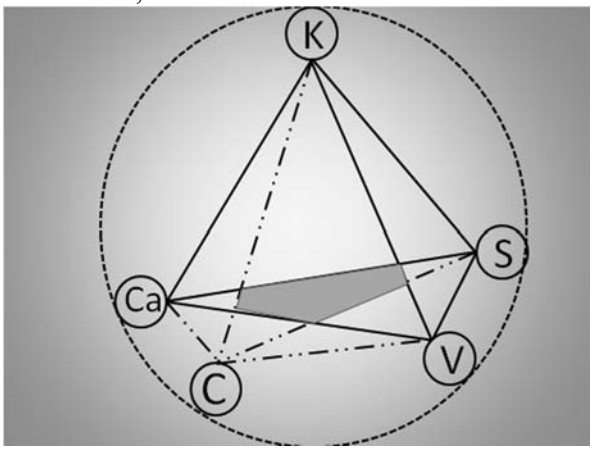

Figure 10 - The hidden curriculum

The hidden curriculum, which is the Theory-in-use, exists in every educational process, and not necessarily intentionally. Lande & Sternlight point out the implicit message delivered to American law students when their studies focus mainly on analysis of appellate cases, doing little writing, gathering no facts, and paying little attention to the realities of the clients' underlying interests. To the extent that students in law school do learn skills apart from pure legal analysis, they typically do so either in occasional clinical or skills classes. This conveys distorted messages about law and lawyers, and fails to convey additional needed information and skills. These implicit messages, which are repeatedly reinforced, erroneously suggest that the bulk of what lawyers do is to analyze and argue appellate law, and that other functions are less common or important. Because many law students are not consciously aware

of the message about lawyers' roles, it is particularly hard to correct.[167]

The Pentalectic Sphere framework might be helpful in exposing the hidden curricula of law schools and in bringing forth the institution's educational Theory-in-use for thorough examination. Constantly revisiting these concepts, surfacing them, and adjusting them according to the Espoused theory can resolve much of the conflicts surrounding initiatives for reform and dissolve much of the resistance to change. If law schools are faced with the disconnection between what they say they do and what they actually do, it is more likely they will adapt and attempt to align their Theory-in-use with their Espoused theory.

The Pentalectic Sphere suggests this systematic framework for analysis, inviting the examination of it connecting lines. When questioning the relationship between the elements of legal education represented by the nodes, some criteria for assessment of their connectivity is needed. Questions that might be asked to assess connectivity of each line in the model may include:[168]

- How much is the connection intact?
- How much is the connection intense?
- How much is the connection durable?
- Where is the accent?

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[167] Lande & Sternlight, *supra* note 33, at 256.

[168] Diamond, *supra* note 2, at 2 ("4. We know that all living systems exchange energy, matter, and information across their boundaries. When we can identify imbalances in these flows - stuck places, over- or under-accumulation, etc. – we can shift things to be more equitable and more sustainable. Therefore: Re-balance the flows across boundaries.") (inspiring these questions).

2. Knowledge-Skills

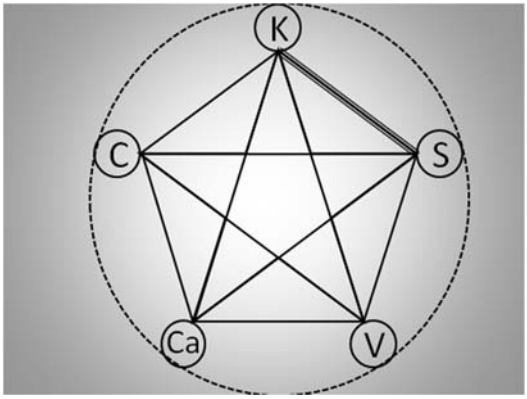

Figure 11 - Knowledge-Skills

Observation of legal curricula suggests that most of the students' time is dedicated to the acquisition of knowledge. Most courses on the curricula introduce doctrinal law, the pedagogy is generally directed at passive learning, and assessment tools are focused on the demonstration of acquired knowledge. This observation resonates with the academy's role of creating and disseminating knowledge. Macfarlane, Jeeves and Boon's survey of legal education noted the strength of the notion of legal education as a liberal education.[169] Some scholars believe that the liberal approach to legal education is essential to the philosophical core of the curriculum. Those scholars believe that reliance on acquiring knowledge has been tempered by the call to acquire legal skills.[170] For them, the connection between knowledge and skills is not, and should not, be intact nor durable.

[169] Julie Macfarlane, Michael Jeeves & Andy Boon, *Education for Life or for Work?* 137 NEW L. J. 835 (1987).

[170] Thomas, *supra* note 4, at 252.

This is also evident in a survey conducted by Boon and Whyte, [171] which revealed that despite the fact that students recognize the need for a secure base of knowledge, its acquisition is an exercise in "memorization and regurgitation" of a content thereafter largely forgotten. New content seems valuable only insofar as it introduces them to new repertoire of skills. This notion is supported by scholars who claim that knowing "what," on its own, does not generate understanding and cannot necessarily lead to a problem being solved, or different problems being solved with the same or different legal solutions.[172]

Other scholars believe that the connection is and should be intact and durable, since knowledge is not only an end in itself; it is also a guide to action; it provides the justificatory foundation for our actions.[173] The law is understood in its operation not by its exposition. In order to demonstrate understanding students are required to apply the law to imaginary factual scenarios.[174] An intense connection between skills and knowledge in demonstrated in the United Kingdom benchmarks for legal education. In order to qualify for a law degree in the United Kingdom, one must be able to perform specific tasks, articulated in the Joint Academic Stage Board ("JASB") Joint Statement issued in 1999[175]:

> Students should be able to apply knowledge to complex situations; recognize potential alternative conclusions for particular situations, and

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[171] Andy Boon & Avis Whyte, *Looking Back: Analysing Experiences of Legal Experience and Training*, 41(2) L. TCHR. 189 (2007).

[172] Rebecca Huxley-Binns, *What is the "Q" for?*, 45(3) THE L. TCHR. 294, 298 (2011).

[173] Bradney, *supra* note 79.

[174] Ferris, *supra* note 1, at 108.

[175] http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page

> provide supporting reasons for them; select key relevant issues for research and to formulate them with clarity; use standard paper and electronic resources to produce up-to-date information; make a personal and reasoned judgment based on an informed understanding of standard arguments in the area of law in question; use the English language and legal terminology with care and accuracy; conduct efficient searches of websites to locate relevant information; to exchange documents by email and manage information exchanges by email; and produce word-processed text and to present it in an appropriate form with clarity.

A monistic approach is perhaps unnecessary. Law schools' choice of accent—knowledge, skill, or an equilibrium between them—can create a pluralistic variety of institutions. The research universities could emphasize liberal education, critique of the law and theoretical developments. Colleges, which might be more vocation-oriented could stress skill-building, training and preparation for the profession.[176]

[176] *See* Efron, *supra* note 91, at 71 (providing more detailed suggestions for application).

3. Knowledge- Values

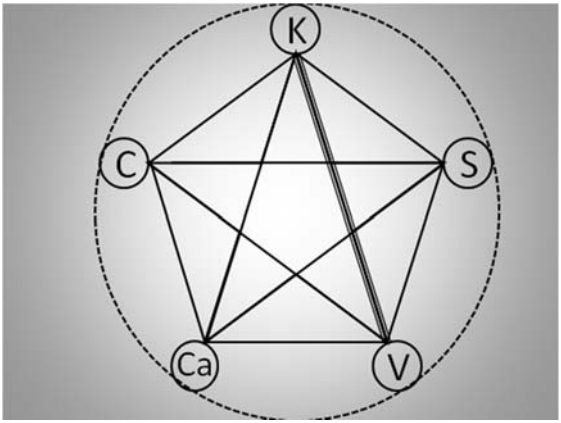

Figure 12 - Knowledge-Values

The knowledge transferred to law students is entrenched in values and beliefs, whether intentionally or unintentionally, as a hidden agenda.[177] It is the question of *what* —not whether— values are delivered through the curriculum that differentiates law schools. The connection between knowledge and skill is not always intact and it is certainly not very durable. It is sometimes claimed that the values of the profession are not in line with other social values.[178] Therefore, teaching black letter law without addressing social or ethical issues creates students' frustration.[179] As social cause scholars advocate the explicit introduction of social justice into the curriculum.[180] Others seek to maintain a more liberal agenda, claiming that the pursuit of knowledge has value in itself and that the moral val-

[177] Ziv, *supra* note 38, at 403.

[178] Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 FORDHAM L. REV. 1621 (2003).

[179] Silverstein & Efron, *supra* note 18.

[180] Wizner, *supra* note 38.

ues of knowledge and the search for knowledge as a basis for one's life lie at the heart of the liberal law school.[181] An integrative approach, calls for attention to both: (1) how fully ethical-social issues pervade the doctrinal and lawyering curricula and (2) the provision of educational experiences directly concerned with the values of the law and the legal profession.[182]

As discussed earlier, law schools promote values. Not explicitly attending to them may cause friction and frustration. For law schools to address the tensions created between knowledge and values, it might be helpful to consider some of the following questions, as well as others:

- Are students offered courses which deal explicitly with values, whether social, liberal, or others? Are these courses mandatory? Race law, gender or queer law, as examples, if offered at all, are usually elective.
- What values are informed by black letter law? Are these values expressed and deliberated in the teaching of the law? When a property law teacher discusses land deeds with no mention of public housing, what is the value underlying the message to his students?[183] Clearly, a hidden valued statement is transferred tacitly to future lawyers, regarding their "real" potential clients. Wizner claims that many law graduates are surprised when they start practicing at the need of poor people for legal representation.[184]

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[181] Bradney, *supra* note 79, at 294 (citing GEORGE STEINER, GRAMMARS OF CREATION (2001) 16 ("More than homo sapiens, we are homo quaerens, the animal that asks and asks.")).

[182] SULLIVAN, *supra* note 99.

[183] Elbashan, *supra* note 38, at 7.

[184] Wizner, *supra* note 38, at 1032.

- How is professional responsibility taught? Is it merely introduced as a list of do's and don'ts, or as an opportunity for ethical deliberations? An example for a possible dilemma for discussion can be the claim by Norma McCorvey, the pregnant woman represented in Roe v. Wade by attorney Sarrah Weddington. She claimed that Weddington had used McCorvey's personal predicament to promote social interests, although contradictory to her client's interest, since when the case reached the Supreme Court and changed the lives of women in the United States, McCorvey had of course long undergone childbirth, when what she sought was the abortion of her pregnancy.[185]
- Is cause lawyering introduced in the curriculum, and suggested as a legitimate (not to say welcomed…) field of practice? A survey conducted in Israel shows that only forty percent of law graduates took legal clinics as a part of their education and thus were exposed to cause lawyering.[186] It is the wish of many legal educators to enhance these numbers.

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[185] Douglas S. Wood, *Who is 'Jane Roe'?* CNN.COM (June 18, 2003), http://edition.cnn.com/2003/LAW/01/21/mccorvey.interview/.

[186] Yael Efron, *Clinical Legal Education in Israel*, CLINICAL LEGAL EDUCATION IN ASIA ACCESSING JUSTICE FOR THE UNDERPRIVILEGED (Shuvro P. Sarker ed.) (Palgrave-Macmillan, 2015),at. 91-111.

4. Knowledge–Capacities

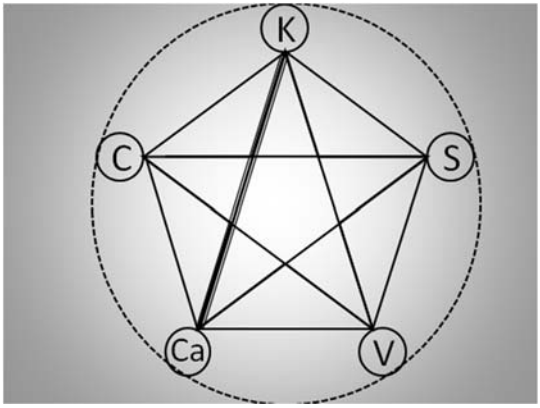

Figure 13 - Knowledge–Capacities

Knowledge is not merely instrumental. It is an essential component of well-being. Hirst claims that "the achievement of knowledge is…the chief means whereby the good life as a whole is to be found. Man is more than pure mind, yet mind is his essential distinguishing characteristic, and it is in terms of knowledge that his whole life is rightly directed."[187] To achieve this sense of well-being, law schools indeed rarely dismiss the connection between knowledge and capacities. They often contemplate over two questions:

- *What capacities are needed for law students in order to attain and retain knowledge?* It is commonplace understanding that in this age of information, it is not the actual information taught, but the ability to find and intelligently use information for the solution of problems,

[187] Paul Hirst, *Liberal Education and the Nature of Knowledge, in* KNOWLEDGE AND THE CURRICULUM: A COLLECTION OF PHILOSOPHICAL PAPERS 30 (Paul Hirst, ed. 1974).

that is of the essence for legal education today.[188] Technological literacy is a prominent example of a capacity required for law students, which needs to be informed by the law school. But, as discussed later, technology is not a replacement of the partnership between learner and educator, which fosters capacities. Assisted capacity-building is at the heart of Dewey's philosophy of the educational process. It lays on the premise that education as centered on the development of the learner as a self-conscious problem-solver directed by the educators' expertise, native wit, or accumulated knowledge.[189] We also know from neurobiology that emotional capacities are also crucial for the formation and retention of knowledge, and scholars have recommended certain practices to enhance them.[190]

- *What do law students need to know in order to obtain certain capacities?* Although it is not the information itself that suffice for legal competence, there must be a set of legal concepts which are essential for the legal competence of students at an appropriate level, even as institutions differ over a range of educational approaches, policies and subject matter.[191] For example, students' knowledge in comparative law can foster their capacities to compare and adapt to different legal systems. This capacity

[188] Ferris, *supra* note 1, at 105.
[189] Ferris, *supra* note 1, at 104.
[190] Austin, *supra* note 7, at 826-47.
[191] Sherr, *supra* note 91, at 56.

> is crucial in an ever "shrinking" world, based on international transactions, multi-national organizations and cross-cultural engagements. Another example has to do with the need to understand historical developments of black letter law, rather than just know what the law is today. In an era characterized by velocity of change, knowledge of changes prepares students for dealing with changes in legal systems generally or with particular transactions specifically.

Not all scholars would agree that the connection between knowledge and capacities is intact and durable. Sherr argues against the methods of assessments enforced in the United Kingdom by HEFCE Quality Assurance initiative, which strives to standardize the curricula, syllabuses and educational objectives as between different law schools based on a core of legal subject matter that must be studied for a law degree. He suggests that students' competence, rather than knowledge alone, should be the focused on. This provides an overarching set of values which can link between different parts of legal education, but is not tied to singular methods of assessment and allows for more abstract, more subjective, and more discretionary elements as well as a basic, objective standard.[192]

[192] *Id.* at 56.

5. Knowledge-Culture

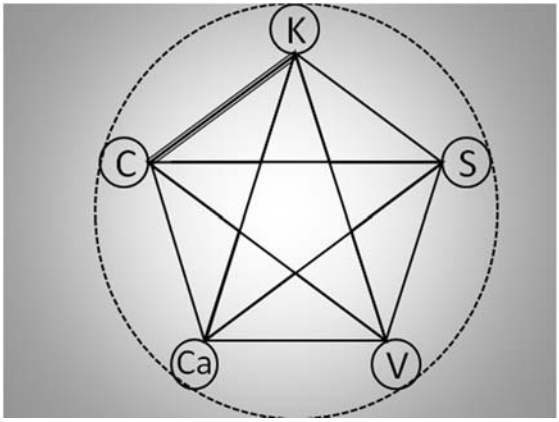

Figure 14 - Knowledge-Culture

Knowledge is a basis for a culture. If law reflects society's culture, then so should the teachings of it. Since very little accent is placed on the teaching of culture in many law schools, the knowledge of the law is lacking.[193] In order to reinforce the connection between knowledge and culture, law school should address the question of what to teach and learn about culture. This question is often answered in regard to the socio-political context of a law school. This context can provide the explanation to the fact that Hebrew law, although rarely practiced, is a mandatory course for a law degree in Israel. It can also explain the curricular decision to require a choice of one of the following three courses in Zefat law school, a public college at the Gallilee, an area inhabited by all major Israeli faiths: Hebrew law, Muslim Law and Canon Christian law. Another example is University of British Columbia's requirement to study First-Nation law at its law school.

[193] Menachem Mautner, *Beyond Toleration and Pluralism: The Law School As A Multicultural Institution,* 9(1) INT'L J. LEGAL PROF. 55 (2002).

A different aspect of the connection between knowledge and culture has to do with the culture of the "academic tribe."[194] As academics in the humanities and social sciences are renewed by contact across disciplines and refreshed by the wider context of open discussion, the legal academy tends to converge in itself. It is traditionally inward looking, reductive in its thinking and concerned principally with the internal discipline of ex post facto rationalizations and the precedential weight of judgments.[195] Sherr suggests an example for this in the course on the law of contracts which does not often start with the recognition that the contract is a system for organizing the reliability of business or economic transfer. A course on contract usually begins with the detail of what constitutes offer and acceptance and ends with how to go about enforcement.[196] However, it is fair to assume that although the course on the law of contracts has probably not changed much since Sherr's call for reaching out of law school's academic tribe, many complementary courses (such as law and economics, law and society, etc.) are offered and able to do so. The legal academic tribe today is different than twenty years ago, as can be noticed by how interdisciplinary it is. However, the tribe is still very conscious and hesitant of what penetrates the curriculum. As an example, the growth of a major global culture of veganism and animal rights movement is still not evident in legal curricula. Nevertheless, as feminism or economics were once absent from law schools and are now prominent inhabitants of legal curriculum, this would also be sure to come.

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[194] TONY BECHER, ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRIES AND THE CULTURES OF DISCIPLINES, SOCIETY FOR RESEARCH INTO HIGHER EDUCATION (SHRE & Open University Press, 1989) (coining term).

[195] Sherr, *supra* note 91, at 40.

[196] *Id.* at 40.

6. Skills- Values

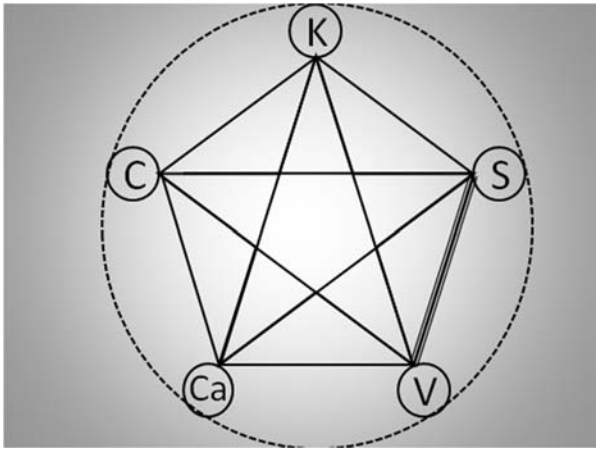

Figure 15 - Skills- Values

Generally, it is quite anecdotal for law schools to pay attention to the connection between values and skills. Some of the skills emphasized in the curriculum, especially the skill of legal analysis, often contradict values held dear by students. The Carnegie Report observes that issues such as the social needs or matters of justice are almost always treated as addenda. Being told repeatedly that such matters fall outside the precise and orderly "legal landscape," students often conclude that they are secondary to what really counts for success in law school and in legal practice. Students are told to set aside their desire for justice and are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.[197] This disconnect has undesired effects. If students do not learn when and how their moral concerns

[197] SULLIVAN, *supra* note 99, at 5.

may be relevant to their work as lawyers they are often confused and disillusioned.[198]#

The Carnegie Report points out that law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social values. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals.[199] This is not merely an ideology. It is a professional requisite. A survey conducted in 2012 reveals what employers expect when hiring of law graduates.[200] Of course employers have an expectation from graduates of strong legal research skills,[201] but they also have expectations that relate to desired values, such as professionalism[202] and strong work ethic.[203] The MacCrate report as well includes in its list of fundamental skills the ability to recognize and resolve ethical dilemmas. [204]

The legal clinics are perhaps the most acknowledged pedagogic means of combining professional skills with social values.[205] However, their inclusion in the legal academic curriculum, certainly in Israel, is not without concern. The clinical legal education poses challenges of institutional,[206] social[207]

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[198] Efron & Silverstein, *supra* note 18 (reinforcing by survey).

[199] SULLIVAN, *supra* note 99.

[200] Wawrose, *supra* note 97.

[201] *Id.* at 532.

[202] *Id.* at 522.

[203] *Id.* at 523.

[204] MACCRATE, *supra* note 37, at 140 ("Skill § 10: *Recognizing and Resolving Ethical Dilemmas*- In order to represent a client consistently with applicable ethical standards, a lawyer should be familiar with: The Nature and Sources of Ethical Standards; The Means by Which Ethical Standards Are Enforced; The Processes for Recognizing and Resolving Ethical Dilemmas.").

[205] Wizner, *supra* note 38.

[206] Efron, *supra* note 187, at 21.

[207] *Id.* at 24.

and ethical[208] nature. The connection of skills and values in legal academy, generally, is a matter of concern, due to the tension between liberal education and vocationalism. Although certain values are desired by legal employers, some social structures seem to be incompatible with the values that legal education esteems. Legal education does not seek to produce docile employees, but rather sceptic citizens, inquiring into the moral value of the society.[209] These tensions are what make the values-skills connection so fragile and the reason why more emphasis is rested on skill-building rather than on the nourishment of values.

7. Skills-Capacities

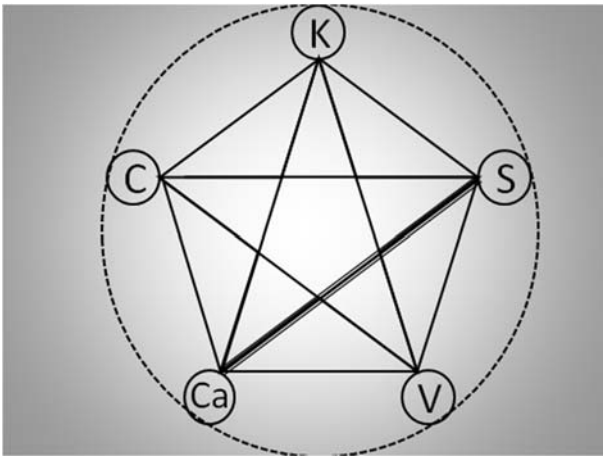

Figure 16 - Skills-Capacities

A preliminary question that this connection raises is what is the difference between skills and capacities? Since both terms deal with abilities, a differentiation is required for the purposes

[208] *Id.* at 25.
[209] Bradney, *supra* note 79, at 300.

of this paper. Skill is about *doing*, while capacity is about *being*. Listening is a skill, while attentiveness is a capacity; questioning is a skill, while curiosity is a capacity. Legal education should aspire to create an intense and durable relationship between the two: when performing certain lawyering tasks, such as interviewing, for example, apply both.[210] However, it is not always the case, and often it gives little attention to this relationship. This sometimes can create tension. For example, the pedagogic approach to focus on the judicial decisions rather than on clients' needs puts more accent on the skill of legal analysis than on the capacity to empathize. Thus, a hidden message is delivered to the student that a client is merely instrumental, not a real person in distress.

So the first question an educator may raise is *should* legal education enhance the interconnectivity between skills and capacities? Scholars believe it is crucial. The tendencies toward regarding the client with a narrow, legalistic perspective instead of really listening, lead to a preoccupation with first-personal concerns[211] that block the sympathy required. This can be viewed as an educational failure, since the future lawyer will find it more difficult to get close to the client, to see the client's situation from within, thus making it harder to give disinterested advice.[212] An educational emphasis on argumentation skills, rather than compassion and attentiveness, can drive the future lawyer, consciously or not, to steer clients toward legal work that is more gratifying for them than for the client, such as extensive litigation instead of a reasonable settlement. This can influence the lawyer's relations not only with clients, but also with opposing counsel and with judges.[213] A good

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[210] Lande & Sternlight, *supra* note 33, at 261.

[211] Riskin, *supra* note 62, at 12 (referring to them as conscious or subconscious cravings for power, wealth, or stature.).

[212] KRONMAN, *supra* note 40, at 300.

[213] Riskin, *supra* note 62, at 12.

working relationship with colleagues and clients is one of legal employers' expectations from law graduates.[214] Legal employers expect an ideal law graduate to possess other capacities, including taking initiative and stepping up to "own the case,"[215] as well as flexibility and an ability to adapt to the needs of supervising attorneys.[216] Students rarely address these capacities in a law school setting.

Under the assumption that teaching being is as important as teaching doing, the question that arises is, *can* it be done? Are capacities born traits, while skills are acquired? New discoveries in neuroscience suggest that changes in patterns of thought, action, and relations are possible, and such changes can even occur quickly.[217] Neuroscience reveals that empathy, for example, is an innate embodied capacity.[218] Not only can empathy be taught but also training to disregard it may prevent us from turning to empathy when it is needed. Tidwell calls this phenomenon "trained incapacity."[219] The flexibility of neural wiring creates pathways in the brain that, when reinforced over time, become so habituated and familiar patterns of thought, reasoning, and behavior, that we experience greater difficulty perceiving alternatives.[220] Therefore, legal education can and should address the capacities needed in the legal profession when building students' skills. Neglecting capacities in the training process may result in a professional deficit.

