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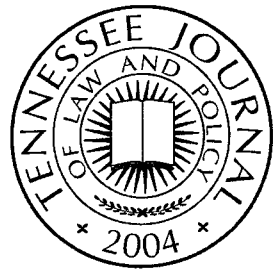

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ESSAYS

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ESSAY

RACIAL DISCRIMINATION IN THE DEATH PENALTY IN TENNESSEE: AN EMPIRICAL ASSESSMENT

John M. Scheb II[*] *& Kristin A. Wagers*[**]

The intense media coverage of the United States Supreme Court's recent decisions in *Baze v. Rees*[1] and *Kennedy v. Louisiana*[2] highlights the ongoing saliency of the death penalty in American politics. In this article, we use empirical evidence to shed light on this controversy. Our analysis utilizes data from 1,068 first-degree murder convictions rendered in Tennessee between 1977 and 2007.[3] The questions animating our research are: 1) *What factors led prosecutors to seek the death penalty?* and 2) *What factors led juries to impose it?* In particular, we are interested in the role that race plays in these decisions. Does the system operate in a racially-neutral fashion, or is it hopelessly infected with discrimination, as some prior studies in other states have suggested?

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[*]Professor and Interim Head Department of Political Science, University of Tennessee, Knoxville

[**]Doctoral Candidate, Department of Political Science, University of Tennessee, Knoxville

[1] Baze v. Rees, 553 U.S. __; 128 S. Ct. 1520 (2008).

[2] Kennedy v. Louisiana, 554 U.S. __; 128 S. Ct. 2641 (2008).

[3] This data is taken from reports submitted by trial judges across the state in compliance with Supreme Court Rule 12, which requires judges to complete detailed reports on cases in which defendants are convicted of first-degree murder. SUP. CT. R. 12.

Race and the Death Penalty

In *Furman v. Georgia*, the Supreme Court invalidated Georgia's death penalty statute and effectively imposed a five-year national moratorium on capital punishment.[4] Concurring in *Furman*, Justice William O. Douglas characterized capital punishment in Georgia as being "pregnant with discrimination."[5] Early social science research has found substantial racial disparities in the administration of the death penalty.[6] "These studies found that blacks were indicted, charged, convicted, and sentenced to death in disproportionate numbers . . . ."[7] However, these early studies were criticized for failing to utilize adequate statistical controls.[8] Modern social science research has found less evidence of discrimination due to the race of capital defendants, but considerable evidence of discrimination based on the race of murder victims.[9]

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[4] 408 U.S. 238, 238-40 (1972).

[5] *Id.* at 257 (Douglas, J., concurring).

[6] *See, generally,* CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 368-70 (University of North Carolina Press 1940); Harold Garfinkel, *Research Note on Inter-and Intra-Racial Homicides,* 27 SOC. FORCES 369 (1949); Elmer H. Johnson, *Selective Forces in Capital Punishment,* 36 SOC. FORCES 165, 169 (1957).

[7] WILLIAM J. BOWERS & GLENN L. PIERCE, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, 69-70 (Northeastern University Press 1984).

[8] *See* Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty,* 46 AM. SOC. REV. 783, 786-92 (1981).

[9] *See, e.g.,* Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After* Furman *in Texas,* 69 SOC. SCI. Q. 853, 853 (1988); Richard Lempert, *Capital Punishment in the '80s: Reflections on the Symposium,* 74 J. CRIM. L. & CRIMINOLOGY 1101, 1106-07 (1983); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases,* 19 LAW & SOC'Y REV. 587, 590-91 (1985); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of*

Encapsulating this research, one author concluded that "the death penalty is between three and four times more likely to be imposed in cases in which the victim is white rather than black."[10] Intersecting the race of defendants with that of victims, researchers have found that black defendants accused of killing white victims are most likely to be sentenced to death.[11] Some argue, however, that apparent racial differences in the administration of the death penalty can be explained in terms of other factors—that racial differences disappear when appropriate statistical controls are introduced.[12] Such control variables include the number of victims, the defendant's criminal history, the relationship

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Louisiana, 15 J. CRIM. JUST. 279, 280 (1987); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-*Gregg *Period,* 79 J. CRIM. L. & CRIMINOLOGY 483, 487-88 (1988).

[10] Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates,* 26 ANN. REV. SOC. 43, 47 (2000) (citations omitted).

[11] *See, e.g.,* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,* 74 J. CRIM. L. & CRIMINOLOGY 661, 707-10 (1983); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts,* 15 STETSON L. REV. 133, 157-65 (1986); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina,* 74 J. CRIM. L. & CRIMINOLOGY 754, 766-78 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination,* 18 LAW & SOC'Y REV. 437, 450-70 (1984).

[12] *See, e.g.,* PUBLIC POLICY AND STATISTICS: CASE STUDIES FROM RAND (SALLY C. MORTON & JOHN E. ROLPH eds., 2000); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999),* 81 NEB. L. REV. 486, 498-500 (2002–2003); Alfred B. Heilbrun, Jr. et al., *The Death Sentence in Georgia, 1974-1987: Criminal Justice or Racial Injustice?,* 16 CRIM. JUST. & BEHAV. 139, 151 (1989); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California,* 32 JURIMETRICS J. 33, 44 (1991-1992).

of the defendant to the victim, the method of killing, the location of the murder, the vulnerability of the victim, and the "atrociousness" of the murder.[13]

Indeed, some have argued that the way to minimize the prospect of racial discrimination in the death penalty is to ensure that it is applied only in the most atrocious crimes.[14] Dissenting in *McCleskey v. Kemp*, Justice John P. Stevens observed that

> . . . there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If [the State] were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.[15]

Justice Stevens' view, at least until recently,[16] was that an infrequently administered death penalty, limited to only the

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[13] *See, e.g.*, PUBLIC POLICY AND STATISTICS: CASE STUDIES FROM RAND (SALLY C. MORTON & JOHN E. ROLPH eds., 2000); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999),* 81 NEB. L. REV. 486, 498-500 (2002–2003); Alfred B. Heilbrun, Jr. et al., *The Death Sentence in Georgia, 1974-1987: Criminal Justice or