How may the relationship between skills and capacities be introduced in a law school setting? Beausoleil & LeBaron

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[214] Wawrose, *supra* note 97, at 529.

[215] *Id.* at 525.

[216] *Id*. at 530.

[217] Beausoleil & LeBaron, *supra* note 66, at 135.

[218] *Id.* at 142.

[219] Alan C. Tidwell, *Not Effective Communication but Effective Persuasion*, 12(1) MEDIATION Q. 3, 4 (1994).

[220] Beausoleil & LeBaron, *supra* note 66, at 135.

point out the importance of the right brain in this regard and its attribution to autobiographical memory, perception of one's body, self-awareness, identification with and empathy for others, and intersubjective processes. Since the right brain works holistically, through whole body sensation, emotion, image, and metaphor; improvisation and associated new thoughts and behaviors are governed by the right brain,[221] it seems quite unnatural to nourish it sitting down and reading appellate judgments. LeBaron advocates movement as means of attending to conflict.[222] Others suggest modest alterations to law school pedagogy. The introduction of skills to law students requires an inter alia enhancement of capacities, by integrating skill building throughout the curriculum, rather than stand-alone courses.[223] The message sent by doing so is that skills and capacities are interrelated. As mentioned earlier, it is also important to focus instruction on the client, rather than on the judge.[224]

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[221] ALLEN N. SCHORE, AFFECT DSYREGULATION AND DISORDERS OF THE SELF (W.W. Norton & Company, Inc., 2003).

[222] JOSEPH B. STULBERG, THE CHOREOGRAPHY OF RESOLUTION: CONFLICT, MOVEMENT AND NEUROSCIENCE (Michelle LaBaron et al. eds., 2013).

[223] Lande & Sternlight, *supra* note 33, at 277-79 (citing practical suggestions in abundance).

[224] *Id*. at 279-82 (citing practical suggestions in abundance).

8. Skills-Culture

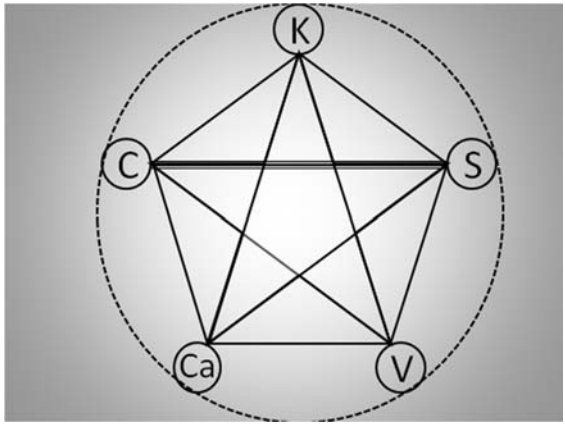

Figure 17 - Skills-Culture

Teaching skills is always a challenge. Teaching skills in multicultural settings is a much greater one. Most educators use role-play in order to offer learners exposure and practice of skills. In law schools, the most common role-play is moot court. But In skill oriented courses, such as negotiation and mediation often use fiction-based simulations.[225] Cultures around the world have used role-play for a wide range of purposes, so they are not foreign means to experience newly learned ideas. However, in many social settings taking on others' identities may be perceived as disrespectful and when a group has a strong ethic of non-interference, then "playing" someone else may feel inappropriate and invasive.[226]

[225] Daniel Druckman & Noam Ebner, *Onstage or Behind the Scenes? Relative Learning Benefits of Simulation Role-play and Design*, 39 SIMULATION & GAMING 465 (2008) (providing an overview of literature examining the contribution of role-plays to the acquisition of skills).

[226] Alexander & LeBaron, *supra* note 159, at 182.

Using experiential learning to teach skills should be done consciously. People need context to interpret and understand ideas, and apply skills appropriately for a variety of real life situations. Experiential learning is the premise that experiences must be realistic to have meaning for the individual students. The exercises and simulations should contain subject matter the student is likely to encounter.[227] When context is artificial, knowledge and skills may be similarly artificial, thus reducing the likelihood of the transfer of skills into real situations.[228]

With that said, there is still much to be gained by experiential skill building, and legal education should not discard of this pedagogy due to cultural heterogeneity. Designing experiential learning must take into account the cultural background of the students. The pseudo-reality simulation design method, developed by Ebner & Efron,[229] has proven successful in engaging students from diverse backgrounds in role-playing. The reason why students are happy to be engaged in a fictional scenario is that the method of pseudo-reality allows them the distance from their own lives needed to safely experience newly acquired skills, yet stay in a context of familiar fact patterns and well acquainted dilemmas. Therefore, when introducing skills in legal education, questions include:

- *What cultural dimensions should be considered in designing the training?*
- *What elements of the socio-political context can be safely introduced in class?*

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[227] Kovach, *supra* note 161, at 346.

[228] Alexander & LeBaron, *supra* note 159, at 184.

[229] Noam Ebner & Yael Efron, *Using Tomorrow's Headlines for Today's Training: Creating Pseudo-Reality in Conflict Resolution Simulation-Games*, 21 HARV. NEGOT. J. 377 (2005).

- *What is the proper balance between realism that would ensure engagement and the fiction that would allow safety to experience?*

In a paper analyzing experiential learning of public international law in multicultural classes, we have suggested possible answers to these questions. [230]

Another impediment to the use of experiential learning in law schools is the contrast to law-school culture. As legal education is dominated by individualist approaches, physically static in nature and almost solely based on written texts, in-class actively engaged team discussions are quite alien to this culture. Neither students nor faculty feel "in their skin" when playing a game in class. This is rapidly changing. As ABA standards now require minimal experiential learning as a vital condition for law school accreditation, American law schools embrace the challenge as part of their first year curriculum. The ever-growing field of clinical legal education also ensures that law schools will in time become more and more accustomed to skill-building activities. As the saying goes, "Practice makes perfect."

[230] Munin & Efron, *supra* note 61.

9. Values-Capacities

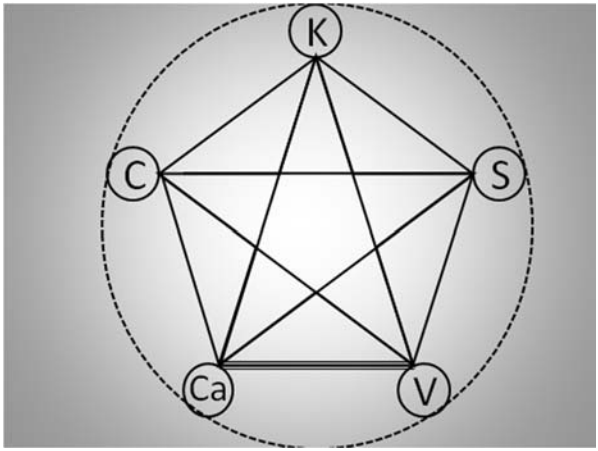

Figure 18 - Values-Capacities

MacFarlane identifies three key professional beliefs that shape the values of the legal profession. These beliefs, she claims, are fossilized into legal education, despite the changing reality of the legal practice.[231] MacFarlane challenges these beliefs, which foster capacities that are inappropriate to current times. A Pentalectic Sphere inspired analysis in light of MacFarlane's professional beliefs flesh out a disconnection between the values and the capacities taught in law schools:

- *Default to rights*[232] – the New Lawyer, claims MacFarlane, should be more attuned to the client's needs, rather than rights. The capacity for emotional intelligence is generally neglected in legal education, and is shadowed by the right-based discourse of values.

[231] MACFARLANE, *supra* note 14, at 47-65.
[232] *Id.* at 49.

- *Justice as process*[233] – this belief reinforces the right-based discourse, yet the processes stressed in law schools rarely involve client participation, neglecting the capacity for teamwork and cooperation.
- *Lawyers in charge*[234] – MacFarlane points out lawyers' frustration from involving clients in decision making processes regarding their case. In law schools that neglect cooperation and emotional intelligence capacities the liberal value of autonomy is delivered to the students as the autonomy of the lawyer, rather than the client.

The connection between values and capacities is most intense and durable in legal clinics and in professional ethics courses. The reason for this is that these courses present opportunities for students to enhance their capacities to address values. Within these two premises, students and faculty focus the learning on the recognition of values, whether social or professional, discuss their contradictions to other values, and experience their application to professional life. When doing so, they develop the capacity to empathize, to deliberate, to be creative, and more.

A constitutional law teacher may ask herself, "How do my students learn about what a person would need if his or her rights were infringed?" A tort law teacher may ask himself, "How should I teach my students about the needs of an injured client?" Clearly, teaching about equality, responsibility, and other related values is not enough. Inclusion of client perspective, compassion, curiosity, creativity, and cooperation is also required.

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[233] *Id.* at 54.
[234] *Id.* at 59.

10. Values-Culture

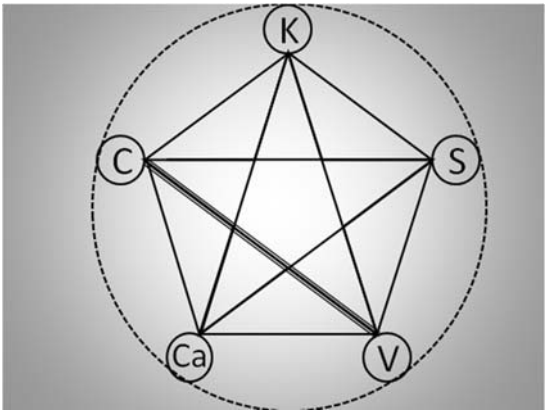

Figure 19 - Values-Culture

Culture is all about values, of course. It is an extremely intense connection. However, in multicultural settings, law school culture does not always interrelate well with the social culture of the students, nor sometimes the faculty. The relationship between law school culture and social values is sometimes impaired. An individualistic law school culture fosters competitiveness, which seems incompatible to cultures that hold cooperative values dear. The connection between professional values and social culture is also not always intact. The value of confidentiality, for example, may contradict cultural assumptions regarding the communal need for expressive sharing of thoughts and feelings, as well as of caring for the individual as a community.

The liberal values of legal education[235] may produce questions for deliberation when considering the call for attention to the individual's culture.[236] These questions include:

[235] Bradney, *supra* note 79.

- *How are the cultural values of the students aligned with law school culture?*
- *How should contradictions be handled?*
- *Where the emphasis should be placed?*
- *What cultural characteristics contradict professional values?*
- *How should legal education address these contradictions?*

A course on law and culture is not a sufficient answer. Cultural courses should incorporate cultural fluency throughout the curriculum, but this is not simple to achieve. The Universalist approach to values, which governs legal education, can contrast a particularistic approach of students' culture. If confidentiality is a key value in law, it may contradict cultures of direct and expressive communication styles. It is challenging to teach zealous advocacy when different cultures regard zealousness differently. When discussing human rights in classes comprised of students from minority groups, any teacher would feel anxious and attempt to use neutral terminology. The tensions are also notable when teaching about territorial disputes to a class of Arabs and Jews in Israel, where attachment to the land is a cultural value in some societies, and caution is necessary when class discussion turns to the relevant laws.[237]

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[236] Ferris, *supra* note 1, at 104.
[237] Munin & Efron, *supra* note 61.

11. Culture-Capacities

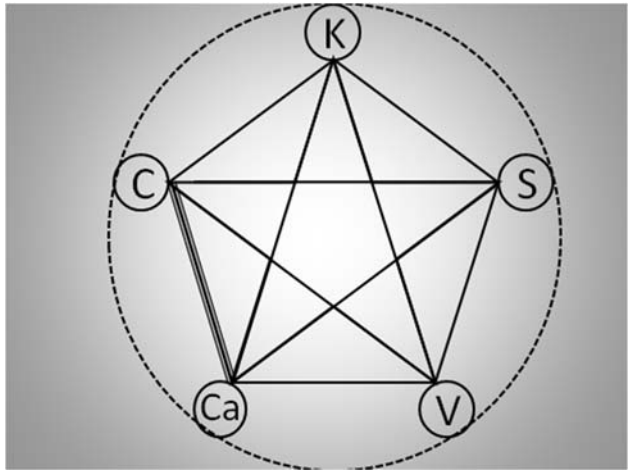

Figure 20 - Culture-Capacities

The following experience may resonate with any educator who has teaching experience in multicultural settings. A group of young intelligent women is sitting outside of class during break, vitally engaged in lively conversation, often loud and gesture-animated. Class begins, and as the teacher seeks students' responses to questions regarding the lesson's material. The young women suddenly do their very best to shrink themselves to a little dot in the background, hoping not to be called upon. This is not due to the fact they do not know the answers. They answer these same questions on the exam impeccably. It is not due to lack of confidence, since no trace of this lack existed minutes earlier outside of class. Something else prevents these women to express their knowledge and skill in a large heterogeneous group.

It is my belief that a disconnection often occurs between capacities required for the study and practice of law, such as assertiveness, cultural indoctrinations, and the invert role of women in certain societies. It is also apparent in the discom-

fort projected by other law students who are members of communitarian societies, when forced to stand out in a competitive setting produced by law school culture. S ome capacities needed for the legal profession contradict cultural traits. In relation to the law school environment, the socio-political context has obvious effects as well. In a non-equal relationship, such as the Jewish-Arab relationship in Israel, many members of minority groups prefer to practice silence rather than speak in the presence of members of the majority.[238] This necessarily impedes learning.

When considering learning preferences, law schools need to acknowledge the existence of various intelligences, which are not only hereditary but are also grounded in culture.[239] Therefore, when designing a curriculum or choosing pedagogical tools, legal educators may ask themselves:

- *Do students' cultural backgrounds complement or impede the capacities required for the study and the practice of law?* For example, if following meticulous procedures, as taught in civil procedure or criminal procedure courses, is foreign to societies that value improvisation then address this tension in class.
- *If the connection between culture and capacities is impaired, what pedagogical methods could assist in mending it?* Reflective journals, small group discussions, and even student-produced podcasts could be useful in mediating students' professional and personal capacities with their cultural backgrounds. Application of such

[238] ARIELLA FRIEDMAN, AVOIDING EXPLOSION WITHOUT SWEEPING UNDER THE CARPET: ARABS AND JEWS IN ZEFAT ACADIMC COLLEGE (Hakibbutz Hameuchad -Sifriat Poalim, forthcoming) (Hebrew).

[239] Kovach, *supra* note 161.

methods should be subject to further research in order to explore their educational efficiency.

- *How can legal capacities be enhanced without infringing on students' cultural upbringing?* This sensitive question entails cultural fluency of the faculty rarely trained or informed regarding these issues. This presents a challenge to legal education institutions, regarding recruitment and promotion of law teachers.

C. Questions produced by the law school environment

A law school, like other systems, does not function in a vacuum. It has an environment it affects and the environment affects it. Many elements in the law school environment produce questions, which have implications on the content and pedagogy of teaching law. In The Pentalectic Sphere, classifies those elements into two main components: the effect of technology and the socio-political context of the law school. Both have directly impact what, why, when, where, how, who and by whom the law is being taught.

1. Technology

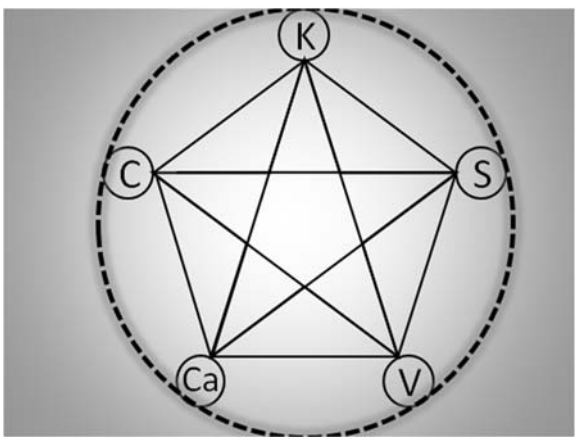

Figure 21 - Technology

Technology affects legal education every day and will do even more continue to increase in the future. It touches each of the elements in legal education: it affects both students' and faculty's access to knowledge; helps acquire and practice new skills; challenges student, faculty, and institutional values; requires the development of new capacities; and promotes cultural fluency.[240] Electronic communications and information technology has made the individual a prominent player in the educational field. Traditional technology changes traditional forms of knowledge and skills delivery, educational expectations and outcomes, including the power and authority relationships between staff and students.[241] An E-learner is, "a self-determining agent who actively selects information from the perceived environment, who constructs new knowledge in the light of what the individual already knows."[242]

A survey of the use of computerized learning environments in European legal education institutes revealed that not only are they widely used,[243] but are constantly improving to provide new services.[244] Bone's survey reveals online resources widely used and valued by students.[245] They also appreciate innovations by law teachers such as podcasts, wikis, or blogs, even though this is not widespread.[246] Yet the face-to-face contact with other students is generally regarded as essential to

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[240] Paul Maharg & Antoinette J. Muntjewerff, *Through a Screen, Darkly: Electronic Legal Education in Europe*, 36 L. TCHR. 307, 326 (2002) (describing how culture also affects the weight given to technology in legal education and pointing out the differences in Legal (educational) culture between Scotland and the Netherlands).

[241] Thomas, *supra* note 4, at 248.

[242] MARLENE LE BRUN & RICHARD JOHNSON, THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW 56 (1995).

[243] Maharg & Muntjewerff, *supra* note 241, at 316.

[244] *Id.* at 328.

[245] Bone, *supra* note 17, at 244.

[246] *Id.*

their learning.[247] Another survey of legal employers' preferences when hiring law graduates suggests that although many employers use traditional methods of legal research, they appreciate law graduates' technological fluency when conducting research and communicating.[248]

Classification of electronic materials for learning the law are:[249]

- **Communication tools** — help to structure, organize and support communication in performing a certain legal task (for example, use of email or chat box to convey instructions and feedback regarding an assignment). As most legal negotiations are not face-to-face anymore, it is crucial to enhance electronic communication skills.[250]
- **Information tools** — contain legal data needed to carry out a certain legal task (for example, legal databases, electronic literature, and search tools, needed to conduct research). Information technology has opened up research and legal information to those involved in the delivery of legal education and to the recipient students. Today, students are information technology literate and electronic sources are invariably their first stop in matters of library science.[251]

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[247] *Id.*

[248] Wawrose, *supra* note 97, at 536.

[249] Maharg & Muntjewerff, *supra* note 241, at 312-14.

[250] Noam Ebner, et al., *You've Got Agreement: Negoti@ting via Email,* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 89 (Christopher Honeyman et al. eds., 2009).

[251] Thomas, *supra* note 4, at 250.

- **Instructional tools** — electronic materials for the effective and efficient acquisition of legal knowledge and legal skills (for example, video clips, PowerPoint presentations and podcasts, which summarize information or demonstrate use of certain skills). In the United Kingdom, distance and home based learning is well established, and video-conferencing is increasingly commonplace.[252]

However, there has been a reluctance to accept that the age of technology has arrived, as academics worry about issues of power, status, and authority. Older and senior members of the faculty have proved to be resistant to employing technical aids in their teaching. Pressure from the students is what generally diminishes this resistance as students seek a uniform standard of approach from staff.[253] The occurrence of change, however, does not necessarily involve its acceptance.

Concerns must be addressed for recognition of technology as essential and integral to the pedagogical process. Two of the major concerns are access to law materials and teaching contact. Questions must also address the role of student-teacher personal connection that is not technology-mediated. Bone's survey reveals that the modern law student is appreciative of the efforts of law teachers in providing lectures and facilitating seminars, which are of fundamental importance to their learning.[254] Cognitive apprenticeships are still fundamental to the educational process, as the teacher illustrates proper ways for acquisition of knowledge and skills, reviews students' performance, and issues feedback on their demonstrated capac-

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[252] *Id.* at 251.
[253] *Id.* at 249.
[254] Bone, *supra* note 17, at 243.

ities, which enhances socialization through notice of values.[255] Yet technology does not eliminate cognitive apprenticeship. In fact, technology supports it. Technology provides a bridge between teaching and learning and by allowing the development of a number of new personal skills, carries it to the profession.[256] The computer can offer these services on a one-to-one basis, theoretically taking us back to the time of the individual tutor.[257]

The other concern regarding technology is the issue of plagiarism, which is increasingly problematic with access to information.[258] This question entails a discussion on values in law school. As individual interests gain more weight, law school culture is becoming more competitive, and the abandonment of integrity and other related values must be dealt with.

Institutional concerns can also benefit from technology. There is real pressure on law library budgets for appropriate holdings of journals, core texts, statutes, and law reports in paper format, which are growingly expensive. For some law schools this is a true budgetary concern. Instead, workstations replace books, accessing databases holding the relevant material.[259] The globalization of the academic market, as societies seek to enter or increase their share of its value, made possible by technology. Franchising and joint degrees are being discussed and implemented globally in accordance with global educational trends, such as Socrates, Erasmus, and the Bologna Declaration.[260] As time, country, and venue become less of a factor in legal education, it is prophesized the next major step

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[255] Collins, *supra* note 115.
[256] Thomas, *supra* note 4, at 249.
[257] *Id.* at 251.
[258] *Id.* at 250.
[259] *Id.* at 251.
[260] *Id.* at 252.

will be the widespread global acceptance of student-centered, self-learning through the support systems offered by technology.[261]

2. The socio-political context

We know from systems theory that every living system is comprised of narratives in a unique context.[262] Law schools, too, exist in a socio-political context, which affects the educational processes practiced and affected by the faculty and students involved in it.

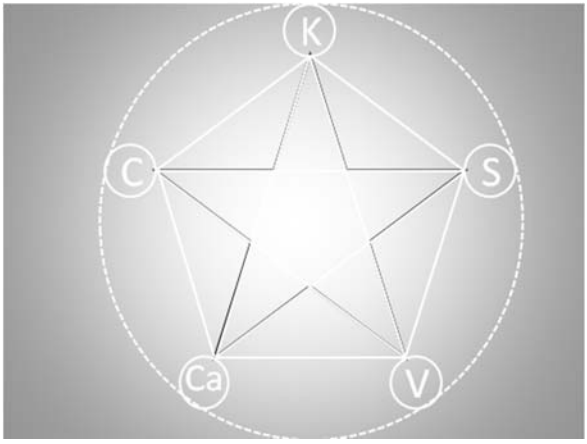

Figure 22 - The socio-political context (background)

Studies examining the significance of higher education as a source of occupational socialization tend to suggest that academic education has little independent effect. Increasingly, as

[261] *Id.* at 251.

[262] Diamond, *supra* note 2 ("Rule 10: Living systems exist within their own unique context. For human systems, that context is the narrative that gives meaning to our choices and actions. Therefore: Articulate, communicate, and validate the stories you tell yourself.").

empirical socialization studies have reported, it has become doubtful that even the vocational training programs can be strong sources of occupational socialization. As a result, research has increasingly emphasized the importance of what is occurring outside the socializing institution in shaping occupational values.[263] However, it seems that law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice around them.[264]

A Pentalectic Sphere inspired curriculum should consider the socio-political context surrounding the law schools. Volatile topics find their way into curricular design in many instances. Some examples that demonstrate this are the inclusion of First-Nation studies in the first year curriculum at the University of British Columbia law faculty in Canada, acknowledging the charged relationship between Native Canadian and European Canadian societies in the region.[265] Another example is the unique method of teaching territorial disputes and other sensitive topics in public international law to the mixed class of Arabs and Jews.[266]

Furthermore, as most legal education institutions are located in secure and peaceful areas, not all some are. not. These specific lines are typed in a shelter, as rockets are flying over my home and airplanes bombard Gaza strip. What we know today from neuroscience about how our brain functions proves a direct link between stress and cognition.[267] Stressful socio-

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[263] Julian Webb, *The Law School As A Source of Occupational Socialisation—Issues of Research Design*, 22 L. TCHR. 95, 96 (1988).

[264] SULLIVAN, *supra* note 99, at 6.

[265] THE UNIVERSITY OF BRITISH COLUMBIA, PETER A. ALLARD SCHOOL OF LAW: J.D. FIRST YEAR CURRICULUM http://www.allard.ubc.ca/jd-first-year-curriculum, (aboriginal and treaty rights taught as part of first year Constitutional Law course) (last visited Oct. 9, 2015).

[266] Munin & Efron, *supra* note 61.

[267] Austin, *supra* note 7, at 823.

political contexts affect students and faculty cognitive well-being, and disregarding this is simply adding a burden on legal education. Addressing stress, on its various forms, whether through contemplative practices or other, is essential.

V. IMPLICATIONS AND APPLICATIONS

A Pentalectic Sphere inspired curriculum could involve a richer realm of considerations. It is of course impossible, nor necessary to address each question produced by this analytical model. The framework suggested here highlights the challenges and tensions derived from legal education. However, careful deliberations of these questions may have some practical implications on law schools and even higher education in general.

The Carnegie Report states:

> Legal education needs to be responsive to both the needs of our time and recent knowledge about how learning takes place; it needs to combine the elements of legal professionalism—conceptual knowledge, skill, and moral discernment—into the capacity for judgment guided by a sense of professional responsibility. Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice.[268]

Law schools may benefit from the Pentalectic Sphere framework when considering different elements of legal education, when aspiring to achieve the Carnegie Report's ideals, and more.

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[268] SULLIVAN, *supra* note 99, at 8.

A. Curricular design

Multiple suggestions, explicit and implicit, for reform in curricular designs have been elaborated in scholarship and in professional reports.[269] Most addressed the need for change in knowledge-skill balance, few advocated for a more value-based curriculum, and even fewer addressed the needs for capacity building and cultural attention. A Pentalectic Sphere inspired curriculum is incorporates all of these elements in the general curriculum, as well as in specific course design. It is concerned with more than time-line questions, as many reforms suggest (when to teach what), because it regards the educational process as recurring loops, introducing its components synchronically. Applying a Pentalectic Sphere framework on a new or existing curriculum entails introduction of all components of legal education in a non-hierarchic and non-sequential manner. It means, for example, introducing emotional capacities and clients centered perspective of knowledge throughout the curriculum from its onset; mainstreaming cultural attention and wrestling with ethical dilemmas right off the start; and revisiting skill-building from day one till graduation out of multiple lenses, including the socio-political one.

At the same time, a specific course design can also benefit from the Pentalectic Sphere framework for analysis. As an example, a course on criminal law may involve not only knowledge of the relevant statutes and their application by the court, but also the values involved and their cultural significance. It can certainly begin by addressing values and emotions of the offender, victim, and the public and how the law regards them. A criminal procedure course can then build on these considerations and enhance not only knowledge but also skills of interviewing, counseling, and advocacy which are ap-

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[269] Huxley-Binns, *supra* note 173; MACCRATE, *supra* note 37; Lande & Sternlight, *supra* note 33 (listing United Kingdom benchmarks).

preciative of them. Essentially, as long as the model assists in raising awareness of educators, then both the general curriculum and specific courses can benefit. It is all about doing it deliberately rather than automatically.

B. Teaching subjects

Most attempts to reform the content of legal education are led with the assumption that of what and how is being taught today is so prominent and sufficient in legal education, that it only requires a slight increase in attention to the practical and ethical-social issues.[270] A Pentalectic Sphere inspired analysis of legal education calls for a comprehensive revisit of the educational goals. It is important of course to introduce courses on law and culture, cause-lawyering and skill-building workshops, but this is not the point. With limited resources, adding courses entails cancelling others. If an institution's resources are limited, it is only fair to assume that courses are allocated according to their main purposes. Therefore, the Pentalectic Sphere framework can assist in leading the inquiry required for this analysis, and in aligning the hidden curriculum with the formal one. As an example, an institution hosting students from the periphery, which are mostly vocation-driven, should offer more practical courses, than theoretical ones. Research universities, which nourish the next generation of legal scholars, should find a bigger emphasis on critical thinking and multidisciplinary knowledge.

C. Pedagogy

Carnegie Report observes that compared to other professional fields, which often employ multiple forms of teaching through a more prolonged socialization process, legal pedagogy is remarkably uniform across variations in schools and

[270] SULLIVAN, *supra* note 99, at 8.

student bodies.[271] A Pentalectic Sphere inspired pedagogy can offer a wide array of teaching tools that could efficiently address each component of the model, including the utilization of the ever-changing advancement in teaching technologies. For example, in order to avoid "explosions" due to the teaching of sensitive socio-political issues, curriculum can adopt pseudo reality based role-plays.[272] Thanks to technology, it is easy to transfer knowledge outside of class time, which leaves plenty of room for skill-building exercises and capacity enhancement activities.

For example, a newspaper clipping of a current event can start a discussion in criminal law class, inviting students to compare it to relevant cases and statutes, which students would research independently. A predicament of a real or fictional character regarding a commercial property or family dispute can be basis for discussion in related doctrinal courses, etc. The contribution of a Pentalectic Sphere perspective on pedagogy is the deliberate consideration of all components when planning a lesson or designing a course. Following the model's questions can inspire a variety of creative teaching methods.

D. Teaching staff

Increased awareness of educators assisted by a Pentalectic Sphere framework for analyzing their craft is, unfortunately, not enough. As long as schools base recruitment and promotion of faculty on scholarship that is mostly theoretical, and focused on appellate-case critique, this area of law would be most developed.[273] It would necessarily push aside the research and writing on well-being, negotiation, and teaching innovations. If literature on pedagogy is not valued, and if

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[271] *Id.* at 5.
[272] Ebner & Efron, *supra* note 230; Munin & Efron, *supra* note 61.
[273] Newton, *supra* note 44.

teaching-competence has minimal, if any, weight in recruitment and promotion decisions, there will be no incentives for change. This ensures stagnation of legal education processes.

The solitude of the law professor, as a feature of law school culture, has undermining effects and is embedded in the traditional hierarchies of knowledge, which is more appreciative of individual work than of teamwork.[274] A Pentalectic Sphere inspired faculty is relational and interconnected. Faculty development programs that consciously aim to increase the faculty's mutual understanding of each other's work are likely to improve students' efforts to make integrated sense of their legal competence.[275] Furthermore, it sends out a tacit message for future lawyers on the importance of collaboration and of the benefits of multi- and inter-disciplinary thinking.

E. Assessment methods

Assessment of what students have learned—what they know and are able to do—is important in all forms of professional education. In law schools, too, assessing students' competence performs several important educational functions. The Carnegie Report notes that in its familiar summative form, assessment sorts and selects students. Summative assessments are useful devices to protect the public, for they can ensure basic levels of competence.[276] Law schools should consider implementation of another form of assessment and formative assessment, which focuses on supporting students in learning rather than ranking, sorting and filtering them.[277] Formative

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[274] Young, *supra* note 60.

[275] SULLIVAN, *supra* note 99, at 9.

[276] *Id*. at 7.

[277] Noam Ebner, et al., *Evaluating Our Evaluation: Rethinking Student Assessment in Negotiation Courses*, ASSESSING OUR STUDENTS, ASSESSING OURSELVES: VOLUME 3 IN THE RETHINKING NEGOTIATION TEACHING SERIES 19, 21 (Christopher Honeyman, et al. eds., (2012).

assessments directed toward improved learning ought to be a primary form of assessment in legal education. Although contemporary learning theory suggests formative assessment enhances the educational effort, law schools make little use of it.[278]

Furthermore, the Pentalectic Sphere exposes a significant shortcoming of law school evaluation methods. As most curricula focus on knowledge and skills, and tend to neglect values, capacities and cultural fluency, assessment of these elements is clearly lacking. We know today that evaluation is a major incentive for students' learning. Therefore, to introduce new elements of legal education, they must be demonstrated in evaluation methods. An important challenge for legal educators would be to utilize assessment tools, which will recognize students' advancement in those aspects as well. Such methods do exist in other related fields, such as negotiation and conflict resolution, [279] and they need to be explored in legal education as well. For example, a civil procedure course could include graded role-plays of client interviews and a detailed suggestion for a proper course of action for the client; a professional responsibility course could include a reflective paper discussing dilemmas of contradicting values, etc. Enhancing debriefing competencies for faculty is also crucial for making these assessment methods significant for learning, and not only for grading.[280]

VI. CONCLUSION

This paper suggests a paradigm shift in the way we understand legal education and scholarship. This new paradigm re-

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[278] SULLIVAN, *supra* note 99, at 7.
[279] Ebner, *supra* note 279.
[280] DEASON, *supra* note 118.

flects meaningfully in the Pentalectic Sphere graphic, as it vividly represents five essential components for legal education and their multidirectional connections: knowledge, skills, values, capacities, and culture. The illustration of this new framework for analysis also represents the effects of technology and of the socio-political context on educational processes. This holistic view of legal education, elaborated in the paper, reflects current thoughts on complex systems and new discoveries in neuroscience. It is inquiry-based, rather than prescriptive, which allows for constant adaptation and flexibility. Therefore, it is proposed as a new model for understanding, designing and assessing the legal curriculum generally, as well as specific courses within it.

The Pentalectic Sphere framework holds some overarching elements for analysis. It elegantly captures and conveys the essence of how lawyers need to think and function in this new world, and suggests how align legal education with it. It honors efficiency in new online, accelerated environments that demand new approaches to pedagogy. Its dynamism enables this model to adapt quickly and respond to changes in globalized legal practice. The circular nature of this framework allows for constant reflection and adaptation, as it incorporates double-loop learning and constant revisiting of educational purposes, and considers ever-changing contexts. It centers on relational capacities, including creativity, and is appreciative of collaboration and connectivity.

The many threads connecting the model's components yield both predictable and unpredictable syntheses. The questioned illustrations of the Pentalectic Sphere resist prescription, and therefore its application calls for further examination. The components and their relational connectedness challenge existing teaching topics, pedagogy, evaluation of students, and faculty recruitment and promotion practices. For further exploration of its implications, this new paradigm also calls for more

legitimacy in literature on teaching and pedagogy than there is today.

PRODUCTS LIABILITY AND LATENT INJURY: SUBMISSION TO THE BANKRUPTCY ESTATE

Amber King*

This article examines how a client's medical products liability defect claim is affected when the client unknowingly omits the potential claim from his or her bankruptcy estate. When a medical device is implanted in a patient, there is potential that a defective product has been implanted arising to a claim in products liability. When that patient files for bankruptcy prior to knowing about the defect, his or her claim may be the property of the bankruptcy estate. A defect claim is determined as property of the bankruptcy estate under different approaches depending on the state where the cause of action accrues. This becomes especially important when a client has subjected themselves to a class action or multi-district litigation suit, particularly with tiered settlement amounts limiting the recoverable amount, which ultimately administers such recoverable funds through bankruptcy. In addition, practicing attorneys from both the bankruptcy field and the personal injury field are subject to certain ethical implications. The implications can arise from several factors. One such factor is a failure to inquire about a potential claim. Another factor is omitting a potential claim from the bankruptcy estate.

The focus of this article is to address the need for uniform rules in the United States Bankruptcy Courts across all states. The rule would allow a bankruptcy petitioner the ability to predict when a potential medical device products liability claim becomes property of the estate. In the absence of such a rule, this article serves as a warning for practitioners of the potential claim. Further suggestions are made for preventing unethical implications such as failing to list potential claims as property of the estate.

* Graduate, Arizona Summit Law School

I. ILLUSTRATION

Jerry is a fifty-two-year-old man who lives in State A. Jerry's twin brother, Tommy, lives in State B. Jerry's and Tommy's respective doctors have told both brothers they will need hip replacements. In 2007, both brothers underwent hip replacement surgery and are implanted with a hip device. In 2008, each brother decides to file for bankruptcy due to financial hardship. Each of the brother's bankruptcy proceedings were administered and closed near the end of 2008. In February 2010, Jerry and Tommy discover that their hip devices caused some metal poisoning and must be replaced. The doctors are unable to tell when the first instance of metal poisoning began. Ultimately, the device was recalled in January 2010. Both brothers decide to bring a claim against the hip device manufacturer under a products liability defect cause of action. Little did they know that because the device was implanted prior to the bankruptcy proceedings, each brother would likely have to reopen the bankruptcy estate in order to list their claims as part of the estate, possibly relinquishing their rights to recovery for the products liability action over to the bankruptcy trustee.

However, the decision to submit the products liability claim as part of the bankruptcy estate depends greatly upon the domicile of each brother. In State A, Jerry must notify the bankruptcy of the claim because his claim accrued prior to filing for bankruptcy. Whereas Tommy, in State B, does not have to notify the bankruptcy court of the claim because his claim accrued after the bankruptcy proceeding was commenced. The result of each circumstance leaves both brothers questioning why there are different results in such similar circumstances.

II. BANKRUPTCY BACKGROUND

Congress has the power to establish "uniform laws on the subject of bankruptcies."[1] Bankruptcy courts are units of the United States District Courts established under Article III of the United States Constitution.[2] The district courts have original and exclusive jurisdiction over all cases under United State Code Title 11 Bankruptcy.[3] Furthermore, all civil proceedings arising under Title 11 or related to Title 11 cases shall be subject to original jurisdiction, but not exclusive jurisdiction, of the district courts.[4] However, the district court shall have exclusive jurisdiction over property of the estate.[5] Exclusivity of jurisdiction means that the bankruptcy court has the restricted "nondelegable control over administration of an estate in its possession."[6] Exclusivity does not mean that the bankruptcy court has exclusive jurisdiction over all cases or controversies in which the debtor has an interest.[7]

A bankruptcy estate is created upon commencement of a case under sections 301, 302, or 303 of Title 11.[8] The bankruptcy estate is comprised of property, including all "legal or equitable interests of the debtor in property as of the commencement of the case."[9] The estate includes all causes of action in which the debtor has an interest as of the commencement of the

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[1] U.S. CONST. art. I, § 8.
[2] U.S. CONST. art. III; 28 U.S.C.A. § 151 (West 2014).
[3] 28 U.S.C.A. § 1334(a) (West 2014).
[4] 28 U.S.C.A. § 1334(b) (West 2014).
[5] 28 U.S.C.A. § 1334(e)(1) (West 2014).
[6] Callaway v. Benton, 336 U.S. 132, 141-42 (1949).
[7] *Id.* at 142.
[8] 11 U.S.C.A. § 541(a) (West 2014).
[9] 11 U.S.C.A. § 541(a)(1) (West 2014).

case.[10] "Legal and equitable interests of the debtor"[11] include all cases and controversies[12] including claims for medical product defects. There are three parts to this requirement: (1) all legal and equitable interest of the debtor, (2) in property, (3) as of the commencement of the case.[13] "[I]n property"[14] includes the rights to money damages from a product defect cause of action.[15] Property of the estate is a broad term and encompasses "all [types] of property including tangible or intangible property, *causes of action*, and all other forms of property."[16] "[A]s of the commencement of the case"[17] refers to the commencement of the bankruptcy action by filing the petition.[18] Property of the estate is subject to the control of the bankruptcy court and trustee until the case is closed.[19] Therefore, all causes of action in which the debtor has an interest as of the commencement of the case must be included in the administration of the property of the estate.

Bankruptcy judges may hear and determine core proceedings arising under Title 11, including, allowing or not allowing exemptions of property of the estate.[20] In addition, any interest

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[10] *In re* Ionosphere Clubs, Inc., 156 B.R. 414, 436 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994).

[11] 11 U.S.C.A. § 541(a)(1) (West 2014).

[12] U.S. CONST. art. III, § 2.

[13] 11 U.S.C.A. § 541(a)(1) (West 2014).

[14] *Id.*

[15] *In re* Webb, 482 B.R. 669, 671 (Bankr. M.D. Ga.), *on reconsideration*, 484 B.R. 501 (Bankr. M.D. Ga. 2012).

[16] United States v. Whiting Pools, Inc., 674 F.2d 144, 149, n.10 (2d Cir. 1982).

[17] 11 U.S.C.A. § 541(a)(1) (West 2014).

[18] Fed. R. Bankr. P. 1002 (2014).

[19] Daniel Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081, 1092 (2012).

[20] 28 U.S.C.A. § 157(b)(2)(B) (West 2005).

in property the estate acquires after commencement is considered property of the estate.[21] There is a strong distinction between the debtor and the estate. That distinction rests on whether the interest in property is the interest of the debtor, as noted in the language of 11 USCA 541(a)(1) or that of the estate, as noted in the language of 11 USCA 541(a)(7).[22] A cause of action for a product defect is a property interest acquired by the debtor.[23] A cause of action for a product defect is not an interest in property that the estate can acquire.[24] A tort action arising from injuries sustained post-petition do not become property of the estate, as it is an interest of the debtor personally and not one which the estate acquires post-petition.[25] When a cause of action arises prior to the commencement of the debtor's bankruptcy action, it is property of the estate.[26] A debtor seeking relief[27] under bankruptcy must file a schedule of assets consisting of the debtor's interests that would become property of the estate.[28] Because a product defect cause of action is a property interest of the debtor and not the estate, only those causes of

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[21] 11 U.S.C.A. § 541(a)(7) (West 2010).

[22] "There is of course a distinction between the debtor and her estate." *In re* Doemling, Bankr. L. Rep. (CCH) ¶ 73,523 (Bankr. W.D. Pa. July 7, 1990); *see also* 11 U.S.C.A. § 541(a)(1) (West 2010) ("[A]ll legal or equitable *interests of the debtor* in property as of the commencement of the case.") (emphasis added), *with* 11 U.S.C.A. § 541(a)(7) (West 2010) ("Any interest in property *that the estate acquires* after the commencement of the case.") (emphasis added). Noting a difference between interests of the debtor and interests of the estate.

[23] *In re* Doemling, Bankr. L. Rep. (CCH) at ¶ 73,523.

[24] *Id.*

[25] 11 U.S.C.A. § 541(a)(7) (West 2010); 3A Bankr. Serv. L. Ed. § 29:129 (2015).

[26] 11 U.S.C.A. § 541(a)(1) ("[A]ll legal or equitable interest of the debtor in property as of the commencement of the case.").

[27] 11 U.S.C.A. § 301(b) (West 2014).

[28] 11 U.S.C.A. § 521(a)(1)(B) (West 2014) (stating that filing is required "unless the court orders otherwise").

action that accrue prior to or at the commencement of the bankruptcy action become property of the estate.[29] Therefore, a cause of action as property of the estate only applies to those causes of action that accrue prior to or at the commencement of the bankruptcy action.

Thus, it must be determined at what time a cause of action accrues for bankruptcy purposes. The time of accrual will determine whether the interest of the debtor arises pre-petition or post-petition. The ultimate goal is to schedule the property interest as an asset or to omit the asset confidently as a post-petition interest.

III. DETERMINING A CAUSE OF ACTION

All potential causes of action that accrue prior to or at the time the debtor files for bankruptcy, regardless of whether the cause of action is known at the time, is considered property of the estate.[30] The debtor has a duty to schedule any cause of action that accrued pre-petition.[31] If the cause of action is known at the time of filing the petition, there are steps that need to be taken in order to effectively administer the property interest.[32] On the other hand, there is no duty for a debtor to schedule a cause of action that accrues after the commencement of the bankruptcy action.[33]

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[29] 11 U.S.C.A. § 541(a)(7) (noting property of the estate includes "any interest in property *the estate* acquired after the commencement of the case.") (emphasis added).

[30] Barger v. City of Cartersville, 348 F.3d 1289, 1291 (11th Cir. 2003).

[31] 11 U.S.C.A. § 521 (West 2014).

[32] 11 U.S.C.A. § 350 (West 2014).

[33] Cusano v. Klein, 264 F.3d 936, 947 (9th Cir. 2001); "Pre-petition causes of action are part of the bankruptcy estate and post-petition causes of action are not." *In re* Brown, 363 B.R. 591, 608 (Mont. 2007) (quoting Witko v. Menotte *(In re* Witko*)*, 374 F.3d 1040, 1042 (11th Cir. 2004)).

In reference to Jerry and Tommy, claims regarding the hip replacement devices are founded under a products liability cause of action. Products liability causes of action only become property of the estate if the debtor had an interest in such cause of action prior to or at the time of filing their bankruptcy petition.[34] Property interest in a cause of action is determined by the time the cause of action accrues.[35] The bankruptcy courts look to the states in determining when the property interest in a products liability cause of action arises.[36]

The bankruptcy code refers to the term "claim" as meaning "a right to payment."[37] A right to payment arises when the state law cause of action accrues.[38] The "accrual test" looks to when state law determines that a person has an interest in a cause of action.[39] Under state law, the determination of when a cause of action accrues varies and is directly related to the statute of limitations. The majority of the states follow the "time of injury" standard.[40] However, when an injury is "not readily apparent," the time of injury is based on the time of discovery of the injury or when the plaintiff reasonably should have discovered such

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[34] 3A Bankr. Serv. L. Ed. § 29:160 (2015).

[35] *Id.*

[36] State law determines whether a debtor has an interest in property at the time of filing the bankruptcy petition. Lobbrecht v. Chendrasekhar, 744 N.W. 2d 104, 107 (Iowa 2008); *see also In re* Folks, 211 B.R. 378, 384 (B.A.P. 9th Cir. 1997) ("Bankruptcy law looks to state law to determine the property rights of the debtor.").

[37] 11 U.S.C.A. §101(5)(A) (West 2010) (defining the term "claim" as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

[38] *In re* Grossman's Inc., 607 F.3d 114, 118 (3d Cir. 2010).

[39] *Id.* at 120.

[40] 43 CAL. JUR. 3D *Limitation of Actions* § 78, Westlaw (database updated Nov. 2015).

injury.[41] For example, Massachusetts provides, "under the discovery rule, the statute of limitations begins when the plaintiff discovers, or reasonably should have discovered, that he has been harmed or may have been harmed by defendant's conduct."[42] The "not readily apparent" standard for discovery is termed as the "discovery rule" among the states that recognize such standard.[43] The majority of states recognizes the discovery rule and have recognized its impact in determining cause of action accrual for those injuries that are not immediate or readily apparent. This is especially true in products liability actions where a medical device is implanted and the injury is internal to the patient, only to be discovered by invasive testing. The discovery rule is a limitation rule only available to tort plaintiffs when the fact of injury of the offending defect is not immediately presented and is only discovered by reasonable due diligence.[44] Many times, an injury from a medical device is not readily apparent and only manifests itself after the time of implant or such time in the future after extended use.[45] For example, Jerry and Tommy were both injured, however, their injuries did not become apparent until the blood test results revealed metal poisoning. The injury occurred sometime earlier, and may even have progressively worsened the longer the devices were implanted. This demonstrates an example of the latency of a medical device implant and the effect of later discovery of an injury.

A few states defer to other methods of determining accrual, delineating from the triggering event of discovery of injury or

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[41] N.C. GEN. STAT. § 1-15 (2015).

[42] Koe v. Mercer, 876 N.E.2d 831, 836 (Mass. 2007).

[43] N.C. GEN. STAT. § 1-15.

[44] AM. L. PROD. LIAB. 3D § 47:32, Westlaw (database updated Nov. 2015).

[45] *Id.*

facts giving rise to a cause of action.[46] For example, Maine begins accrual at the time in which the implant or procedure is performed.[47] However, the date of implant or procedure is not a strong indicator of accrual because an injury has not necessarily occurred. Missouri, Idaho, Oregon, and Alabama limit accrual specifically to the time of injury.[48] Limiting accrual to the time of injury can be difficult to detect in a medical device products liability action because the device is implanted and not readily apparent without further invasive testing. Further, Oklahoma determined accrual from the time a plaintiff could maintain an action, which may or may not incorporate the discovery rule as a necessity for determining causation.[49]

As illustrated with Jerry and Tommy, the outcome of accrual is different based on each party's domicile. Jerry lives in a state similar to Maine. In Jerry's state, a cause of action accrues at the time of the procedure or implant. Therefore, Jerry's cause of action accrued in 2007, at the time of his implant. The cause of action accrues even though Jerry did not know he was injured until February 2010 when blood tests revealed metal poisoning. Tommy lives in a state like Massachusetts, which follows the discovery rule. Tommy did not discover his injury until February 2010 when the blood tests showed metal poisoning. Under the discovery rule, however, the determining factor is when the

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[46] Francis McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 419 (1980).

[47] Descoteau v. Analogic Corp., 696 F. Supp. 2d 138, 141 (D. Me. 2010).

[48] IDAHO CODE ANN. § 5-219 (West 2015); King v. Nashua Corp., 763 F.2d 332, 333 (8th Cir. 1985); Adams v. Armstrong World Indus., Inc., 596 F. Supp. 1407, 1408-09 (D. Idaho 1984); Griffith v. Blatt, 51 P.3d 1256, 1260 (Or. 2002); Garren v. Commercial Union Ins. Co., 340 So. 2d 764, 766 (Ala. 1976).

[49] Baxley v. Harley-Davidson Motor Co., 875 N.E.2d 989, 990 (Ohio Ct. App. 2007).

injury was discovered or reasonably should have been discovered. Tommy could have reasonably discovered possible injuries a month prior, in January 2010, when the recall of the device was issued. Therefore, Tommy's cause of action accrued either in January 2010, the time of the recall, or February 2010, when he discovered the metal poisoning. Both brothers' bankruptcy actions were filed in 2008. Because Jerry's cause of action accrued under state law in 2007, his claim for injury and the cause of action become property of his estate. Jerry must re-open his bankruptcy matter and have the cause of action administered through bankruptcy court. In contrast, Tommy, living in a discovery state where the discovery was made after the bankruptcy commenced, is not required to have his cause of action administered through bankruptcy.

When determining the cause of action accrual *for bankruptcy purposes*, discovery of the injury is irrelevant.[50] Discovery of the injury poses notions of difficulty in determination of the exact time of the cause of action accrual.[51] Discovery can be made with only "some" evidence or "substantial" evidence.[52] Further, either objective knowledge or actual knowledge of the injury and its cause is required.[53] These requirements make it difficult to determine which of the discovery provisions are most conducive to the facts of any given case.[54] A cause of action can accrue for different purposes at different times. More specifically, it is different for statute of limitations purposes than it is for bankruptcy purposes.[55] This difference is because a cause of

[50] *In re* Swift, 129 F.3d 792, 798 (5th Cir. 1997).
[51] *Id.*
[52] McGovern, *supra* note 48, at 421.
[53] *Id.*
[54] *Id.*
[55] *In re* Swift, 129 F.3d at 798.

action for ownership purposes can occur prior to statute of limitations purposes.[56] This distinction of accruals is evident where an injury has occurred well in advance of the discovery of the injury, such as in latent injuries from product defects.

Many legislatures have been hesitant to put discovery provisions in statutes.[57] The hesitation derives from the inherent inability to place a time limit on discovery.[58] Discovery can be within one year, or, in serious latent injuries, more than ten years. The judiciary requests discovery provisions to aid in the ease and predictability of claim-accrual determination.[59] The length of time it may take a person to "discover" an injury is never ending.[60] This latency in discovery greatly affects a defendant manufacturer. For example, when an injury is not discovered until ten years after implantation, the defendant must now answer for a ten-year-old defect, which may or may not be a true defect. It is likely that the defect is exacerbated by the lengthy time of use. For this reason, legislatures have usually included statutes of repose to limit the time to bring a defect claim founded upon discovery, typically ten years.[61] Statutes of repose are heavily supported by the manufacturing industry as well.[62] Manufacturers support the limits because an unknown limitation of time to bring a claim places an undue burden on affordable insurance for the manufacturer to protect against these latent claims.[63] The discovery timing methods are a bal-

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[56] *Id.*

[57] McGovern, *supra* note 48, at 422-23.

[58] *Id.* at 422.

[59] *Id.* at 422-23.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Mary Donnelly, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. L. REV. 123, 124 (1980).

ance between claims unfairly precluded by missing the applicable time of commencement and those claims that have run stale.[64] The requirement of strict balancing between discovery and stale claims is the reason discovery is limited to those injuries that are not immediately apparent.[65] Immediately apparent injuries remain based on the "time of injury" standard.[66] In the matter of medical device implants, injury is typically not immediately apparent. The discovery rule is one option the bankruptcy court could use to determine the cause of action accrual for bankruptcy purposes. The same challenges imposed in the civil action context are faced in the bankruptcy action. Timing with discovery is imminent and does not pinpoint the exact time of an injury, which is needed for a true cause of action determination.

At least one court has looked at whether the elements of the products liability claim occurred prior to or after filing, as opposed to the general time of discovery rule.[67] However, an essential element in a medical device implant products liability cause of action is the injury, which may not be immediately apparent.[68] Other courts look to whether the cause of action is "sufficiently rooted in [Debtor's] pre-bankruptcy past."[69] However, the "sufficiently rooted" standard is a difficult one to apply to products liability causes of action and should be disregarded.

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[64] Elizabeth A. Gordon, *Products Liability, The Statute of Limitations, and the Discovery Rule After North Coast Air v. Grumman Corp.*, 25 WILLIAMETTE L. REV. 901, 904 (1989).

[65] *Id.* at 905.

[66] *Id.*

[67] *In re* Webb, 484 B.R. at 505. The discovery rule does not apply to the present circumstances. The Court will look to whether the elements of the product liability claim occurred before or after filing.

[68] *Id.*

[69] *In re* Brown, 363 B.R. at 608 (citing Field v. Transcontinental Ins. Co., 219 B.R. 115, 119 (E.D.Va. 1998), *aff'd* 173 F.3d 424, 1999 WL 102052 (4th Cir. 1999)).

The plain reading of "sufficiently rooted" could impose that almost every medical device implantation that occurs prior to bankruptcy is property of the estate, regardless of whether an injury occurs pre- or post-petition.

Another option is to limit the claims to the "date of sale" or "date of the implant." This option is a reasonable standard for predicting potential liability and causes of action.[70] However, there are implications for a time of implant rule where a claim may be barred before any injury has occurred, when applying the date of implant, and the latency extends beyond some arbitrary time limit.[71] There may also be due process implications with this method, such as barring a claim before it ever accrues.[72]

For these reasons, the "time of injury" should then be the driving factor to determine the timing of the cause of action for bankruptcy purposes. The time of injury is the moment a "single wrongful invasion of a single primary right," in this case, bodily safety, is imposed on the victim.[73] Therefore, the cause of action is not based upon the facts, but upon the wrong committed surrounding the facts.[74] The cause of action exists when the facts make the wrong appear.[75] In general, this leads to the determination that the cause of action accrues when the "plaintiff can file suit and obtain relief,"[76] focusing on the time the injury occurs.[77] The downfall to the "time of the injury" in a products liability action is that it is not always easily ascertainable as to the time of the specific injury. Uncertainty as to the time of injury is a common problem with medical device implants. Upon implantation, the device is not always defective until such

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[70] Donnelly, *supra* note 65, at 126-27.
[71] *Id.* at 146.
[72] *Id.*
[73] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 723 (1966).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *In re* Swift, 129 F.3d 792, 798 (5th Cir. 1997)..

time much later in its use. In the hypothetical regarding Jerry and Tommy, the hip implants themselves were not per se defective until they were implanted. Upon use, they caused metallic poisoning, injuring Tommy and Jerry. In addition, many other patients with the same hip device may never sustain any injuries from their implants. It is difficult to know the exact time that the metallic poisoning occurred, and it was only until the brothers went to their physicians and submitted to blood testing that there was any indication that an injury had occurred. Further, there is an inherent inequity in a strict time of injury method.[78] Strict time of injury methods are difficult to apply to latent injuries that may occur earlier than when the injury manifests itself. The discovery rule was created as a solution to this very problem—balancing claims not readily apparent and claims that become stale when not commenced in a timely manner.[79] For this reason, discovery rules of some form have been implemented in most jurisdictions.[80]

However, many of the bankruptcy courts decline to follow the "accrual" test, as it heavily conflicts with the definition of a claim under Title 11 and as adopted by the Bankruptcy Reform Act of 1978.[81] The House and Senate reports note that the addition of the definition of the claim is a significant departure from the absence thereof.[82] As such, the broad definition is contemplated to encompass all legal obligations of the debtor.[83] This determinate is regardless of how "remote" or "contingent" the claim may be.[84] The Supreme Court further expanded this

[78] Gordon, *supra* note 66, at 904.

[79] *Id.*

[80] Gordon, *supra* note 66, at 904.

[81] *In re* Grossman's Inc., 607 F.3d at 120; *see* 11 U.S.C.A. §101(5)(A) (defining "claim"); *see also* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[82] H.R. REP. NO. 95-595, at 309 (1977); S. REP. NO. 95-989, at 21 (1978).

[83] H.R. REP. NO. 95-595, at 309 (1977); S. REP. NO. 95-989, at 21 (1978).

[84] H.R. REP. NO. 95-595, at 309 (1977).

determinate by saying, "a bankruptcy court does not apply the law of the state where it sits . . . [but] must administer and enforce the Bankruptcy Act as interpreted by this court in accordance with the authority granted by Congress to determine" how to administer the estate.[85] Furthermore, the "accrual test" ignores the fact that a claim can exist before any right to payment exists under some state law.[86] *In Re Grossman* overruled the "accrual test" because of the test's failure to incorporate the modifiers in the definition for a claim after the "right to payment." [87] These modifiers included such terms as "contingent," "matured," and "unmatured."[88] However, this ruling leaves a void in cause of action accruals as the determinative for when a claim must be scheduled as part of the bankruptcy estate.[89]

Therefore, the court's reasoning for moving away from the discovery rule and looking to the time of injury is circular because it places the question as to the cause of action accrual in a loop with no end. The discovery rule does not work for ownership of a cause of action, but is sufficient for statute of limitations purposes. The time of injury for a medical device defect is not easily ascertainable and pinpointing the exact time is neither calculable nor exact. Using the strict language of the Bankruptcy Reform Act of 1978 is too broad and encompasses potential claims that have not even risen to the level of a cause of action.[90] This broad reading of the Act includes potential claims where an injury has yet to occur.[91] The bankruptcy petitioner is put up against a wall with no option but to give up the cause of action to the estate, whether the cause of action actually accrued

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[85] Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162-63, 167 (1946).

[86] *In re* Grossman's Inc., 607 F.3d 114, 120 (3d Cir. 2010)..

[87] *Id.*

[88] *Id.*

[89] *Id.* at 121.

[90] *Id.*

[91] *Id.*

pre-petition. A void is apparent and some reference to a uniform rule under these circumstances, or a set method for calculating the cause of action accrual for bankruptcy purposes is recommended.

IV. PREDICTABILITY OF CAUSE OF ACTION FOR BANKRUPTCY PURPOSES

The tort system seeks to promote equity and fairness[92] instead of predictable results and definite rules.[93] Equity and fairness are best achieved in tort matters through rulings tailored to individual facts.[94] There is an inherent need to protect plaintiffs with latent injuries to allow a sufficient method and timing for raising their claim.[95]

Alternatively, bankruptcy was created to offer benefits to both the debtors and creditors. The debtors get a "fresh start," while creditors receive some payment on the debt owed by the debtor.[96] The purpose of bankruptcy is to create a "fresh start" for the debtor while giving the creditors some relief, if not full relief, from the debtor's obligations.[97] Debtors can retain certain property that creditors cannot reach.[98] Retention of certain property allows debtors to have sufficient assets to "start fresh" with their finances.[99] "Fresh start" provides that the debtor has

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[92] McGovern, *supra* note 48, at 431.

[93] *Id.*

[94] *Id.* at 433.

[95] Gordon, *supra* note 66, at 904.

[96] Saul P. Levmore, *First Annual Paulus Lecture Series: Fables, Sagas, and Laws*, 33 WILLIAMETTE L. REV. 485, 488-89 (1997).

[97] *Id.*

[98] Rose J. Murphy, *Bankruptcy Exemptions: The Need for Uniformity in the United States and Canada*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 127 (2001).

[99] *Id.*

retained the basic assets needed for an immediate economic recovery.[100] A "fresh start" does not mean that creditors are necessarily left to minimum asset recovery.[101] Bankruptcy strives to also deter the debtor in setting the example that broken promises and taking advantage of creditors is not tolerated.[102] To achieve these purposes, some uniformity or predictability in bankruptcy rules is needed.

A debtor is allowed certain exemptions of property from a creditor's reach.[103] These exemptions include properties that are essential for the livelihood and protection of debtors from becoming impoverished or reliant on state aid.[104] The Bankruptcy Code allows for exemptions of a portion of personal injury settlements either under the federal standard or state standards.[105] For example, the federal exemption amounts up to $22,975.00, for the actual injury.[106] The state statutes regarding exemption amounts vary and often allow for a choice between the state exemptions and federal exemptions.[107] Some states even restrict entitlement to federal exemptions.[108] For example, under Arizona law, residents are not entitled to federal exemptions, including the personal injury exemption.[109] The state exemptions may or may not exceed the limits of the federal

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[100] *Id.* at 132.

[101] *Id.*

[102] *Id.*

[103] Thomas Keefe, *Validity, Construction, and Application of State Exemption Statutes for Proceeds of Personal Injury or Wrongful Death Lawsuits*, 99 A.L.R.6th 481 (2014).

[104] *Id.*

[105] 11 U.S.C.A. § 522 (West 2010).

[106] Personal injury exemptions are designed to cover only payments covering actual bodily injury. 11 U.S.C.A. § 522(d)(11)(D) (West 2010); *In re* Territo, 32 B.R. 377, 381 (Bankr. E.D.N.Y. 1983).

[107] Keefe, *supra* note 105, at 481.

[108] *Id.*

[109] ARIZ. REV. STAT. ANN. § 33-1133(B) (2015) ("Notwithstanding subsection A, in accordance with 11 U.S.C. 522(b), residents of this state are not

exemption.[110] For example, Nevada has a personal injuring exemption stating that compensation shall not exceed $16,150, an amount below the Federal exemption limit.[111] Alternatively, in Maryland, there is no limit to the personal injury compensation exempted, so long as it is reasonable.[112] The Maryland courts allowed an exemption of personal injury compensation of $4.5 million, noting the amount as reasonable for the injuries sustained.[113] The basis for exemptions is the protection of the debtor's livelihood [114] and should extend to a debtor's expectation of latent injuries that give rise to delayed causes of action of which should or should not become property of the estate. Absent such predictability and uniformity in calculating accrual periods, debtors will not have the same or similar "fresh start" as another debtor similarly situated from another state.[115] This is evident in the example of Jerry and Tommy, where Jerry's cause of action accrued prior to bankruptcy and Tommy's cause of action accrued after bankruptcy. Jerry must

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entitled to the federal exemptions provided in 11 U.S.C. 522(d). Nothing in this section affects the exemptions provided to residents of this state by the constitution or statutes of this state.").

[110] Murphy, *supra* note 100, at 128.

[111] NEV. REV. STAT. § 21.090(u) (2013) ("Payments, in an amount not to exceed $16,150, received as compensation for personal injury, not including compensation for pain and suffering or actual pecuniary loss, by the judgment debtor or by a person upon whom the judgment debtor is dependent at the time the payment is received.").

[112] MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(2) (2014) ("Except as provided in subsection (i) of this section, money payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings. This exemption includes but is not limited to money payable on account of judgments, arbitrations, compromises, insurance, benefits, compensation, and relief. Disability income benefits are not exempt if the judgment is for necessities contracted for after the disability is incurred.").

[113] *In re* Butcher, 125 F.3d 238, pincite (4th Cir. 1997).

[114] *Id.*

[115] Murphy, *supra* note 100, at 132.

submit his claim to the bankruptcy court for administration. While there may be an exemption, it could limit his compensation for the injury, and the bankruptcy estate receives the residual. Tommy, however, will not have his claim administered in the bankruptcy action, which allows for full compensation for his injury.

In seeking a solution to the problem of calculating a cause of action accrual for bankruptcy purposes, there are additional third party interests that must be taken into account. There are the creditors, and, as in the hypothetical, when the injury manifests after bankruptcy, there are the medical providers, insurers, and other costs arising from the injury. The medical providers, insurers, and other vendors incurring costs from the injured patient often place liens on the injured party's claim.[116] The liens will attach to exempt funds depending on how the lien was obtained, either statutorily, judicially, or in equity.[117] A petitioner can seek lien avoidance, however, it is a ruling the court must make.[118] If the cause of action is administered through the bankruptcy, the lien holders may not recover on their liens, or may have the liens significantly reduced through the administration of the estate.[119] There must be a balance between the interest of the bankruptcy court and the interests of tort plaintiffs, including any lien holders on the injury cause of action.[120]

Congress clearly provided in 11 U.S.C. § 541 a strong distinction between state law and other non-bankruptcy law.[121] "Congress, when it desired to do so, knew how to restrict the

[116] Keefe, *supra* note 105, at 481.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] "Nothing in § 541 suggests that the phrase 'applicable non-bankruptcy law' refers, as petitioner contends, exclusively to state law." Patterson v. Shumate, 504 U.S. 753, 758 (1992).

scope of the applicable law to 'state law' and did so with some frequency." [122] Congress did not contemplate the state bankruptcy rules when considering causes of action.[123] The legislation is silent in regards to any state law requirement. The decision to look to state law is purely of a judicial nature and can be reviewed, reevaluated, or replaced by an act of the legislature.[124] Under the Rules of Decision Act, except where "[a]cts of congress" provide, state law, including judicial decision, will prevail.[125] The legislature has the authority to create a uniform law to promote predictability in cause of action accrual for bankruptcy purposes.[126] Further, bankruptcy courts exist to administer one set of rules—the Bankruptcy Code.[127] The bankruptcy courts, sitting in every district and serving debtors of every state, are required to interpret multiple sets of laws.[128] Having a rule of predictability eliminates the need to interpret multiple state laws and allows for a more streamlined judicial administration of bankruptcy estates.

Implementing a rule that provides predictability to causes of action for medical device product liability claims would further the interests of both the judiciary and the legislature to create a more uniform method for cause of action calculation in latent injuries. It is "inherently unfair" that the outcome of a bankruptcy matter is dependent upon the location of the debtor, when all other facts of the injury are similar to other debtors.[129] The

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[122] *Id.*

[123] *Id.*

[124] 28 U.S.C.A. § 1652 (West 2014).

[125] *Id.*

[126] U.S. CONST. art. I, § 8 ("The Congress shall have the Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;"); 28 U.S.C.A. § 1652 (West 2014).

[127] Daniel Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081, 1137-38 (2012).

[128] *Id.*

[129] *Id.* at 1138.

inability to predict outcomes gives bankruptcy law the appearance of unfairness and inequality among claimants.[130] Where the perception of bankruptcy is a fair process by giving the debtor a "fresh start" and relieving the creditors of some of the debtor's obligations, the inability to predict outcomes results in unfairness. A uniform treatment of debtors' injury claims as property of the bankruptcy estate mitigates any misconception that the law is irrational and unfair.[131]

A rule promoting fairness in administering a "fresh start" to debtors and payment to creditors should be general and uniform. General and uniform rules for determining cause of action accrual for bankruptcy purposes would demonstrate that "all persons under the same conditions and in the same circumstances are treated alike." [132] Creditors are equally affected together with the debtors and potentially "lose out" on their personal injury settlements when causes of action to the bankruptcy estate are submitted to the bankruptcy court. Creditors, who often operate in multiple states, have varied expectations that personal injury proceeds will be used in administering the estate.[133] Having a rule giving balance to predictability with determining when causes of action become property of the state helps ensure a creditor can predict which debtors in bankruptcy will have additional funds available from a cause of action to relieve their debt.[134] This further gives notice of the bankruptcy courts' purpose to deter debtors and sends the message that "broken promises and taking advantage of creditors is not tolerated." [135] Having a rule promoting

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[130] *Id.*
[131] *Id.*
[132] Murphy, *supra* note 100, at 136.
[133] *Id.* at 141.
[134] *Id.*
[135] *Id.* at 132.

predicability ensures stable financial relations between the debtor and the creditor.[136]

Therefore, a uniform or predictable rule regarding the determination of property of the estate provides for fair and equitable treatment of the debtors, and assists the creditors with what to expect when a debtor commences a bankruptcy action.[137]

V. RECOMMENDED UNIFORM LAW FOR PREDICTABILITY

For injuries not readily apparent, the time of implant or sale of the device is not effective to determine a cause of action because, often, an injury has yet to occur until extended use of the device occurs. The time of injury method for determining cause of action accrual is not sufficient. Time of injury cannot always be easily ascertained, and sometimes the injury, while present in a person's body, is not immediately manifested. Because the discovery rule sets a bar for statute of limitations purposes, the discovery rule is not entirely effective for bankruptcy purposes. A person could reasonably have a cause of action before discovery where the injury, although not apparent, has already occurred and is only discovered some time later. A void is left as to what rule would best predict the results for bankruptcy estates involving debtors who have a medical device implant.

One recommendation is to have a cap on the cause of action accrual. For example, accrual does not exceed the time a medical device has been issued a recall. This allows for some predictability that, regardless of when the injury is discovered, a debtor cannot go beyond the recall date to prevent the cause of action from being property of the estate. This moment in time allows the debtor reasonable notice that a defect is present and reasonable time to determine whether an injury has occurred. The issuance of a recall is a strong indicator of a problem with

[136] Austin, *supra* note 129, at 1137.
[137] Murphy, *supra* note 100, at 128.

a medical device and a potential cause of action. From 2003 to 2012, the number of medical device recalls increased over ninety-seven percent, attributing to "increased awareness by device firms" in identifying problems with devices after being on the market.[138] Recalls are instituted in more than one way, including reports by the manufacturer of defects, Food and Drug Administration inspections leading to the issuance of recalls, and health reports from different reporting systems, usually by medical providers.[139] This increased ability to issue recalls[140] provides for a strong presumption that injuries have or could result from the device use. The FDA, through its efforts in increasing recall issuance and monitoring, noted an increase in recalls from 604 in 2003 to 1,190 in 2012.[141] As to the inquiry on injury, if it were not initiated prior to a recall, it would likely occur after the recall. Discovery is then determined by the time of recall because a patient should have known that the injury could occur at that time and should have taken measures to inquire and verify whether any injury has occurred.

Similar to using the statutes of repose for statute of limitations purposes, using the date of recall places a ceiling on causes of action. In the bankruptcy context, it places the ceiling on when a cause of action for products liability is classified as property of the bankruptcy estate. By using the time of recall as the ceiling, other questions arise as to when the injury is presented

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[138] *Medical Device Recall Report, FY2003 to FY 2012*, FDA, page 2, http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDRH/CDRHTransparency/UCM388442.pdf (last visited April 10, 2015).

[139] *FDA 101: Product Recalls- From First Alert to Effectiveness Checks*, FDA, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm049070.htm (last visited April 10, 2015).

[140] *Medical Device Recall Report, FY2003 to FY 2012*, FDA, page 7, http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDRH/CDRHTransparency/UCM388442.pdf (last visited April 10, 2015).

[141] *Id.*

prior to recall. In that event, the logical progression is to use the time of discovery of the injury. The time of injury is too far removed from latent injuries or injuries that do not manifest immediately to the injured person. Therefore, the most reasonable option for cause of action determination for bankruptcy purposes is time of discovery.

VI. CAUTIONS IN PRACTICE

Absent a rule aiding in predicting when a cause of action accrues for bankruptcy purposes in the medical device products liability context, practitioners, both in preparing bankruptcy petitions and personal injury representation, must take steps to maintain ethical integrity. Not being aware of the cause of action accrual implications can have negative effects for both the counsel preparing a bankruptcy petition and counsel representing a personal injury victim, including ethical reprimands and even criminal sanctions.[142]

Bankruptcy practitioners are not only subject to, for purposes of this article, ABA Model Rules of Professional Conduct, but also the ethical standards set forth in the Bankruptcy Reform Act of 1978.[143] Bankruptcy attorneys can unintentionally subject themselves to bankruptcy fraud for failure to list items as the potential property of the estate, including potential claims.[144] It is a criminal offense to "knowingly and fraudulently conceal assets."[145] When it is not clear if a claim is considered an asset that must be reported to the estate, it is in the best interests of

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[142] Robin E. Phelan & John D. Penn, *Bankruptcy Ethics, An Oxymoron*, 5 AM. BANKR. INST. L. REV. 1, 3 (1997); Harry M. Sterling, *Ethical Problems in Bankruptcy*, 14 COLO. LAW. 2147, 2148 (1985).

[143] Sterling, *supra* note 144, at 2148.

[144] Phelan & Penn, *supra* note 144, at 2-3.

[145] *Id.* at 3.

the attorney to report the claim as an asset and let the bankruptcy court administer the claim as property or abandon the claim.[146] Under 11 U.S.C.A. § 554, abandonment of property—in this case, a products liability claim—can be abandoned under two instances: by the trustee or by the judge.[147] Any remaining property not abandoned is considered administered at the closing of the bankruptcy action, as long as it has been scheduled.[148] Any property not scheduled and administered or abandoned is still considered property of the estate after closing of the bankruptcy action.[149] A petitioner who has not revealed that he or she has a medical device implant, nor that he or she knows of any potential claim, may unintentionally fail to disclose such assets in the petition. While the attorney may not knowingly conceal this potential asset, a failure to ask the petitioner during pre-petition meetings about any possible implants may raise concerns in later bankruptcy litigation when a claim arises under products liability. Fraudulently concealing assets requires the element of intent.[150] A bankruptcy attorney may not "intend" to conceal a possible personal injury claim. However, it can be argued that the attorney knew potential claims for personal injury might become property of the estate. Further, it can be argued that the attorney intentionally failed to inquire about potential claims with the intent to not disclose such potential claims in the bankruptcy petition. A petitioner hires a bankruptcy attorney with the expectation that the attorney will help the petitioner in understanding all assets that must be listed and what exemptions to claim, if any. This reliance places a greater burden on the bankruptcy attorney to cover all potential assets that must be listed. A simple inquiry as to any device implants can relieve

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[146] *Id.*
[147] 11 U.S.C.A. § 554 (West 2010).
[148] 11 U.S.C.A. § 554(c) (West 2010).
[149] 11 U.S.C.A. § 554(d) (West 2010).
[150] Phelan & Penn, *supra* note 144, at 4.

the attorney of the potential argument of intent to defraud. Inquiring further protects the attorney when a client later claims the attorney never raised the questions of implants and possible litigation as an asset. Taking reasonable measures to inquire further protects the bankruptcy attorney from potential claims of misconduct.[151]

A seasoned personal injury attorney should be aware that a claim can become part of the bankruptcy estate and that conflicts of interest may arise. Typically, the client pays for personal injury representation on a contingency basis.[152] Under a contingency contract, the attorney representing the injured party has a direct interest in the outcome of the case.[153] If the injured party does not prevail, the attorney does not get paid, or, if the injured party does not receive full compensation, attorney's fees are minimized.[154] While there are no specific professional responsibility rules addressing conflict of interest, the combination of multiple rules alludes to such concerns.[155] The Bankruptcy Code, however, specifically prohibits an attorney from having an interest in the estate.[156] The Bankruptcy Code requires the attorney to "be both disinterested and hold no interest adverse to the estate."[157]

When the claim becomes property of the estate, the claim is administered through bankruptcy. A previously hired attorney on a contingency fee-based representation has a direct interest in the claim, which is now part of the estate.[158] Conflicts of interest in the bankruptcy context can result in disqualification of

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[151] *Id.* at 5-6.
[152] 46 AM. JUR. PROOF OF FACTS 2d 1 (1986).
[153] *Id.*
[154] *Id.*
[155] Sterling, *supra* note 144, at 2148-49.
[156] *Id.*
[157] *Id.*
[158] *Id.*

the attorney and ultimately a denial of any fees.[159] The decision then rests on the bankruptcy judge to determine if the discipline of foregoing all fees outweighs any entitlement that the attorney may have for such fees, if any.[160] The level of interest can also vary depending upon which chapter of the Bankruptcy Code the debtor has filed. In most instances, an individual debtor has filed under chapter seven.[161] Chapter seven does not require the attorney to be fully disinterested, but the attorney cannot have an adverse interest to that of the debtor.[162] The determination of whether a conflict is material to the debtor's estate is left to the discretion of the bankruptcy judge.[163] However, failure to disclose such possible conflict may result in a denial of fees requested.[164]

The consequences for ethical violations for the bankruptcy attorney and the personal injury attorney can range from fines and imprisonment for fraud to suspension and disbarment.[165] While most courts may not find that an unknowing omission of a potential claim rises to such a degree of failure to follow ethical guidelines, counsel should not take such risks. Even without any disciplinary record, a judge can use his or her discretion and set an example that such "ignorance" of something so basic should warrant stricter punishments, such as disbarment.[166] Therefore, when in doubt, the best option for an attorney is to inquire with the client as to any implants or medical device uses and then disclose the possible claim, in the event that an injury occurs.[167] Scheduling all possible causes of action allows the

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[159] *Id.* at 2149.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 2150.
[164] *Id.*
[165] Phelan & Penn, *supra* note 144, at 42-44.
[166] *Id.* at 44.
[167] *Id.*

bankruptcy court to administer the property and potentially abandon such potential claims, giving the debtor all rights if a claim were to arise in the future.[168]

VII. CONCLUSION

Jerry and Tommy have experienced vastly different results from their products liability actions: Jerry giving up his settlement to administration in bankruptcy and Tommy having full access to his settlement funds. It is not the goal of the bankruptcy court to punish an innocent person implanted with a harmful device, instead, it is to hold an irresponsible debtor accountable. In the event that a person never knew of their cause of action until after the commencement of a bankruptcy action, the effects of having to administer the claim serves as a punitive action on the debtor. When the determination for administering property of the state is based upon various estate laws, the outcome is varied among debtors. Some uniform rule on cause of action accrual is desirable to create predictability in the bankruptcy action.

As demonstrated, a strong cause of action accrual determination is the use of the discovery rule. While the discovery rule has its limitations, the majority of states follow this rule, demonstrating its popularity. Since the bankruptcy court currently looks to the states for cause of action accrual, implementing a uniform rule based on the majority is ideal. In the absence of some uniform rule—practitioners beware. As a practitioner, reasonable inquiry should be the primary focus in preparing a bankruptcy petition or filing an injury claim. Without inquiry as to any implanted devices, the practitioner is unprotected against potential malpractice claims. These concerns further the need for a uniform rule on cause of action accrual of medical

[168] 11 U.S.C.A. § 554 (West 2010).

device product liability actions for the purposes of deterring property of the bankruptcy estate.

RECONSIDERING GUILT AFTER CONVICTION: EXPLORING THE HYPOTHETICAL FREESTANDING HABEAS CLAIM OF INNOCENCE

Joseph Amonett*

Nothing can be more frightening than being convicted of a crime committed by another person. After all, a criminal conviction is society's way of saying, "you violated our laws and shall be punished." Many are convinced that the American criminal justice system effectively operates to convict only those who are truly guilty. For example, Justice O'Connor suggested "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."[1] Similarly, former Attorney General Edwin Meese, under President Ronald Reagan, quipped that it is contradictory to think that there are many suspects who are innocent of a crime because "[i]f a person is innocent of a crime, then he is not a suspect."[2] Despite the general belief in a sound justice system, there have been

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[1] Herrera v. Collins, 506 U.S. 390, 398-99 (1993) (O'Connor, J., concurring).

[2] Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1328 & n.34 (1997) (quoting Reagan Seeks Judges with "Traditional Approach," U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67 (interview with Edwin Meese, Attorney General)).

1,570 exonerations to date across the United States, 329 of which have resulted because of DNA evidence.[3]

These numbers illustrate that the Constitution's "unparalleled protections" can fail. Although these exonerations represent that some have successfully regained their freedom, there are undoubtedly many who are not as fortunate. For those individuals who have been convicted in a state court, their only hope after exhausting all state remedies is to turn to the federal judiciary. This article explores claims of innocence within the context of federal habeas corpus proceedings after new evidence of innocence is discovered. Part I discusses the background of federal habeas corpus as it applies to state claims of innocence, as well as the limitations imposed on such claims by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Part II examines the jurisprudence of habeas corpus innocence claims. Part III explores the importance of revisiting freestanding innocence claims. Part IV addresses why innocence is a constitutional claim pursuant the cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment. Part V proposes that a freestanding claim of innocence warrants a reversal of conviction and a release from confinement if a prisoner can prove beyond a reasonable doubt that he or she is actually innocent based on newly-discovered evidence. Finally, part VI concludes by summarizing why a successful freestanding claim of innocence necessitates relief in federal habeas corpus proceedings.

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[3] The NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited March 31, 2015); *DNA Exoneree Case Profile*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/ (last visited March 31, 2015).

I. BACKGROUND

Federal statutory law allows a United States court to entertain applications for writ of habeas corpus for persons in custody, pursuant to state judgments, but only on the ground that a person is being held in violation of the Constitution, laws, or treaties of the United States.[4] The AEDPA, Anti-Terrorism and Effective Death Penalty Act, later amended the statutes pertaining to the law of habeas corpus by virtue of its enactment.[5] Specifically, the AEDPA mandates that a state applicant must have exhausted all state remedies prior to filing an application in a federal court, or otherwise show an absence of an effective state corrective process.[6] AEDPA further prohibits federal courts from granting applications with respect to any claim that was adjudicated on the merits in a state court proceeding, unless the adjudicated claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[7]

A state prisoner can obtain federal habeas relief pursuant to 28 U.S.C. §§ 2254(d)(1)-(2).[8] Claims of innocence based on newly-discovered evidence must be analyzed under § 2254(d)(1) because § 2254(d)(2) is limited to evidence heard at trial and introduced into the record.[9] The problem is that the United States Supreme Court has yet to hold that innocence is a

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[4] 28 U.S.C. § 2254(a) (1996).

[5] *See* Anti-Terrorism and Effective Death Penalty Act, Pub.L. 104–132, §735, 110 Stat. 1214 (1996).

[6] 28 U.S.C. §§ 2254(b)(1)(A)-(B)(ii) (1996).

[7] 28 U.S.C. §§ 2254(d)(1)-(2) (1996).

[8] *Id.*

[9] *See* 28 U.S.C. §2254(d)(2) (1996).

freestanding constitutional claim.[10] This prohibits any lower federal court from granting a writ of habeas corpus solely on innocence grounds,[11] and prevents an applicant from successfully asserting that his or her incarceration is in violation of the Constitution.

II. JURISPRUDENCE OF FEDERAL HABEAS CLAIMS OF INNOCENCE

There are three types of evidence presented at trial: (1) complete, (2) incomplete, and (3) corrupted.[12] Instances where a fact-finder was presented with a complete list of evidence is irrelevant for a habeas corpus claim of innocence based on newly-discovered evidence because, by definition, newly-discovered evidence renders the evidence heard at trial incomplete.[13] Thus, two types of innocence claims can be raised in a habeas corpus application: (1) freestanding innocence claims based on an incomplete presentation of evidence at trial, and (2) procedural default innocence claims where the evidence presented at trial was corrupted by other constitutional violations.[14]

A. Herrera Claims

A *Herrera* claim involves a bare assertion of innocence based solely on newly-discovered evidence.[15] This claim arises

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[10] McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013).

[11] Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171, 185 (2014).

[12] *In re* Davis, 2010 WL 3385081, at 44; Kaneb, *supra* note 11, at 217.

[13] The Supreme Court established the standard of review for habeas claims based on complete, but insufficient, evidence in Jackson v. Virginia, 443 U.S. 307, 309, 318-19 (1979).

[14] *Compare* Herrera v. Collins, 506 U.S. 390, 404-05 (1993), *with* Schlup v. Delo, 513 U.S. 298, 327 (1995).

[15] *Schlup*, 513 U.S. at 314.

from the only case to address whether innocence is a freestanding constitutional claim: *Herrera v. Collins.*[16] In *Herrera*, the Court did not reach the question of whether innocence was a freestanding constitutional claim, but *assuming arguendo*, determined that the applicant clearly failed to meet the standard of proof necessary to obtain relief for such a claim.[17]

Leonel Herrera was convicted of two counts of capital murder in 1992, and sentenced to death for killing two officers of the Texas Department of Public Safety.[18] After exhausting numerous post-conviction options, including one habeas corpus petition, Herrera filed a second petition alleging "actual innocence."[19] In his second petition, which he filed ten years after his conviction, Herrera claimed that new affidavits showed that his now dead brother committed the murders.[20] He further argued that, because of this newly-discovered evidence, the Eighth and Fourteenth Amendments to the United States Constitution prohibited his execution.[21] The Court ultimately held that Herrera's claim of innocence did not entitle him to federal habeas relief.[22]

Writing for the majority, Chief Justice Rehnquist explained that the Court has never held innocence to be a freestanding constitutional claim.[23] He further noted that precedent actually prevented the Court from granting federal habeas relief to a state prisoner merely because of the existence of newly-discovered evidence relevant to guilt or innocence.[24] In response to Herrera's Eighth Amendment cruel and unusual claim, Justice

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[16] Kaneb, *supra* note 11, at 174.
[17] *Herrera*, 506 U.S. at 418-19.
[18] *Id.* at 394.
[19] *Id.* at 398.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 418-19.
[23] *Id.* at 400.
[24] *Id.* (citing Townsend v. Sain, 372 U.S. 293, 317 (1963)).

Rehnquist wrote that the Eighth Amendment only applied to sentencing challenges.[25] Thus, Herrera's Eighth Amendment challenge failed because he was challenging his conviction.[26] Justice Rehnquist also denied Herrera's Fourteenth Amendment claim in terms of procedural due process, stating that he was a legally guilty person before the Court and that Texas' refusal to entertain the newly-discovered evidence did not transgress principles of fundamental fairness "rooted in the traditions and consciences of our people."[27]

Justice O'Connor concurred, but she asserted that the question was not whether a state can execute an innocent person, but "whether a fairly convicted, and therefore, legally guilty person, is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew . . . notwithstanding his failure to demonstrate that constitutional error infected his trial."[28] She explained that in most circumstances, "that question would answer itself in the negative" because of the "unparalleled protections" offered by the Constitution at trial.[29] She further noted that Herrera was clearly guilty and that answering the question of whether innocence is a freestanding constitutional claim was unnecessary and inadvisable due to federalism concerns.[30] Justice Scalia similarly expressed that there was "no basis in text, tradition, or contemporary practice for finding in the Constitution a right to demand judicial consideration of newly-discovered evidence brought forward after conviction."[31] Finally, Justice White concurred because Herrera's claim fell far from what would be required to obtain relief, but he also suggested that an

[25] *Id.* at 406.
[26] *Id.*
[27] *Id.* at 411.
[28] *Id.* at 420 (O'Connor, J., concurring).
[29] *Id.*
[30] *Id.* at 421 (O'Connor, J., concurring).
[31] *Id.* at 427-28 (Scalia, J., concurring).

applicant *could* obtain relief upon a showing that no rational trier of fact could find proof of guilt beyond a reasonable doubt.[32]

The dissent, led by Justice Blackmun, underscored Justice O'Connor's assertion that the Constitution offers criminal defendants "unparalleled protections" by explaining that those protections sometimes fail.[33] Justice Blackmun determined that the execution of a validly convicted person was forbidden by the Eighth and Fourteenth Amendments when newly-discovered evidence could prove innocence.[34] He reasoned that executing the innocent epitomizes the purposeless and needless imposition of pain and suffering prohibited by the Eighth Amendment.[35] Blackmun further explained that executing the innocent violates the Fourteenth Amendment because the execution of an innocent person is the ultimate arbitrary imposition that freedom protects against.[36] Ultimately, Justice Blackmun proposed that a federal habeas corpus petitioner should obtain relief if he can show that he is probably innocent.[37]

B. Schlup Claims

A *Schlup* claim requires a showing of innocence sufficient to allow federal courts to review independent constitutional claims on the merits that are otherwise barred.[38] This innocence gateway is necessary because "a prisoner retains an overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'"[39] Unlike *Herrera*

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[32] *Id.* at 429 (White, J., concurring).
[33] *Id.* at 430 (Blackmun, J., dissenting).
[34] *Id.*
[35] *Id.* at 431-32 (Blackmun, J., dissenting) (quotations omitted).
[36] *Id.* at 436-37 (Blackmun, J., dissenting) (quotations omitted).
[37] *Id.* at 442 (Blackmun, J., dissenting).
[38] Kaneb, *supra* note 11, at 197.
[39] Schlup v. Delo, 513 U.S. 298, 321 (1995) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

claims, the Supreme Court has upheld *Schlup* claims.[40] For *Schlup* claims, the Court has defined innocence as a showing "that it is more likely than not that no reasonable juror would have convicted [the defendant] in light of the new evidence."[41] A dissection of *Schlup*, like that of *Herrera*, will provide a foundation for the arguments later in this article.

Lloyd Schlup was convicted and sentenced to death in 1985 for the murder of a fellow prison inmate.[42] In 1989, after exhausting his state collateral remedies, Schlup filed a federal writ of habeas corpus asserting ineffective assistance of counsel. His application was denied because it was procedurally barred.[43] He reapplied for habeas relief in 1992 and asserted: (1) his execution was prohibited by the Eighth and Fourteenth Amendments because he was actually innocent, (2) trial counsel was ineffective for failing to interview alibi witnesses, and (3) the state failed to disclose exculpatory evidence.[44]

Justice Stevens wrote in the majority opinion that Schlup's claim of innocence was procedural in nature, in contrast to Herrera's substantive claim, because Schlup faced procedural obstacles that he had to overcome before a federal court could have addressed the merits of the other constitutional claims.[45] Stevens further explained that Schlup's claim of innocence operated only to bring him within the "narrow class of cases implicating a fundamental miscarriage of justice."[46] Accordingly, a *Schlup* claim of innocence is only a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[47]

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[40] *Id.* at 327.
[41] *Id.*
[42] *Id.* at 301-02.
[43] *Id.* at 306.
[44] *Id.* at 307.
[45] *Id.* at 314.
[46] *Id.* at 314-15.
[47] *Id.* at 315 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

Justice Stevens acknowledged that habeas corpus is an equitable remedy at its core.[48] He referred to Justice O'Connor, who once wrote "in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[49] The Court denoted these "appropriate cases" as falling within the fundamental miscarriage of justice exception, which provides relief to inmates who are incarcerated and truly deserving of relief.[50] This fundamental miscarriage of justice exception is warranted in rare and "extraordinary" cases because a prisoner retains an overriding "interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated."[51] Furthermore, linking the fundamental miscarriage of justice exception to innocence accommodates "both the systematic interest in finality, comity, and conservation of judicial resources and the overriding individual interest in doing justice in the extraordinary case."[52]

Justice Scalia, in his dissent, attacked the majority's conclusion that a federal court "must hear a claim of actual innocence and reach the merits of the petition if the claim is sufficiently persuasive."[53] He argued that the Court adopted mere dictum without analysis, as if it were binding precedent, in order to bypass the rules of habeas finality codified in statute.[54] Because Justice Scalia argued that a court should not use a claim of actual innocence to reach the merits of a petition, he declared that the Court should have sustained the lower court's ruling without

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[48] *Id.* at 319.

[49] *Id.* at 320-21 (quoting Murray v. Carrier, 477 U.S. 478, 495-96 (1986)).

[50] *Id.* at 321.

[51] *Id.* at 321 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

[52] *Id.* at 322 (internal quotations omitted).

[53] *Id.* at 347 (Scalia, J., dissenting).

[54] *Id.*

saying more.[55] However, the Court's majority went on to discuss an appropriate standard of proof that should be required by a petitioner claiming innocence in order to have his or her constitutional claims heard on the merits.[56] Chief Justice Rehnquist also dissented, but because he thought the Court adopted the incorrect standard.[57]

C. Innocence Claims Applied Beyond the Death Penalty Context

Both *Herrera* and *Schlup* address innocence claims within the death penalty context, but their application extends to all criminal cases in which incarceration is imposed.[58] In *District Attorney's Office for Third Judicial Dist. v. Osborne*, the Court explained that if innocence was a freestanding constitutional claim, it would not be a mere death penalty issue.[59] After all, if executing the innocent serves no legitimate penological purpose, the same must be said for imprisoning the innocent.[60] The Court has mentioned that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[61] Accordingly, the analyses applied to *Herrera* and *Schlup* claims should be used not only in the death penalty context, but in all criminal cases in which a prisoner has received even a one-day jail sentence.

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[55] *Id.* at 351 (Scalia, J., dissenting).

[56] *Id.* at 325-32.

[57] *Id.* at 334-42 (Rehnquist, C. J., dissenting).

[58] *See* Dist. Attorney's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 71-72 (2009).

[59] *Id.* (noting that the Court need not answer whether innocence is a freestanding constitutional claim in this case, but said, *arguendo*, that such a right would not have been violated here).

[60] *See In re* Davis, 2010 WL 3385081, at 43 (2010).

[61] Robinson v. California, 370 U.S. 660, 667 (1962).

III. THE IMPORTANCE OF REVISITING HERRERA

Justice O'Connor concluded in her *Herrera* concurrence that an inmate generally cannot seek habeas relief after a constitutionally flawless trial.[62] Because "trial is the paramount event for determining the guilt or innocence of the defendant," a convicted inmate "is not innocent in the eyes of the law."[63] Thus, the question presented in *Herrera* was not whether a State can execute an innocent person, but instead "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew . . . notwithstanding his failure to demonstrate that constitutional error infected his trial."[64] Justice O'Connor decided that the answer should usually be no, but the Court left this question ultimately unanswered.[65]

Although the United States Supreme Court has failed to answer this question, many states have done so on their own in reaction to the growing number of exonerations across the country.[66] At the time the Court decided *Herrera*, the usefulness of DNA had not been established in criminal courts.[67] To date, there have been 1,570 exonerations in the United States, and 329 of those resulted because of DNA evidence.[68] Thus, many state legislatures have changed their approach to innocence claims.[69]

Specifically, state legislatures have moved toward a more petitioner-friendly approach.[70] When the *Herrera* decision was

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[62] *See* Herrera v. Collins, 506 U.S. 390, 419-20 (1993) (O'Connor, J., concurring).

[63] *Id.* at 419 (O'Connor, J., concurring).

[64] *Id.* at 412 (O'Connor, J., concurring).

[65] *See Herrera*, 506 U.S. at 418-19.

[66] Kaneb, *supra* note 11, at 202.

[67] *See id.*

[68] THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 3.

[69] Kaneb, *supra* note 11, at 202.

[70] *See id.* at 203.

delivered, most states required that motions for new trials based on newly-discovered evidence of innocence be filed within a short period of time after conviction.[71] Today, the State of Delaware is the only state in the nation with a specified time limit.[72] Furthermore, none of the other forty-nine states that abolished this time limitation require a supplemental constitutional violation, or a showing that an inmate was deprived of a fair trial, to obtain post-conviction relief.[73] Federal courts should follow suit because they continue to recognize constitutional violations after state courts have denied relief on the same basis.[74] Despite a lack of federal legislative efforts at this point in time, the Supreme Court can still improve this area of the law by establishing a constitutional foundation for state standards, thereby "catching prisoners who fall through the large gaps left open by state laws."[75] However, this change cannot happen until the Court revisits *Herrera* and establishes that innocence is a freestanding constitutional claim.

IV. INNOCENCE IS A FREESTANDING CONSTITUTIONAL CLAIM

It is well established that state prisoners may only seek federal habeas relief for constitutional claims.[76] The AEDPA further restricts habeas relief, in relevant part, to instances where a state court's denial of a claim was "contrary to, or an unreason-

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[71] *Id.* at 202.

[72] *Id.* at 141.

[73] *Id.* at 203.

[74] *Id.* at 180. *See* n.21 for a list of forty-six inmates who were exonerated by a federal court for a constitutional violation of which a state court denied relief.

[75] *Id.* at 182.

[76] 28 U.S.C. § 2254(a) (1996).

able application of, clearly established federal law, as determined by the United States Supreme Court."[77] Accordingly, a state prisoner can only seek federal habeas relief for a *Herrera*-type claim when the Court establishes that innocence is a free-standing constitutional claim. This section will review the arguments that have been asserted to show that innocence itself is a constitutional claim. Specifically, innocence is protected by the cruel and unusual punishment clause of the Eighth Amendment, as well as the due process clause of the Fourteenth Amendment.[78]

As a preliminary note, the following arguments must be placed in the proper context. Inmates who find newly-discovered evidence of innocence file habeas petitions as individuals who are legally guilty of a crime.[79] When a habeas petition is filed based on a *Herrera* claim of innocence, he or she is seeking a new determination of guilt.[80] However, this re-determination is not an attack on the fact-finder's verdict.[81] A prisoner who had a constitutionally perfect trial still "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated."[82] Thus, a *Herrera* claim is an inmate's attempt to change his or her status from legally guilty to legally innocent based on new evidence of factual innocence.

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[77] 28 U.S.C. § 2254(d)(1) (1996).

[78] *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1979) (discussing cruel and unusual punishment); Rochin v. California, 342 U.S. 165 (1952) (discussing substantive due process); Mathews v. Eldridge, 424 U.S. 319 (1976) (discussing procedural due process); *see also* Kaneb, *supra* note 11, at 209-12 (asserting that fundamental fairness requires judicial review).

[79] *See* Herrera v. Collins, 506 U.S. 390, 419-420 (1993) (O'Connor, J., concurring).

[80] *Id.* at 402.

[81] *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

[82] Schlup v. Delo, 513 U.S. 298, 321 (1995) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

A. Eighth Amendment Cruel and Unusual Punishment

The Eighth Amendment bars not only those punishments that are deemed barbaric, but also "those that are excessive in relation to the crime committed."[83] Punishment is excessive, and thereby unconstitutional, if "it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[84] A punishment can fail this test on either ground.[85] Any punishment should fail the test on both grounds when given to a person who finds newly-discovered evidence that is sufficient to establish his or her innocence.

The penological goals of punishment include: (1) retribution, (2) deterrence, and (3) rehabilitation.[86] Punishing a person who presents sufficient newly-discovered evidence of innocence cannot possibly make a measurable contribution toward these goals. However, courts do not condemn a punishment for this reason unless it has also found "that the objective indicators of state laws or jury determinations evidence a social consensus against that penalty."[87] Thus, the Eighth Amendment is not static, but "rather reflects evolving standards of decency."[88]

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[83] Coker v. Georgia, 433 U.S. 584, 592 (1979) (internal quotations omitted). In *Herrera*, the Court denied the defendant's Eighth Amendment claim because he challenged his guilt and not his punishment. *Herrera*, 506 U.S. at 406. Justice Blackmun asserted that the defendant could challenge his sentence by challenging his guilt because punishment is inextricably intertwined with guilt. *Id.*at 433-44 (Blackmun, J., dissenting).

[84] *Coker*, 433 U.S. at 592.

[85] *Id.*

[86] *See* State v. Gardner, 947 P.2d 630, 634 (Utah 1997).

[87] Stanford v. Ky., 492 U.S. 361, 379-80 (1989).

[88] Herrera v. Collins, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 506 (1986)).

Punishing an innocent person does not achieve any penological goal. Justifying retribution as the basis of punishment depends on the degree of an offender's culpability.[89] When a person proves his or her innocence, he or she is demonstrating a complete lack of culpability and should, therefore, not be punished.[90]

When looking at a deterrent justification, both general deterrence and specific deterrence must be examined.[91] General deterrence is meant to deter members of society from engaging in future criminal acts by publicizing one individual's punishment.[92] In contrast, specific deterrence refers to a punishment that deters an offender from committing another crime.[93] Punishing an innocent person cannot achieve the goal of either type of deterrence simply because the punishment would be imposed on a non-offender and non-guilty party.

The last penological goal, rehabilitation, attempts to reform an offender through obtaining an understanding of the external factors that may be responsible for the person's criminal behavior.[94] This goal will also be unmet by punishing a person who can establish innocence because zero external factors can be responsible for criminal behavior that does not even exist. Justice Blackmun has further commented on the social consensus regarding punishment of the innocent by explaining that the execution of an innocent person is "at odds with contemporary

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[89] *Stanford*, 492 U.S. at 403-04.

[90] *See* Christopher L. Russell, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U.L. REV. 843, 847-48 (2002).

[91] *See id.* at 857.

[92] *Id.*

[93] *Id.*

[94] Adam Lamparello, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction"*, 16 OHIO ST. J. ON DISP. RESOL. 335, 359-60 (2001).

standards of fairness and decency."[95] Accordingly, punishing an inmate who can establish innocence is nothing more than the purposeless and needless imposition of pain and suffering, and it makes no measurable contribution to the penological goals of our criminal justice system.

A sentence of incarceration can also fail the Eighth Amendment cruel and unusual punishment test if it "is grossly out of proportion to the severity of the crime."[96] Under this analysis, the punishment of an innocent person clearly is disproportionate to the crime because the person did not even commit the alleged crime. For this reason, as well as those mentioned above, the continued punishment of a person who can establish his innocence is excessive and, therefore, unconstitutional pursuant to the Eighth Amendment.

B. Fourteenth Amendment Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[97] Substantive due process prohibits the government from engaging in conduct that "shocks the conscience,"[98] or that interferes with rights "implicit in the concept of ordered liberty."[99] In this context, "liberty is not a series of isolated incidents . . . [i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[100] Justice

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[95] Herrera v. Collins, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting) (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)).

[96] Coker v. Georgia, 433 U.S. 584, 592 (1979) (internal quotations omitted).

[97] U.S. CONST. amend. XIV.

[98] Rochin v. California, 342 U.S. 165, 172 (1952)

[99] Palko v. Conneticut, 302 U.S. 319, 325-26 (1937).

[100] *Herrera*, 506 U.S. at 436 (Blackmun, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992)).

Blackmun emphasized that the execution of an innocent person is the "ultimate arbitrary imposition."[101]

A constitutional society that promotes due process simply cannot accept punishing the innocent.[102] Although the *Herrera* court framed the issue in that case as procedural in nature, Justice Blackmun argued that the majority misinterpreted the question.[103] Instead, he framed the issue as substantive by asking "whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly-discovered evidence."[104] Justice Blackmun concluded that the answer must be yes, in part, because punishing the innocent "shocks the conscious."[105] This conclusion does not attack a fact-finder's verdict because the habeas claim is based on newly-discovered evidence.[106] Accordingly, arbitrary impositions and purposeless restraints, such as incarcerating or executing the innocent, violate substantive due process under the Fourteenth Amendment. As Justice Blackmun observed, "[t]he execution of a person who can show that he is innocent comes perilously close to murder."[107]

C. Fourteenth Amendment Procedural Due Process

Procedural due process imposes constraints on government actions that deprive individuals of, in relevant part, life and liberty interests within the meaning of the Fourteenth Amendment.[108] When an inmate presents a compelling claim of inno-

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[101] *Herrera*, 506 U.S. at 437 (Blackmun, J., dissenting).
[102] *See Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).
[103] *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting).
[104] *Id.* at 430-31 (Blackmun, J., dissenting).
[105] *Id.* at 435-37 (Blackmun, J., dissenting).
[106] *Elizondo*, 947 S.W.2d at 209.
[107] *Herrera*, 506 U.S. at 446 (Blackmun, J., dissenting).
[108] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

cence based on newly-discovered evidence, procedural due process requires that the future deprivation of life, or continued deprivation of liberty, be fairly re-examined.[109] The fundamental requirement of procedural due process includes an "opportunity to be heard at a meaningful time and in a meaningful manner."[110]

Freestanding habeas claims of innocence are protected by procedural due process when inmates present compelling claims of innocence because fundamental fairness requires judicial review of those claims.[111] Furthermore, preventing judicial review of an inmate's freestanding innocence claim strikes an imbalance of competing interests that is not equitable.[112] The government's interest in comity, finality, and conservation of judicial resources cannot possibly outweigh an individual's life or liberty interests when there is new compelling evidence that the individual is innocent.

Due process is a flexible tool that is used to minimize the risk of error when depriving a person of life or liberty.[113] When a person is convicted and subsequently incarcerated, he or she has suffered a deprivation of liberty.[114] Additionally, a person is deprived of life when executed.[115] These deprivations are constitutional if defendants receive the due process protections

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[109] *See id.* at 335; *see also* United States v. Salerno, 481 U.S. 739, 746 (1987).

[110] *Mathews*, 424 U.S. at 333.

[111] Kaneb, *supra* note 11, at 211.

[112] *See Mathews*, 424 U.S. at 348; *see also* Schlup v. Delo, 513 U.S. 298, 319 (1995) (explaining that habeas corpus is an equitable remedy).

[113] *Mathews*, 424 U.S. at 324.

[114] Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

[115] Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1183 (6th Cir. 1997).

afforded by a fair trial.[116] However, the problem is that the constitutional protections of a fair trial can sometimes fail.[117] When an inmate discovers compelling evidence of his or her innocence after a fair trial, denying that person of an opportunity to present that evidence violates fundamental fairness in accordance with the Fourteenth Amendment.[118]

One of the most "concrete indicators of what fundamental fairness and rationality require" is a widely shared practice.[119] The near-uniform application of a rule can show that it is fundamental, and that its absence in application "offends a principle of justice that is deeply rooted in the traditions and conscience of our people." [120] Prior to the new millennia, a strong assumption existed that only the guilty were convicted.[121] However, the growing number of exonerations across the country has undermined this assumption.[122] States have reacted almost uniformly to these exonerations by removing the time limits for raising an innocence claim.[123] Furthermore, none of the states that have abandoned these time limits require a supplemental constitutional violation, or a showing that an inmate was deprived of a fair trial, to obtain post-conviction relief.[124] Accordingly, fundamental fairness requires that federal courts adhere to the near-uniform rule that states have adopted, which calls for judicial review when an inmate can show compelling newly-discovered evidence that establishes innocence.

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[116] Jackson v. Virginia, 443 U.S. 307, 314 (1979).

[117] Herrera v. Collins, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting).

[118] Kaneb, *supra* note 11, at 211.

[119] *Id.* at 209.

[120] *Id.*

[121] *See supra* text accompanying note 1 and 2.

[122] *See supra* text accompanying note 3.

[123] *See* Kaneb, *supra* note 11, at 210.

[124] *Id.*

The "quantum and quality" of due process, on the other hand, depends on the situation.[125] As mentioned, due process is a flexible tool used to minimize error.[126] When determining the quantum and quality of process that is due, courts typically weigh and balance four factors: (1) the importance of the particular deprivation, (2) the risk of deprivation by using inadequate procedures, (3) the value of using additional procedures, and (4) the burden and cost to the government for implementing such procedures.[127] Surely, there are no greater constitutionally- protected interests than those of life and liberty. Failing to provide post-conviction judicial review of compelling claims of innocence will leave factually innocent people unprotected from improper convictions. Creating an opportunity for convicted persons to present claims of innocence based on newly-discovered evidence would help minimize these improper convictions. Lastly, the burden and cost to the government by allowing free-standing habeas claims of innocence will be negligible because of the extraordinarily high standard of proof that would be required for relief.[128] Although the government has an interest in comity and finality, it "must yield to the imperative of correcting a fundamentally unjust incarceration."[129] Therefore, procedural due process requires habeas review of innocence claims when an inmate discovers new, compelling evidence of innocence.

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[125]Heller v. Doe, 509 U.S. 312, 332 (1993) (quoting Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 13 (1979)).

[126] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[127] *Id.* at 334-35.

[128] *See infra* Part V.

[129] Schlup,v. Delo, 513 U.S. 295, 320-21 (1995) (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)).

V. PROPOSING A STANDARD WITH ACCOMPANYING RELIEF

This article has provided the background for state-based innocence claims in federal habeas corpus proceedings.[130] The law currently provides that inmates may use innocence as a procedural gateway that allows federal courts to hear constitutional claims that are otherwise barred; however, the Supreme Court has not recognized that innocence itself is a freestanding constitutional claim.[131] For the reasons outlined in Part III, the Court should revisit *Herrera*, and it should ultimately hold that such a claim exists based on the constitutional arguments explained in Part IV.[132] If the Court does this, the next questions are clear: What standard must be met to obtain relief and what should that relief be? This author suggests that a freestanding claim of innocence warrants a reversal of conviction and a release from confinement if a prisoner can prove beyond a reasonable doubt that he or she is actually innocent based on newly-discovered evidence.

A. Freestanding Claims of Innocence Require Proof Beyond a Reasonable Doubt

The Constitution prohibits the criminal conviction of any person, except upon proof of guilt beyond a reasonable doubt.[133] As noted in Part II of this article, a conviction can occur with a complete, incomplete, or corrupt presentation of the evidence at trial.[134] However, habeas claims of innocence based on newly-discovered evidence can only be attributed to evidence that is

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[130] *See supra* Part I and II.

[131] *Schlup*, 513 U.S. at 314, 321.

[132] *See supra* Part III and IV.

[133] Jackson v. Virginia, 443 U.S. 307, 309 (1979).

[134] *See supra* Part II; *In re* Davis, 2010 WL 3385081, at 44; Kaneb, *supra* note 11, at 217.

incomplete or corrupt.[135] Under these circumstances, courts consider the "probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole."[136]

This evaluation is not an attack on the fact finder's verdict.[137] Rather, a court simply weighs the newly-discovered exculpatory evidence against the evidence of guilt adduced at trial.[138] Because the government has won a trial conviction at this point, the burden of proof unquestionably shifts to the inmate to prove that he or she is actually innocent by providing the newly-discovered evidence to the court.[139] In 2006, the Supreme Court established the standard of proof that a habeas applicant must meet to win a *Schlup* claim of innocence, where the evidence at trial was constitutionally corrupted.[140] Unfortunately, the only indisputable certainty regarding a *Herrera* standard, where the evidence at trial was factually incomplete, is that the burden must be extraordinarily high—higher than the *Schlup* constitutional gateway requirement.[141]

A *Schlup* claim requires a habeas applicant to prove that a constitutional error at trial "probably resulted" in a conviction when he or she is actually innocent.[142] To satisfy this preponderance of the evidence standard, an applicant must show that, more likely than not, no reasonable juror would have convicted him or her in light of the new evidence.[143] Although *Herrera* never discussed a standard of proof for freestanding habeas claims of innocence, we know that it must be higher than the

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[135] *See supra* text accompanying note 11.

[136] *Ex parte* Elizondo, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996).

[137] *Id.* at 209.

[138] *Id.* at 206.

[139] *Id.* at 207.

[140] Schlup v. Delo, 513 U.S. 295, 326-27 (1995).

[141] House v. Bell, 547 U.S. 518, 555 (2006).

[142] *Schlup*, 513 U.S. at 322 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

[143] *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

Schlup requirement.[144] Therefore, the standard must be clear and convincing evidence, or beyond a reasonable doubt.

When considering which standard to uphold, a court should take into consideration the relief sought and weigh that against the government's interests. A truly innocent person certainly wants to be released from custody and exonerated of the charges for which he or she was convicted. However, the government has an interest in the finality of its criminal convictions because it must protect the integrity of the justice system.[145] Thus, an extraordinarily high standard is warranted for a freestanding claim of innocence because a convicted person presumably had a constitutionally error-free trial.[146] A conviction in such a trial is entitled to the greatest respect.[147]

In *Ex parte Elizondo*, the Texas Court of Criminal Appeals held that the standard of proof for a *Herrera* claim of innocence is clear and convincing evidence.[148] That court noted that a habeas court must be convinced that new facts unquestionably establish an applicant's innocence.[149] In that case, the standard made sense because the petitioner was seeking a new trial. The problem is that an actual innocent person, one who also continues to serve his or her sentence during the appellate process, wants to be exonerated without reviving a trial process where incarceration may be extended. This remedy of exoneration must require a greater burden than that used in *Elizondo*, leaving the court with no other option other than to use a standard of beyond a reasonable doubt.

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[144] *House*, 547 U.S. at 555.

[145] Coleman v. Thompson, 501 U.S. 722, 772-73 (1991).

[146] *See* Herrera v. Collins, 506 U.S. 390, 417 (1993).

[147] *Elizondo*, 947 S.W.2d at 209.

[148] *Id.*

[149] *Id.* The *Elizondo* court affirmed that "unquestionably establish" is synonymous with "clear and convincing." *Id.*

The constitutional protections in our criminal justice system serve two purposes: (1) to prevent the guilty from escaping punishment, and (2) to prevent the innocent from suffering the ramifications of a wrongful conviction.[150] When the government presents proof of guilt beyond a reasonable doubt, the defendant's presumption of innocence is eliminated and the defendant becomes legally guilty.[151] If a convicted person discovers new evidence that proves his or her innocence by the same standard used at trial, then a habeas court logically must grant relief. For a court to deny relief under this scenario would be simply inequitable in light of the dual aim of the criminal justice system.

B. Proof of Innocence Beyond a Reasonable Doubt Demands a Reversal of Conviction and a Release From Confinement

Freedom is perhaps the most fundamental right a person can have. For this reason, the government may only take away that right by obtaining a criminal conviction when there is evidence of guilt beyond a reasonable doubt.[152] Considering this is the highest recognized standard in the country,[153] a habeas applicant who can meet this requirement should be given the best possible remedy. Specifically, a successful freestanding innocence claim should allow a petitioning inmate to be released from custody and acquitted of the charges for which he or she was convicted.

The Fifth Amendment to the Constitution supports the conclusion that a successful *Herrera* claim warrants a reversal of conviction and not a new trial.[154] The double jeopardy clause of

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[150] United States v. Nixon, 418 U.S. 683, 709 (1974).

[151] *See Herrera*, 506 U.S. at 419-20 (O'Connor, J., concurring).

[152] *See In re* Winship, 397 U.S. 358, 362 (1970).

[153] Colo. v. Connelly, 479 U.S. 157, 186 (1986).

[154] *See* Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*,

64 STAN. L. REV. 535, 586 (2012) (concluding that successful *Schlup* claims bar retrial).

the Fifth Amendment provides that no person shall be tried twice for the same offense that places his life or limbs in jeopardy.[155] When a person is convicted of a criminal offense at trial, but that conviction is later reversed for insufficiency of the evidence pursuant to a federal habeas corpus petition, a retrial is barred because the reversal is the equivalent to a judgment of acquittal.[156] An acquittal is defined as a ruling that resolves some or all of the factual elements of the crime charged.[157] A reversal based on an affirmative proof of innocence, which is inherently more difficult to obtain than a reversal based on insufficient evidence, must logically bar retrial as well because such a finding resolves at least some of the factual elements of the crime charged. An applicant who proves beyond a reasonable doubt that he or she is innocent of a crime has done just that—proven his or her innocence. A retrial after this occasion is therefore inequitable, and a habeas court should reverse a conviction with prejudice in this circumstance.

The Eighth Amendment applies when a habeas applicant is granted relief equivalent to an acquittal.[158] An inmate must be immediately released once a conviction is reversed for two reasons.[159] First, continued incarceration "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[160] Second, any continued punishment is grossly out of proportion to the severity of the crime because an applicant becomes legally innocent once a habeas court renders judgment in his or her favor.[161] Accordingly, incarceration is

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[155] *Id.*

[156] McDaniel v. Brown, 558 U.S. 120, 131 (2010).

[157] United States v. Bell, 163 U.S. 662, 671 (1896).

[158] *See* U.S. CONST. amend. VIII (providing that excessive punishment is unconstitutional).

[159] *See generally supra* Part IV (analyzing the Eighth Amendment as it applies to freestanding claims of innocence).

[160] *See supra* text accompanying note 83.

[161] *Id.*

prohibited after the reversal of an inmate's conviction, and the applicant must be immediately released from prison.

VI. CONCLUSION

When the Constitution's "unparalleled protections" fail a factually innocent person at trial, that person becomes the victim of an imperfect criminal justice system. State inmates have post-conviction tools at their disposal to fight a wrongful conviction, but these avenues are limited. Once all appeals and collateral claims are exhausted, these inmates have no option but to turn to the federal judiciary. Habeas corpus is an equitable remedy that allows state inmates to attack their convictions on constitutional grounds.[162] For those who are actually innocent, the problem is that the United States Supreme Court has failed to hold that innocence, itself, is a freestanding constitutional claim.

It is vital that the Supreme Court revisits this issue and holds that innocence is protected by the Constitution. By doing so, the Court will catch the prisoners who fall through state cracks. Two provisions of the Constitution support freestanding habeas claims of innocence: (1) the cruel and unusual punishment clause of the Eighth Amendment, and (2) the due process clause of the Fourteenth Amendment. Both substantive and procedural due process is implicated by the Fourteenth Amendment in this context. These constitutional protections should guarantee that wrongfully convicted people have the opportunity to challenge their guilt when newly-discovered evidence proves their innocence.

For a freestanding innocence claim, relief should be obtained by proving innocence beyond a reasonable doubt. When such a claim is asserted, a habeas applicant is seeking to have his or her conviction overturned based on newly-discovered ev-

[162] Schlup v. Delo, 513 U.S. 295, 319 (1995).

idence. Because an applicant's legal status changes from presumably innocent to guilty upon conviction, to prove otherwise requires an extraordinary amount of proof. Relief on this basis should be reserved only for the most deserving inmates who can show that they are actually innocent of the crime charged. This application of law maintains the government's interest in comity and finality while preserving an innocent inmate's interest in seeking redress for an unjust incarceration.

An inmate who can prove his or her innocence by satisfying this incredibly high burden should have his or her conviction dismissed with prejudice and be released from custody. Considering the equitable principles on which habeas corpus is founded, this relief is the most fair in light of the very difficult standard that must be met to obtain relief. Accordingly, the Court should hold that freestanding claims of innocence are protected by the Constitution, and that such claims warrant a reversal of conviction and a release from confinement when newly-discovered evidence proves innocence beyond a reasonable doubt.

COMPETENTLY, KNOWINGLY, AND VOLUNTARILY DYING WITH DIGNITY: WHY STATES THAT ALLOW DEFENDANTS TO VOLUNTEER FOR EXECUTION SHOULD ALLOW TERMINALLY ILL PATIENTS TO DIE IN A DIGNIFIED AND HUMANE MANNER

Melanie Walthour*

I. INTRODUCTION

There is no constitutional right to die. Nonetheless, the Supreme Court left the right-to-die dilemma for the states to decide. In forty-four states and the District of Columbia, competent, willing, terminally ill patients cannot chose to die with dignity with the assistance of a physician.[1] Yet, in thirty-two states, competent defendants[2] can knowingly and voluntarily abandon

* Graduate, Arizona Summit Law School

[1] *State by State Guide to Physician- Assisted Suicide*, EUTHANASIA PROS AND CONS, http://euthanasia.procon.org/view.resource.php?resourceID=000132 (last visited Mar. 16, 2015); *Death with Dignity Acts*, DEATH WITH DIGNITY NATIONAL CENTER, http://www.deathwithdignity.org/acts (last visited Mar. 16, 2015).

[2] The author will use to term "defendants" to refer to death row inmates throughout the article.

their appeal process to expedite their executions.[3] Some scholars call this act "death row volunteerism"[4] and call the defendants "volunteers."[5] States that allow defendants to knowingly and intelligently volunteer for execution essentially assist defendants with expediting their deaths. The Supreme Court held that a defendant must be competent and knowingly and voluntarily waive his right to an appeal.[6] Similarly, states that enacted Death with Dignity laws require terminally ill patients to be competent and knowingly and voluntarily make the decision to end their lives with the assistance of a qualified physician.[7] Because the standards to allow a defendant to take control over his life and expedite his death are similar to the standards set forth in the Death with Dignity Act, states that allow defendants to volunteer should allow competent, terminally ill patients to request a lethal dose of medication from their physician to expe-

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[3] *States with the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 16, 2015).

[4] Kristen Dama, *Redefining a Final Act: The Fourteenth Amendment and States' Obligation to Prevent Death Row Inmates From Volunteering to be Put to Death*, 9 U. PA J. CONST. L 1083 n.1 (2007); the author will refer to "death row volunteerism" as "volunteerism" throughout the article.

[5] John Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICHIGAN LAW REVIEW 939, 940 (2005); the author will use the term "volunteers" in this context throughout the article.

[6] *See* Gilmore v. Utah, 97 S. Ct. 436, 437 (1976) (terminating the stay of execution because the state proved that Gilmore was competent and made a knowing and intelligent waiver of his appeal); *see* Godinez v. Moran, 113 S. Ct 2680, 2688 (1993) (reasoning that before a court accepts a defendant's waiver of his right to counsel he must be competent and the waiver must be intelligent and voluntary).

[7] *See* OR. REV. STAT. § 127.805 (West, Westlaw through 2015 Reg. Sess.); *see* VT. STAT. ANN. tit. 18 § 5283 (West, Westlaw through 2013-2014 Adjourned Sess.); *see* WASH. REV. CODE ANN. § 70.245.020 (West, Westlaw through 2015 Reg. Sess.) (providing the requirements for patients and written requests for medication).

dite their deaths as well. Although a large portion of the defendants that volunteer suffer from some type of mental illness,[8] this article argues that there are sufficient analogies between competent and knowing volunteers and competent and knowing terminally ill patients.

Part II of this article will analyze the Supreme Court's decision in *Washington v. Glucksberg* and *Cruzan v. Director, Missouri Dept. of Health*, and how these cases lay a foundation for advocates who claim that if defendants may expedite their execution by waiving their appeal process, then terminally ill patients, who desire to expedite their deaths in a humane and dignified manner, should have the right to do so. Part III will define physician-assisted suicide, what it means for competent, terminally ill patients to knowingly and voluntarily consent, and what it means when a competent defendant knowingly volunteers for execution. Part IV will explore Oregon and Montana, two of the five states that allow physician-assisted suicide. This section will also explore Texas and Alabama, two of the forty-five states that ban physician-assisted suicide and have the most volunteered executions since 2000. Part V will discuss some the arguments for and against volunteerism. Part VI will discuss some of the arguments for and against physician-assisted suicide, and why states should implement Death with Dignity laws. Part VII will conclude the discussion regarding why death penalty states that allow defendants to volunteer for execution should allow terminally ill patients to die with dignity with the assistance of a physician.

II. ANALYSIS OF THE SUPREME COURT DECISIONS IN GLUCKSBERG AND CRUZAN

There is no constitutional right to die. Nevertheless, advocates in favor of physician-assisted suicide argue that people

[8] Blume, *supra* note 5, at 962.

should have the fundamental right to make decisions about ending their own lives. In *Washington v. Glucksberg*, the state of Washington enacted a law that made it a crime to assist suicide.[9] Physicians, who practiced medicine in Washington, wanted to help three terminally ill patients end their lives, but Washington's ban on physician-assisted suicide prohibited the physicians from assisting.[10] The physicians and the terminally ill patients sued the state of Washington, claiming that the ban on physician-assisted suicide was unconstitutional.[11] The United States District Court ruled in favor of the physicians and patients, and Washington's Attorney General appealed.[12] The Court of Appeals for the Ninth Circuit affirmed the District Court's ruling, and the Attorney General petitioned to the Supreme Court.[13]

The Court held that physician-assisted suicide was not a fundamental right under the Due Process Clause of the Fourteenth Amendment.[14] Because physician-assisted suicide was not a fundamental right, the state of Washington had to prove that its ban on physician-assisted suicide was rationally related to its legitimate interest of preserving and protecting all human life.[15] Respondents did not dispute that the state had a "real interest in preserving the lives of those who can still contribute to society and enjoy life."[16] In addition, the state argued that the ban not only preserved human life, but also, protected the integrity of the medical profession, and vulnerable groups of individuals from abuse, neglect, and mistakes.[17] Because the Court ruled that assisted suicide was not a fundamental right and did not rule

[9] Washington v. Glucksberg, 117 S. Ct. 2258, 2261 (1997).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 2262.
[13] *Id.*
[14] *Id.* at 2271 (1997).
[15] *Id.*
[16] *Id.* at 2272.
[17] *Id.* at 2273.

on whether physician-assisted suicide was constitutional or unconstitutional, it left the decision for the states. The rational basis standard of review made it less challenging for states to meet that standard. Lastly, although the state of Washington banned physician-assisted suicide at the time the Court rendered this decision, Washington is one of the five states that allow physician-assisted suicide today.

Moreover, the Court held, in *Cruzan v. Director, Missouri Dept. of Health*, that Missouri's law, which required clear and convincing evidence that the patient wanted to withdraw from life support, was constitutional.[18] The Court reasoned that although the Fourteenth Amendment protects the taking of a person's life, liberty, and pursuit of happiness without due process, "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions."[19] Some scholars drew the inference, from the decision in *Cruzan*, that patients who refuse treatment have the same intent as patients who desire to self-administer treatment.

On the same note, Elizabeth Brennan's article titled, *A Patient's Right to Physician Assisted Suicide*, illustrates the right-to-die dilemma. Brennan discusses how it is inconsistent with *Cruzan* for states to ban a competent, terminally ill patient from dying with dignity regardless if the patient is on life support or not.[20] This article supports the view that if *Cruzan* permits competent, terminally ill patients to withdraw from life support with clear and convincing evidence in their favor, states should not have the authority to ban competent, terminally ill patients who

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[18] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2856 (1990).

[19] *Id.* at 2851.

[20] Elizabeth Brennan, *A Patient's Right to Physician Assisted Sui*cide, 1 HOLY CROSS J.L. & PUB. POL'Y 195, 196 (1996).

choose to self-administer treatment to expedite their deaths.[21] Brennan cites *Cruzan* to illustrate how the Court determined that there was no clear distinction between *allowing* a competent, terminally ill patient to die and *assisting* a competent, terminally ill patient's death.[22]

Furthermore, the ruling in *Cruzan*, where a competent patient may refuse life support, is analogous to defendants who waive their appeal process. Notably, because the Court held that a competent, terminally ill patient may refuse treatment, it is no coincidence that a competent defendant may refuse to challenge his death penalty sentence. The Court declared that forcing a competent person to undergo life support is battery,[23] and forcing a defendant to appeal his death sentence is a violation of the Rules of the Supreme Court.[24]

III. DEFINING PHYSICIAN ASSISTED SUICIDE ("PAS") AND "VOLUNTEERISM"

A. Physician Assisted Suicide ("PAS")

1. Definition and Requirements

Physician-assisted suicide ("PAS") is "a medical practice that involves a physician assisting a terminally ill, competent adult in dying by writing a prescription for a lethal dose of a

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[21] *Id.* (citing *Cruzan* where the Court determined that there was not clear distinction between a terminally ill patient that choose to withdraw from life support and a terminally ill patient the choose to administer a lethal dose of medication.).

[22] *Id.*

[23] *Cruzan*, 110 S. Ct. at 2865 (quoting that "[t]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician.").

[24] *See* Hammett v. Texas, 100 S. Ct. 2905, 2906 (1980) (granting the defendant's motion to withdraw his petition, under Rule 60 of the Rules of the Supreme Court, that his attorney filed against his will in order to review his conviction and death sentence).

drug that will be self-administered by the patient."[25] Under the Death with Dignity Act that Oregon, Vermont, and Washington enacted, a patient qualifies to make the decision to die with the assistance of a physician when he or she: (1) is an adult, (2) is a resident[26] in the state that allows PAS, (3) is capable of making and communicating health care decisions for him/herself, and (4) is diagnosed with a terminal illness that will lead to death within six months.[27]

In addition, the physician has to meet certain requirements as well. A physician must: (1) be licensed in the same state as the patient, (2) diagnosis the patient with a terminal illness, with six months or less to live, (3) make sure that the patient made a voluntary request, (4) refer the patient to a psychological examiner, if a physician determines that the patient's judgment is impaired, and (5) inform the patient of alternatives and request that the patient notify next-of-kin.[28] Finally, a second consulting physician must examine the patient and the medical records and confirm the first physician's results.[29]

2. Knowingly

Under the Death with Dignity Act, in order for a terminally ill patient to consent to PAS, the physician must determine that the patient knew of her diagnosis, prognosis, risks associated

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[25] Susan M. Behuniak & Arthur G. Svenson, PHYSICIAN-ASSISTED SUICIDE: THE ANATOMY OF A CONSTITUTIONAL LAW ISSUE 1 (2003).

[26] OR. REV. STAT. § 127.860 (West, Westlaw through 2015 Reg. Sess.); WASH. REV. CODE ANN. § 70.245.130 (West, Westlaw through 2015 Reg. Sess.) (requiring residents show proof of a drivers license, voter registration, owned or leased property in the state, or tax return from the most recent year).

[27] § 127.805 (Westlaw); § 70.245.020 (Westlaw); VT. STAT. ANN. tit. 18 § 5283 (West, Westlaw through 2013-2014 Adjourned Sess.) (providing the requirements and written requests for medication).

[28] § 127.805 (Westlaw); tit. 18 § 5283 (Westlaw); § 70.245.020 (Westlaw) (providing the requirements and written requests for medication).

[29] § 127.805 (Westlaw); tit. 18 § 5283 (Westlaw); § 70.245.020 (Westlaw) (providing the requirements and written requests for medication).

with taking the medication, and alternative options to PAS.[30] The term "knowingly" means having or showing awareness or understanding and being well informed.[31] Although the Death with Dignity Act uses the term "informed decision," the definitions are similar. For example, Washington defines an informed decision as, a decision by a qualified patient based on "an appreciation of the relevant facts and after being fully informed by the attending physician."[32] Meaning, the qualified physician must make sure the patient appreciates and understands the process of PAS, and the physician must fully inform the patient of the risks and alternatives to the lethal dose of medication, such as comfort care, hospice care and pain control.[33]

3. Voluntarily

Although the Death with Dignity Act mentions that the patient's request for medication must be voluntary, it does not define the term. However, according to *Black's Law Dictionary*, the term voluntarily means done by design or intention.[34] To clarify, a qualified physician must determine that the patient's request for medication was the patient's true objective absent any form of undue influence or coercion.[35] If the physician determines that the patient's decision was involuntary or impaired

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[30] § 127.815(1)(c) (Westlaw); tit. 18 § 5283(6) (Westlaw); § 70.245.040(1)(c) (Westlaw) (describing the physicians' responsibilities of fully informing the patient).

[31] BLACK'S LAW DICTIONARY 429 (4th pocket ed. 2011).

[32] § 70.245.010 (Westlaw).

[33] § 127.815(1)(c)(E) (Westlaw); tit. 18 § 5283(6)(D) (Westlaw); § 70.245.040(1)(c)(v) (Westlaw) (providing alternatives to the lethal dose of medication).

[34] BLACK'S LAW DICTIONARY 813 (4th pocket ed. 2011) (defining "voluntarily").

[35] § 127.810(1) (Westlaw); tit. 18 § 5283(a)(4) (Westlaw); § 70.245.030(1) (Westlaw) (providing that the written requests for medication must be voluntary and free from coercion, duress, and undue influence).

in any way, the physician must refer the patient to a psychological examiner.[36] Nevertheless, the fact that the patient has to self-administer[37] the medication speaks highly in terms of voluntariness. No one else can control the medication except the patient because the patient must ingest the medication. In addition, the patient has the freedom to "rescind the request [for medication] at any time and in any manner . . . ."[38] Therefore, it is safe to say that although the Death with Dignity Act does not define "voluntarily," one can infer that if a patient decided to self-administer the medication absent any undue influence or coercion, then the patient's decision was by design and intent.

4. Competency

Although Vermont and Oregon use the term "capable," Washington uses the term "competent." Nevertheless, the definitions are the same. For example, Vermont and Oregon define a "capable" patient as, "a patient [who] has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available."[39] Similarly, Washington defines a competent patient as, "a patient [who] has the ability to make and communicate an informed decision to health care providers, including communica-

[36] § 127.825 (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician must refer patient to a psychologist, psychiatrist, or clinical social worker if physician finds signs of impaired judgment).

[37] § 70.245.010(12) (Westlaw) (defining "self-administer" as a qualified patient's act of ingesting medication to end his or her life in a humane and dignified manner).

[38] § 127.845 (Westlaw); tit. 18 § 5283(10) (Westlaw); § 70.245.100 (Westlaw).

[39] § 127.800(3) (Westlaw); tit. 18 § 5281 (Westlaw) (defining "capable").

tion through persons familiar with the patient's manner of communicating if those persons are available."[40] Thus, but for the *health care* decisions and *informed* decisions the definitions are identical.

Although the term "competency" is a legal term that refers to the "mental ability to understand problems and make decisions,[41] the legal definition is similar to Vermont's, Oregon's, and Washington's definition. The key component is for the individual patient to make and communicate informed, health care decisions. Moreover, under the Death with Dignity Act, the patient has to demonstrate competence to attending physicians, or consulting physicians, psychiatrists, or psychologists.[42] The Death with Dignity Act does not provide a standard for proving that a patient is competent to consent to PAS. Nevertheless, one can infer that if clear and convincing evidence was constitutional in *Cruzan*,[43] as the standard to prove an incompetent patient's intent to withdraw treatment, then a clear and convincing standard under PAS circumstances would hold before the Court as well.[44] Although the Court did not make that standard mandatory for all states,[45] the Court acknowledged that many courts, that evaluate an incompetent patient's intent in similar situations, require a clear and convincing standard of proof showing that the patient wanted to withdraw treatment.[46]

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[40] § 70.245.010(3) (Westlaw) (defining "competent").

[41] BLACK'S LAW DICTIONARY 138 (4th pocket ed. 2011) (defining "competency").

[42] § 127.825(1)(h) (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician may not prescribe the medication until the person performing the counseling determines that the patient is not suffering from any mental disorders or depression).

[43] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2851 (1990).

[44] *Id.*

[45] *Id.* at 2854.

[46] *Id.* at 2854-2855.

Similar to the standard the Court upheld in *Cruzan*, studies show that *forensic psychiatrists* concur that the standard of proof to determine whether a patient is competent should be, at the least, by clear and convincing evidence.[47] For example, The American Journal of Psychiatry published a study where 290 board-certified forensic psychiatrists filled out a survey answering questions about their views on PAS, standard of proof that judicial review should require, and a general overview of the factors physicians should consider in evaluating whether a patient is competent.[48] According to the results, "[n]inety percent of all respondents indicated that if judicial review were used in the evaluation, the legal standard of proof for competence should be . . . 'clear and convincing evidence' . . . or . . . 'beyond a reasonable doubt' . . . ."[49] The study also mentioned that, although there is no scientific determination on the standards and thresholds for deciding whether a person is competent to consent to PAS, forensic psychiatrists *still* favor the procedural and legal safeguards that the Death with Dignity Act has in place.[50] For example, forensic psychiatrists felt that two independent examiners were necessary, followed by some type of judicial or administrative review.[51] In Oregon, Vermont, and Washington, two independent physician examinations are mandatory.[52] In

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[47] Linda Ganzini, M.D. ET AL., *Evaluation of Competence to Consent to Assisted Suicide: View of Forensic Psychiatrists*, 157 AM. J. PSYCHIATRY 595, 597 (2000).

[48] *Id*. at 596.

[49] *Id.* at 597.

[50] *See id.* at 599.

[51] *Id.*

[52] OR. REV. STAT. § 127.820 (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 18 § 5283(7) (West, Westlaw through 2013-2014 Adjourned Sess.); WASH. REV. CODE ANN. § 70.245.050 (West, Westlaw through 2015 Reg. Sess.) (providing that a consulting physician must examine the patient and his or her relevant medical records and confirm the first physician's results).

fact, the second physician must examine the patient and medical records and confirm the first physician's findings.[53]

However, forensic psychiatrists claim that states should require forensic psychiatrists to perform the evaluations. According to the study, the goal of mental health evaluation is for patients to master four skills in order to consent to PAS.[54] For example, a patient must have the ability to communicate a choice, understand relevant information, appreciate the current situation and its consequences, and manipulate information rationally.[55] These four skills are similar to what the Death with Dignity Act requires. Lastly, even though forensic psychiatrists are not mandatory to perform evaluations for competency in some states, physicians are the medical experts who diagnose the patient with the terminal illness and are fully capable of performing proper examinations.

In short, a patient must be competent and knowingly and voluntarily consent to PAS. The physician must make sure that the request to die with dignity in a human manner is voluntary absent any signs of undue influence or coercion, and the physician must fully inform the patient about the diagnosis, prognosis, risks, and alternatives. Most importantly, the patient must have the ability to make, communicate, and understand health care decisions, and if there were a standard of proof under the Death with Dignity Act, it would most likely be clear and convincing evidence. After reviewing the terminology and requirements, and comparing the terms to *Black's Law Dictionary*, one can appreciate the similarities. This is important because, as we

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[53] § 127.820 (Westlaw); tit. 18 § 5283(7) (Westlaw); § 70.245.050 (West, Westlaw through 2015 Reg. Sess.) (providing that a consulting physician must examine the patient and his or her relevant medical records and confirm the first physician's results).

[54] Ganzini, *supra* note 47, at 599.

[55] *Id.* at 598-99 (citing, Paul Appelbaum & Tom Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635–38 (1988).

look at the terminology and requirements for volunteerism, the requirements are also similar to the requirements for PAS.

B. Volunteerism

1. Definition

John Blume, author of *Killing the Willing: "Volunteers" Suicide and Competency*, articulates that the term "volunteers" refers to "[defendants] who chose to waive their appeals and face execution without further delay."[56] In addition, Christy Chandler, author of *Voluntary Executions*, defines voluntary executions and writes:

> A capital defendant effectively chooses execution when he decides to give up his right to counsel, to forbid his attorney from presenting mitigating evidence, or to waive an appeal of his conviction or sentence. The most common scenario reviewed by the courts involves the defendant who, once convicted and sentenced to death, waives his appeals and resists any challenges to his execution.[57]

Thus, as long as the defendant is competent and waives his right to an appeal knowingly and voluntarily, the courts will grant the defendant's request.

2. Knowingly

In order for a defendant to properly waive his appeal process, he must waive his right knowingly and intelligently. In the Supreme Court case, *Hammett v. Texas*, the trial court convicted the petitioner of murder, sentenced him to death, and the court

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[56] Blume, *supra* note 5.

[57] Christy Chandler, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1908 (1998).

of appeals affirmed the conviction.[58] Even though the petitioner informed his attorney that "he did not wish to pursue any further appeals in his case," his attorney filed a petition for review by the Court against his request.[59] The petitioner moved to dismiss the petition on the grounds that he "made this decision voluntarily and with full knowledge of the consequences, only after due consideration of all facts and circumstances regarding the case."[60] The Court held that, under the Rules of the Supreme Court, a petitioner or appellant may withdraw his petition or appeal, and the Court granted the petitioner's request.[61]

Before *Hammett*, the Court in *Gilmore v. Utah* determined that the defendant made "a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed."[62] The trial court convicted the defendant of murder and sentenced him to death.[63] The defendant's attorneys informed him of his right to appeal, that there were substantial grounds for an appeal, that the Utah Supreme Court had yet to review the constitutionality of Utah's death penalty law, and that there was a chance that the court would find the death penalty law unconstitutional.[64] After hearing and understanding all of the information, the defendant made his decision to waive his appeal.[65] This was an example of the defendant *knowingly* making his decision with full knowledge of the consequences, facts, and circumstances. The Court con-

[58] Hammett v. Texas, 100 S. Ct. 2905, 2609 (1980).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Gilmore v. Utah, 97 S. Ct. 436, 437 (1976).
[63] *Id.*
[64] *Id.* at 438 n.4.
[65] *Id.*

firmed the validity of the state's determinations of the defendant's competence and terminated the application for stay of execution.[66]

Now, the Court in *Hammett* defined knowing as, having full knowledge of the consequences, facts, and circumstances.[67] This is similar to definition of "knowingly" for a terminally ill patient consenting to PAS. In essence, a terminally ill patient must appreciate the relevant facts, but the physician must fully inform the patient of everything there is to know about PAS including the diagnosis, risks, and alternatives.[68] Moreover, in *Gilmore*, the defendant's attorneys fully informed their client when they told him that he should file an appeal, that there were substantial grounds for an appeal, and that it was likely he would win.[69] Likewise, when a physician informs the patient of the procedure of PAS, the risks, alternatives, and other information, the patient is able to *knowingly* make a decision. Thus, the Court and the Death with Dignity Act require the defendant and the patient to fully understand the decisions that they make. The only way an individual can knowingly make a decision is to fully *know* everything there is to know about the consequences and relevant facts of his or her particular situation.

3. Voluntarily

In *Godinez v. Moran*, the Court defined a qualified "knowing and voluntary" waiver as one where a trial court determined that the "defendant actually . . . underst[ood] the significance

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[66] *Id.*; *see also* BLACK'S LAW DICTIONARY, 717 (4th pocket ed. 2011) (defining "stay" as, "the postponement or halting of a proceeding, judgment, or the like.").

[67] Hammett v. Texas, 100 S. Ct. 2905, 2609 (1980).

[68] OR. REV. STAT. § 127.815(1)(c) (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 18 § 5283(6) (West, Westlaw through 2013-2014 Adjourned Sess.); WASH. REV. CODE ANN. § 70.245.040(1)(c) (West, Westlaw through 2015 Reg. Sess.) (describing the physicians' responsibilities of fully informing the patient).

[69] *Gilmore*, 97 S. Ct. at 438 n.4.

and consequences of a particular decision and whether the decision [was] uncoerced."[70] Here, the Court defined voluntary as making a decision absent any coercion.[71] Similarly, in *Gilmore*, the defendant told the Court that he made his decision absent any drugs, alcohol, or prior treatment in prison.[72] Although the Court focused on a knowing and intelligent waiver, these facts indicate that the defendant was not under any influence that could have impaired his decision. In addition, the Court in *Godinez* pointed out that the trial court "explicitly found that the [defendant's] guilty pleas were freely and voluntarily."[73] Thus, a defendant's decision is voluntary when it is free from any undue influence or coercion.

In comparison, a terminally ill patient's consent to PAS must be voluntary.[74] Meaning, the patient must make a voluntary request to end her life by ingesting a lethal dose of medication.[75] Physicians must examine the patient and make sure the patient is not suffering from any depression or any other influences that could impair her decision.[76] Likewise, a defendant must undergo the same examination and, in referencing *Godinez* and

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[70] Godinez v. Moran, 113 S. Ct. 2680, 2687 n.12 (1993).

[71] *Id.* at 2688 (citing Dusky v. United States, 362 U.S. 402 (1960)).

[72] *Gilmore*, 97 S. Ct. at 438 n.4.

[73] *Godinez*, 113 S. Ct. at 2683 & n.2 (indicating that the defendant was not under the influence of drugs or alcohol, other than the medication prescribed for his seizures).

[74] OR. REV. STAT. § 127.810(1) (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 18 § 5283(a)(4) (West, Westlaw through 2013-2014 Adjourned Sess.); WASH. REV. CODE ANN. § 70.245.030(1) (West, Westlaw through 2015 Reg. Sess.) (providing that the written requests for medication must be voluntary and free from coercion, duress, and undue influence).

[75] § 127.810(1) (Westlaw); tit. 18 § 5283(a)(4) (Westlaw); § 70.245.030(1) (Westlaw) (providing that the written requests for medication must be voluntary and free from coercion, duress, and undue influence).

[76] § 127.810(1) (Westlaw); tit. 18 § 5283(a)(4) (Westlaw); § 70.245.030(1) (Westlaw) (providing that the written requests for medication must be voluntary and free from coercion, duress, and undue influence).

Gilmore, a showing of no drugs, alcohol, or coercion is proper to conclude that the defendant made a voluntary decision.[77] Both requirements of voluntariness are remarkably similar, which illustrates that a standard that is good enough under the Death with Dignity Act is also good enough for the Supreme Court.

4. Competency

In *Godinez*, the Supreme Court held that the same competency standard that the Court requires a defendant to have to stand trial is the same competency standard it requires in order for a defendant to plead guilty and waive his right to counsel and appeals.[78] The Court cited its holding in *Dusky v. United States*, where it held that a defendant is competent when he "has 'sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceeding against him.'"[79] Thus, in order for a defendant to knowingly and voluntarily waive his right to appeal, the defendant must be competent and understand the significance and consequences of his of her decision.[80] However, some scholars question whether courts do enough to challenge a defendant's competence.

For example, Justice Thurgood Marshall joined in the dissent in *Gilmore* and challenged the court's determination of the defendant's competence.[81] Justice Marshall stated that the Eighth Amendment not only protects individuals from cruel and unusual punishment, "but that it also expresses a fundamental

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[77] *See Godinez*, 113 S. Ct. at 2683 n.2 (indicating that the defendant was not under the influence of drugs or alcohol, other than the medication prescribed for his seizures); *see also Gilmore*, 97 S. Ct. at 438 n.4 (indicating that the defendant was not under the influence of any drugs or alcohol).

[78] *Godinez*, 113 S. Ct. at 2688.

[79] *Id.* at 2685 (citing Dusky v. United States, 362 U.S. 402 (1960)).

[80] *Id.* at 2687 n.12.

[81] Gilmore v. Utah, 97 S. Ct. 436, 440 (1976) (Marshall, J., dissenting).

interest of society in ensuring that state authority is not used to administer barbaric punishments."[82] Justice Marshall disagreed that the defendant competently and knowingly waived his appeal process.[83] He stated that the defendant had a little over two months since the sentencing hearing to make the decision, and had an inadequate evaluation consisting of a one-hour interview.[84] Even the defendant's attorney refused to question his competence.[85] Thus, Justice Marshall stated that not only could the Utah courts not make such a determination of competency but also, that the courts' failure to act efficiently resulted in what Justice Marshall believed to be an invalid waiver.[86]

In short, defendants who are competent to stand trial are also competent to waive their rights to an appeal. Competence is one of the requirements that a defendant must satisfy in order to waive his right to an appeal. Moreover, when a competent defendant knowingly and voluntarily waives his right to appeal, and the court grants his request, the court assumes the role of assisting the defendant with expediting his execution. Competency, knowing, and voluntary standards are adequate for the court to grant the defendant's request to control his life and expedite his execution. Nevertheless, competency, knowing, and voluntary standards are not enough for states that ban PAS. In fact, the court's role is similar to that of the physician who assists a competent, terminally ill patient who knowingly and voluntary desires to expedite her death. Yet, states that continue to ban PAS and allow volunteers to expedite their execution do not see the inconsistency.

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

IV. STATES THAT ALLOW PAS AND VOLUNTEERS

A. States That Allow PAS

Currently, PAS is legal in only five states—Oregon,[87] Vermont,[88] Montana,[89] Washington,[90] and New Mexico.[91] According to the Death with Dignity National Center, twenty-two legislatures including the District of Columbia will see death-with-dignity related bill proposals before the end of their current session.[92] New Mexico Court of Appeals is currently reviewing a challenge to a lower court's ruling that held that physicians were not criminally liable under New Mexico's assisted suicide laws.[93] Pending New Mexico's decision, New Mexico[94] and Montana[95] are the only states that legalized PAS via a court ruling and did not enact the Death with Dignity Act.

On December 5, 2008, Montana's First Judicial District Court, in *Baxter v. Montana*, held that under article II, sections 4 and 10 of the Montana Constitution, a terminally ill, competent patient has a legal right to die with dignity.[96] Judge Dorothy McCarter ruled that the legal right to die with dignity included the legal right to "use the assistance of his physician to obtain a prescription for a lethal dose of medication that the patient may

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[87] OR. REV. STAT. § 127.805 (West, Westlaw through 2015 Reg. Sess.).

[88] VT. STAT. ANN. tit. 18 § 5283 (West, Westlaw through 2013-2014 Adjourned Sess.).

[89] MONT. CONST. art. II, §§ 4,10 (West, Westlaw through 2015 Sess.).

[90] WASH. REV. CODE ANN. § 70.245.020 (West, Westlaw through 2015 Sess.).

[91] *Death with Dignity Acts*, DEATH WITH DIGNITY NATIONAL CENTER, http://www.deathwithdignity.org/advocates/national (last visited Mar. 16, 2015).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] MONT. CONST. art. II, §§ 4,10 (West, Westlaw through 2015 Sess.).

[96] Baxter v. Montana, No. ADV-2007-787, 2008 Mont. Dist. LEXIS 482, at *36.

take on his own if and when he decides to terminate his life."[97] Robert Baxter, a seventy-five-year-old truck driver, diagnosed with lymphocytic leukemia,[98] died with dignity the day of the ruling[99]. The Montana Attorney General appealed the case, and on December 31, 2009, the Montana Supreme Court ruled in favor of Baxter. It held that there was "no indication in Montana law that physician aid in dying provided to terminally ill, mentally competent adult patients is against public policy."[100] Although this Supreme Court decision did not result in Montana establishing a Death with Dignity Act, Oregon, Virginia, and Washington enacted the law, with Oregon being the first state to do so.

On November 8, 1994, fifty-one percent voted in favor of Oregon's Ballot Measure 16,[101] which allowed terminally ill adults to obtain prescriptions for a lethal dose of medication.[102] This bill became the Death with Dignity Act. The act provides:

> An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of

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[97] *Id.*

[98] Baxter v. Montana, 224 P.3d 1211, 1214 (Mont. 2009).

[99] *Id.* at 1223 n.1.

[100] *Id.* at 1215.

[101] "Ballot Measure 16" was the actual name of the bill Oregon voters passed in 1994.

[102] *State by State Guide to Physician- Assisted Suicide*, EUTHANASIA PROS AND CONS, http://euthanasia.procon.org/view.resource.php?resourceID=000132 (last visited Mar. 16, 2015); *In Oregon*, DEATH WITH DIGNITY NATIONAL CENTER http://www.deathwithdignity.org/in-oregon (last visited Mar. 16, 2015).

> ending his or her life in a humane and dignified manner.[103]

On November 4, 1997, Oregon voters voted against Ballot Measure 51,[104] which repealed the law allowing terminally ill patients to obtain a lethal prescription.[105] Because sixty percent of Oregonians voted against the bill, the Death with Dignity Act remained the law.[106]

Nonetheless, in *Gonzales v. Oregon*, Oregon's Attorney General challenged the drugs physicians prescribed under the Controlled Substance Act ("CSA"). The Attorney General argued that when Congress classified controlled substances under U.S.C. § 812, the Controlled Substance Act, it permitted the Attorney General to remove, reschedule, or add substances so long as the Attorney General met the requirements for the research and findings. In addition, because the CSA regulates the activity of physicians—prescribing lethal self-administered drugs, the Attorney General argued that:

> [A]ssisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act. Such conduct by a physician registered to dispense controlled substances may 'render his

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[103] OR. REV. STAT. § 127.805 (West, Westlaw through 2015 Reg. Sess.).

[104] "Ballot Measure 51" was the actual name of the bill Oregon voters opposed in 1997.

[105] *State by State Guide to Physician- Assisted Suicide*, EUTHANASIA PROS AND CONS, http://euthanasia.procon.org/view.resource.php?resourceID=000132 (last visited Mar. 16, 2015).

[106] *Id.*

> registration . . . inconsistent with the public interest' and therefore subject to possible suspension or revocation under 21 U. S. C. 824(a)(4).[107]

However, the Supreme Court held that "the CSA's prescription requirement [did] not authorize the Attorney General to bar [physicians from] dispensing [a lethal self-administered prescription] for assisted suicide in the state medical regime permitting such conduct."[108] The Court reasoned that Congress intended that the Attorney General have limited authority concerning the regulation of the prescription requirements under the CSA.[109] Thus, such limited authority did not give the Attorney General authority to ban the act of dispensing a controlled substance.[110]

Moreover, Oregon's Death with Dignity Act continues to be the landmark legislation for PAS. This act is responsible for so many terminally patients having the power to end their suffering and take control over their lives. According to the Oregon Public Health Division, since 1997, physicians prescribed 1,327 terminally ill patients lethal self-administered medication to expedite their deaths.[111] Out of those prescribed, 859 patients died with dignity from self-administering the lethal dose of medication.[112] The difference in those prescribed from those that self-administered the lethal dose of medication illustrates the freedom of choice that patients have. Meaning, just because the physician prescribed the medication, does not mean that the patient had to self-administer it. As mentioned earlier, under the

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[107] Gonzales v. Oregon, 126 S. Ct. 904, 913 (2006).

[108] *Id.* at 925.

[109] *Id.* at 916-917 (describing the Attorney General's powers as limited, and describing his rulemaking authority in two provisions).

[110] *Id.* at 925.

[111] OREGON PUBLIC HEALTH DIVISION, http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year17.pdf *2 (last visited Mar. 16, 2015).

[112] *Id.*

Death with Dignity Act, a patient has the right to "rescind the request [for medication] at any time and in any manner . . . ."[113] Since these statistics illustrate only Oregon's numbers, it is unclear how many other terminally ill patients across the United States cannot choose to end their lives in a humane and dignified manner because those states fail to enact a Death with Dignity law.

B. States That Allow Volunteerism

Since the reinstatement of the death penalty in 1976, state participants executed 141 defendants who waived their appeals.[114] Since 2000, Alabama and Texas had the most volunteers. For example, in Texas, 2003, Larry Hayes "expedited his execution by waiving his appeals."[115] His reason for doing so was so that he could "atone his crime."[116] In 2004, Ynobe Matthews had been on death row since 2001 when he decided to waive his appeals so that the state of Texas would no longer delay his execution.[117] In 2005, Alex Martinez instructed his Houston defense attorney not to file any appeals to delay his death.[118] In 2007, Christopher Swift "spurned all appeals" and according to his attorney, Swift wanted to receive the death penalty since the first day of his trial.[119] In 2009, the courts granted David

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[113] OR. REV. STAT. § 127.845 (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 18 § 5283(10) (West, Westlaw through 2013-2014 Adjourned Sess.); WASH. REV. CODE ANN. § 70.245.100 (West, Westlaw through 2015 Reg. Sess.)

[114] *State by State Information*, DEATH PENALTY INFORMATION CENTER, http:// www.deathpenaltyinfo.org/state/ (last visited Mar. 16, 2015).

[115] *Defendants Who Were Executed and Designated Volunteers*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (last visited Mar. 16, 2015).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

Martinez's request to stop any appeal designed to "spare his life."[120] Overall, Texas has executed 521 defendants, more defendants than any other states.[121] Unsurprisingly, Texas leads the other death penalty states with the most volunteers, which total about twenty-eight defendants.[122]

On the other hand, Alabama is not as high up on the list when it comes to the total number of executions. Since 1976, Alabama executed fifty-six defendants.[123] Nonetheless, since 2000, Alabama had about seven defendants waive their appeals process to expedite their execution.[124] For example, in 2000, Pernell Ford waived his appeals and fired his defense attorney, and a federal appellate court held that Ford was competent to perform those actions.[125] In 2002, Lynda Lyon Block refused to go further with her appeal process because she felt the courts were corrupt and lacked jurisdiction over her.[126] About three years later, Mario Centobie opposed his federal public defender's efforts to block the execution.[127] Centobie claimed that he was competent and preferred death instead of life in prison.[128] In

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[120] *Id.*

[121] *Executions State and Region*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Mar. 16, 2015).

[122] *Defendants Who Were Executed and Designated Volunteers*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (last visited Mar. 16, 2015).

[123] *Executions State and Region*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Mar. 16, 2015).

[124] *Id.*

[125] *Defendants Who Were Executed and Designated Volunteers*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (last visited Mar. 16, 2015).

[126] *Id.*

[127] *Id.*

[128] *Id.*

2009, Jack Trawick refused to make any legal efforts to stop his execution.[129] Trawick asked the judge to sentence him to death.[130] About two years later, Christopher Johnson refused to pursue any appeals after the jury sentenced him to death.[131] Johnson filed papers to ensure that no one would be able to file an appeal on his behalf.[132]

The examples of volunteers above raise a controversial issue over the state's role in expediting a defendant's execution. Some scholars argue that because states allow defendants to waive their defenses to any Eight Amendment claims, defendants essentially seek the state's assistance in committing suicide.[133] On the other hand, advocates in support of defendants' right to volunteer argue that volunteers accept death as a just punishment.

V. ARGUMENTS FOR AND AGAINST VOLUNTEERISM

A. Defendants Who Expedite Their Execution Accept the Justice of Their Punishments.

Those in favor of allowing defendants to expedite their executions argue that defendants, who do so, accept the justice of their punishments. Stephen Skaff, author of a note that explores the case *Chapman v. Commonwealth*, articulates how "proponents of allowing [defendants] to waive appeals and volunteer speak equally often of respecting the autonomy of the [defendant] to choose his defense, or choose to have his just punishment

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[129] *Id.*

[130] *Defendants Who Were Executed and Designated Volunteers*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (last visited Mar. 16, 2015).

[131] *Id.*

[132] *Id.*

[133] *See* Blume, *supra* note 5, at 948.

administered without undue delay."[134] In other words, when a jury finds a defendant guilty and sentences him to death, both actions exemplify what advocates call justice. Skaff also sheds light on John Blume's argument against volunteerism and states, "[v]olunteering is not suicide because 'society—through a jury or judge—has found the death penalty to be the appropriate punishment for the defendant's crime.'"[135] According to Skaff and Blume, proponents of volunteerism agree that if a defendant admits guilt and waives his trial or appeal, "[he] preserves [his] dignity and humanity" by accepting the punishment set out under the law. Additionally, with the assistance of the courts, that defendant will expedite his execution with such a waiver. Thus, although the defendant knows death is imminent, he still requests that the court speed up the process. Interestingly, this seems similar to the request of a terminally ill patient.

One the other hand, although advocates contend that defendants, who expedite their executions by requesting the state to waive their appeals, inevitably accept punishment, the fact is that defendants would still accept their punishments without the state granting their requests. If a defendant's punishment were *just*, an appeal would only confirm its *justice*. Instead, as some states like California recently discovered, the punishment could be unconstitutional.[136] Meaning, if a defendant challenged his

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[134] Stephen Skaff, *Chapman v. Commonwealth: Death Row Volunteers, Competency, and "Suicide by Court"*, 53 ST. LOUIS U. L. J. 1353, 1356 (2008-2009).

[135] *Id.* at 1356-57 (citing Blume, John, "Killing the Willing: 'Volunteers,' Suicide and Competency," 103 MICHIGAN LAW REVIEW 939, 952 (2005)).

[136] Steve Almasy & Ann O'Neill, *California's Death Penalty Ruled Unconstitutional*, CNN, (Sep. 8, 2014, 7:35AM), http://www.cnn.com/2014/07/16/justice/california-death-penalty/ (reporting a defendant who challenged the validity of his sentence from 1995, where a federal judge vacated his sentence and wrote, "[a]llowing this system to continue to threaten [the defendant] with the slight possibility of death, almost a generation after he was first sentenced, violates the Eighth Amendment's prohibition against cruel and unusual punishment.").

death sentence, he could expose the state's dysfunctional death penalty system.[137]

Nevertheless, this argument in favor of allowing defendants to waive their appeal process supports why states should allow PAS. In particular, allowing terminally ill patients to expedite their deaths with dignity in a human manner, allows patients to accept and take control of their illnesses. Similarly to defendants who accepts their punishment by waiving their appeals, terminally ill patients will be able to accept their illnesses when the suffering is unbearable, they become heavy burdens on their loved ones, and can no longer enjoy life's pleasures like they once did.

B. Allowing Defendants to Abandon Their Appeal Process Undermines the Integrity of Our Criminal Justice System

Although *Gilmore v. Utah* dates back to 1976, this was the same year of the reinstatement of the death penalty. In addition, some argue that those opposed to the death penalty take the view that allowing defendants to volunteer for execution is a violation of the Eighth Amendment and an insult to the integrity and consistency of the criminal justice system. For example, Justice Marshall strongly opposed the death penalty and wrote several dissents in related cases. In *Whitmore v. Arkansas*, he stated that appellate review was a safeguard from cruel and unusual punishment and protection to ensure that the government did not abuse its power and "undermined the integrity of our criminal justice system."[138] In *Lenard v. Wolff*, Justice Marshall stated that:

> Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and usual punishment cannot be overridden

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[137] *Id.*

[138] Whitmore v. Arkansas, 110 S. Ct. 1717, 1732 (1990) (Marshall, J., dissenting).

> by a defendant's purported waiver. By refusing to pursue his Eighth Amendment claim, [the defendant] has, in effect sought the State's assistance in committing suicide.[139]

Justice Marshall's dissenting opinions assert that absent the court's determination that a defendant is competent to waive his appeal, the courts undermine the criminal justice system. He also contends that although a defendant is competent, allowing him to "refuse to pursue his Eight Amendment claim" allows him to seek the "state's assistance in committing suicide." This article supports Justice Marshall's dissenting opinions and adds that allowing defendants to waive their rights to appeal their death penalty sentences, allows states to assist defendants in their desire of imminent death. Although Justice Marshall questions the efficiency of how courts evaluate a defendant's competence, the point is that without the assistance of the courts, defendants would not have the option to expedite their executions.

VI. ARGUMENTS FOR AND AGAINST PAS

A. Why States Should Allow PAS

1. Individual Autonomy

Although there is no constitutional right to die, the Court in *Cruzan* had it right. States should amend their laws to support the inference from the Court's holding in *Cruzan*. One cannot distinguish a terminally ill patient who desires to expedite her death by terminating life support from a terminally ill patient who desires to expedite his death by ingesting self-administered medication. Because both terminally ill patients want to control

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[139] Lenard v. Wolff, 100 S. Ct. 29, 30-31 (1979) (Marshall, J., dissenting).

when they die and how they die, both patients are similarly situated. If physicians may not force or terminate life support on a terminally ill patient without the patient's consent, then states should allow a terminally ill patient to consent to ingesting prescribed self-administered medication to expedite her death. Both terminally ill patients have the same intent, which is to expedite their deaths. Following *Cruzan*, Missouri does not prosecute physicians if a patient shows clear and convincing evidence that she wishes to terminate life support. Accordingly, states should not prosecute physicians if a terminally ill patient competently, knowingly, and voluntarily consents to a prescribed lethal dose of medication.

Interestingly, in *Cruzan*, the Court refreshed our recollection of the history of unauthorized touching by a physician.[140] The Court compared leaving a patient on life support to unauthorized touching by a physician, which the Court labeled as battery.[141] Essentially, the Court established that the right to refuse treatment is the right to control one's medical treatment. If the government cannot force a patient to stay on life support, the government should not interfere with a self-administered dose of medication that a patient desires to ingest. Thus, terminally ill patients should be able to control their mental and physical state at the time of their deaths.

2. Death with Dignity

Advocates that support PAS argue that states should not force people to remain dependent upon others, to helplessly witness their own loss of control, or to otherwise endure conditions that unacceptably compromise human dignity. Laura Trena-

[140] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2865 (1990) (quoting that "[t]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician.").

[141] *Id.*

man-Molin, author of a comment titled, *Physician-Assisted Suicide: Should Texas Be Different?* illustrates how advocates of PAS argue that PAS will prevent unsuccessful, family-assisted or premature suicide attempts.[142] This argument supports allowing PAS because patients will be able to enjoy the rest of their strong days with family without feeling the pressure of trying to commit suicide and failing at the attempt.[143] For example, Trenaman-Molin illustrates examples where terminally ill patients tried to take matters into their own hands. In one example, a terminally ill cancer patient set himself on fire.[144] In other examples, terminally ill patients attempting to shoot themselves or overdose on drugs, resulting in serious brain damage.[145] Lastly, some terminally ill patients sought help with committing suicide from their families.[146] These examples are not ways in which a person desires to die in a dignified and humane manner. Physicians should be able to assists terminally ill patients with expedite their deaths because physicians have the expertise in dealing with terminally ill patients. Thus, terminally ill patients should not have to result to such inhumane methods to end their suffering.

Moreover, patients should not have to continue suffering because their state does not allow PAS. For example, Brittany Maynard, a twenty-nine-year old newlywed received a diagnosis that she had terminal brain cancer.[147] Although Maynard had

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[142] Trenaman-Molin, Laura, *Physician-Assisted Suicide: Should Texas Be Different?*, 33 HOUS. L. REV 1475, 1487 (1996-97).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Gloria Goodale, *How Brittany Maynard Renewed Debate on Ethics of Right to Die Movement*, THE CHRISTIAN SCIENCE MONITOR, (Nov. 3, 2014), http://www.csmonitor.com/USA/Society/2014/1103/How-Brittany-Maynard-renewed-debate-on-ethics-of-right-to-die-movement-video.

access to quality health care and was financially stable, she decided to end her life.[148] Because California did not allow PAS, Maynard moved to Oregon to take control over her life and die in a dignified and humane manner.[149] Maynard is one of many terminally ill patients that refuse to suffer because society wants to preserve all human life. No person should have to suffer at the expense of another, and states that refuse to accommodate terminally ill patients like Maynard support the idea that terminally ill patients should not have control over ending their suffering in a humane and dignified manner.

B. Why States Ban PAS

1. Sanctity of Life

Those opposed to PAS argue that life is inherently sacred, and nothing can justify the deliberate taking of a human life. Some states that ban PAS argue that PAS contradicts their public policy interest in preserving life. Nevertheless, Elizabeth Brennan argues that allowing PAS does not "further [or] abrogate" preventing suicide or preserving life.[150] Namely, states that aim to preserve life fall short of their goal in cases of a terminally ill patient or a defendant. Both individuals will die eventually— by the effects of the illness and execution. The issue is who should be able to determine when the patient and the defendant die. The Court in *Cruzan* established that the patient should determine when she wants medical treatment or not.[151] In addition, the Court, in *Godinez,* held that the competent defendant must voluntarily and knowingly make the decision to waive his appeal process. In both cases, the Court leaves

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[148] *Id.*

[149] *Id.*

[150] Brennan, *supra* note 20, at 198.

[151] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2866 (1990).

the decision to the individual. Since that is the case, it is inconsistent to ban competent, terminally ill patients from deciding what to do with their bodies.

On the other hand, one could argue that the death penalty contradicts the argument for preserving life. If states valued preserving life, they would not sentence defendants to death as their punishments. Preserving life means preserving all human life, including defendants. Nonetheless, thirty-two states support the death penalty, and allow defendants to volunteer for execution.[152]

2. Patients Change Their Minds

In addition, those opposed to PAS argue that some terminally ill patients who request the assistance of a physician to help them end their lives, will decide, for a variety of reasons, that life is bearable. That is to say, once a physician prescribes the drug to the patient, the patient may decide that he or she can bear to live with the illness that will eventually kill him or her within six months. Banning PAS because a patient may change her mind only supports the argument that patients should be able to make the final decision. As mentioned earlier, under the Death with Dignity Act, terminally ill patients have the power to rescind the request for medication. Moreover, Oregon's number of prescribed patients compared to the number of patients who actually self-administered the medication illustrates that patients change their minds. This is a good option under the Death with Dignity Act. Nonetheless, defendants do not have the luxury of changing their minds after waiving their rights to an appeal, yet states are more in favor of allowing defendants to have control over when and how they die.

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[152] *States with the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 16, 2015).

C. Why States Should Implement Death with Dignity Laws

Death penalty states that have pending legislation regarding Death with Dignity Act are closer to achieving consistency within their states than states that are not in the process of incorporating some type of legislation. Particularly, states that allow voluntarism should seriously consider implementing the Death with Dignity Act because competent defendants and competent, terminally ill patients are analogous. Comparing the two, one can see similarities in acceptance of circumstances, imminent death, the roles of the court and physicians, competency, and knowingly and voluntarily consenting. If the Death with Dignity Act accepts standards that are similar to the standards a court accepts to grant a defendant's request to waive his appeal, then the Death with Dignity standards ought to be sufficient.

1. Acceptance of Punishment and Illness

Volunteers accept their punishments and request to expedite their executions. They refuse to challenge the justice of their punishments. Competent defendants who waive their rights to an appeal understand the consequences and disadvantages of their waivers. Nevertheless, volunteers take control over their lives and how and when they die by choosing execution without any further delay.

Likewise, terminally ill patients accept their diagnosis and wish to expedite their deaths. Like Brittany Maynard, her life was her choice, and it should be. After she received the diagnosis that she had terminal brain cancer, she accepted the diagnosis. Brittany, took control over her life, and decided she wanted to die while maintaining physical and mental control over her body. For Brittany, and many other terminally ill patients, it is important to accept the illness, and take control. Even though Brittany had quality health care, and was financially stable, she made a choice. Nevertheless, courts and advocates of the death

penalty in over 30 states concur that it is acceptable for the defendant to make such a request; yet only five states concur that it is acceptable for terminally ill patients to expedite their death with the assistance of a physician.

2. Imminent Death

As much as states want to preserve life, the fact is that terminally ill patients will die within a short period. Terminal brain cancer was something Brittany would have to live with for the rest of her life, and on the day she decided to end her life, she accepted the results of her diagnosis. Meaning, the final stage for Brittany would be death in less than six months, and when she decided to die, she decided to fast-forward to that final stage. Brittany would inevitably die, and by moving to Oregon, she had the freedom to live her life with no worries about the final stages of her cancer. Brittany and many other terminally ill patients decided to embrace imminent and inevitable death on their own terms.

Similarly, volunteers decided to expedite their executions because they knew death was the final stage for them. They decided to embrace imminent and inevitable death on their own terms. After a court sentences them to death, volunteers accept the punishment without further delay. Both terminally ill patients and volunteers accept that death is imminent and inevitable, and they choose to embrace death in a humane and dignified manner. Nevertheless, states allow volunteers and ban terminally ill patients from embracing death in a dignified and humane manner. Thus, the question becomes, why is it ok for volunteers but not terminally ill patients?

3. Physicians vs. Courts

Courts grant defendants' request to waive their rights to an appeal. Judges carefully examine the materials submitted by the parties and determine whether the defendant is competent and

whether his waiver was knowing and voluntary.[153] Judges will not grant a defendant's request if they determine that some undo influence or coercion impaired the defendant's judgment.[154] Essentially, courts listen to the defendant's request and grant it when appropriate. Courts terminate appeals filed by the defendant's attorney if the defendant desires to do so, and there is no dispute as to the defendant's competence.[155] Although courts do not administer the execution, courts grant the request, expedite the process, and guarantee that the courts will not delay the defendant's execution any further.

Comparably, physicians do not administer the lethal medication—they only prescribe it. Physicians carefully evaluate terminally ill patients to determine whether they are competent and whether their requests are free of any undo influence or coercion.[156] Physicians will not grant the patient's request if they determine that the patient displayed signs of depression or coercion.[157] In fact, the physician must refer the patient to a psychiatrist, psychologist, or clinical social worker.[158] Only after the

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[153] *See* Gilmore v. Utah, 97 S. Ct. 436, 437 (1976) (holding that the state's determinations of the defendant's competence and knowing and intelligent waiver were valid).

[154] *See* Godinez v. Moran, 113 S. Ct. 2680, 2687 n.12 (1993).

[155] Hammett v. Texas, 100 S. Ct. 2905, 2906 (1980).

[156] OR. REV. STAT. § 127.815(1)(a) (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 18 § 5283(5) (West, Westlaw through 2013-2014 Adjourned Sess.); WASH. REV. CODE ANN. § 70.245.040(1)(a) (West, Westlaw through 2015 Reg. Sess.) (describing physicians' responsibilities of evaluating the patient).

[157] § 127.825 (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician must refer patient to a psychologist, psychiatrist, or clinical social worker if physician finds signs of impaired judgment).

[158] § 127.825 (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician must refer patient to a psychologist, psychiatrist, or clinical social worker if physician finds signs of impaired judgment).

psychiatrist, psychologist, or clinical social worker clears the patient, can a physician prescribe the medication.[159] Like courts, although physicians do not administer the medication to the patient, physicians grant the request and expedite the patient's death by prescribing the medication.

4. Competency

Defendants must be competent to waive their rights to an appeal. Similarly, terminally ill patients must be competent to consent to ending their lives in a dignified and humane manner. If having the ability to communicate with an attorney and an understanding of the proceedings against them is proper to give defendants control over their lives,[160] then having the ability to make and communicate informed health care decisions to health care providers should be proper to give terminally ill patients control over their lives as well. In both cases, defendants and patients are capable of communication with an attorney and a physician, and capable of understanding all the facts that pertain to their situations. Both desire to take control over their lives, and embrace imminent and inevitable death in a dignified and humane manner.

Moreover, terminally patients must prove that they are competent to two physicians and if appropriate, a psychiatrist, psychologist, or clinical social worker.[161] Comparably, defendants

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[159] § 127.825(1)(h) (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician may not prescribe the medication until the person performing the counseling determines that the patient is not suffering from any mental disorders or depression).

[160] *See* Godinez v. Moran, 113 S. Ct. 2680, 2685 (citing Dusky v. United States, 362 U.S. 402 (1960)).

[161] *See* § 127.825(1)(h) (Westlaw); tit. 18 § 5283(8) (Westlaw); § 70.245.060 (Westlaw) (providing that the physician may not prescribe the medication until the person performing the counseling determines that the patient is not suffering from any mental disorders or depression).

must prove to psychiatrists and psychologists that they are competent to waive their appeals.[162] Thus, if the reports from psychiatrists and psychologists are sufficient to prove that defendants are competent to expedite their executions, then states should accept the reports from physicians, psychiatrists, and psychologists regarding terminally ill patients' consent to end their lives by ingesting a lethal dose of medication.

5. Knowingly

Defendants must actually understand the significance and consequences of their decisions before they can waive their rights to an appeal.[163] Likewise, terminally ill patients must understand all the information regarding their diagnosis, prognosis, risks associated with taking the medication, and alternative options to PAS before they can consent.[164] In both cases, defendants and patients have to have full knowledge of the consequences of their decisions and understand the significance of their situations. If the standard for defendants is sufficient for the Supreme Court, then a similar standard under the Death with Dignity Act should be sufficient for states to allow PAS.

6. Voluntarily

Terminally ill patients must voluntarily request a lethal dose of medication. Physicians have a duty to evaluate their patients and make sure they are not under any depression or coercion.[165] Similarly, defendants must voluntarily waive their rights to an

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[162] *See Godinez*, 113 S. Ct. at 2682-83 n.2.

[163] *Id.* at 2687 n.12.

[164] § 127.815(1)(c) (Westlaw); tit. 18 § 5283(6) (Westlaw); § 70.245.040(1)(c) (Westlaw) (describing physicians' responsibilities of fully informing the patient).

[165] § 127.810(1) (Westlaw); tit. 18 § 5283(a)(4) (Westlaw); § 70.245.030(1) (Westlaw) (providing that the written requests for medication must be voluntary and free from coercion, duress, and undue influence).

appeal. The Supreme Court established that a waiver is voluntary if it is free from any coercion.[166] In other words, if defendants prove that they were not under the influence of alcohol, drugs, threats, or promises, at the time of their requests, then courts will rule that their waivers were voluntary. The Death with Dignity Act and the Supreme Court are on the same page when it comes to voluntariness. Both require that defendants and terminally ill patients make their own decisions absent any influence. Moreover, the courts want to confirm that defendants intentionally waived their rights to an appeal, and physicians want to confirm the same for terminally ill patients who request the medication to end their lives.

VII. CONCLUSION

In conclusion, states that allow defendants to volunteer for execution should allow PAS. Because defendants and terminally ill patient share the same acceptance, imminent death, competency requirement, and must knowingly and voluntarily make the decision to expedite their deaths, states that allow volunteerism should enact the Death with Dignity Act to maintain consistency. It is inconsistent to allow volunteerism and not PAS because competent volunteers and competent, terminally ill patients are analogous.

One cannot distinguish between defendants that choose to accept their punishment by expediting their execution, and patients who choose to accept their terminal illness by self-administering a lethal dose of medication to expedite their deaths. One cannot distinguish between the role of the courts that grant defendants' requests to expedite their executions, and the role of physicians who grant terminally patients' requests for prescriptions to expedite their deaths. In addition, one cannot distin-

[166] Gilmore v. Utah, 97 S. Ct. 436, 438 n.4 (1976).

guish the level of competency defendants and terminally ill patients must have as it pertains to requesting lethal medication or waiving appeals. Both individuals understand the facts, procedures, risks, disadvantages, and alternatives of their decisions. Lastly, one cannot distinguish the information courts require defendants to have and understand from the information the Death with Dignity Act requires physicians to give terminally ill patients. Both individuals must be knowing and intelligent before they can make their decisions.

More importantly, PAS gives patients the option to live their lives without worrying about losing control over their minds and bodies later, which is similar to courts that grant defendants' waiver to prevent any delays on their executions. Terminally ill patients do not want any delays any more than defendants do. States that allow volunteerism should allow PAS so that terminally ill patients can rest knowing that their physicians will be able to assist them when it is time and they can no longer suffer.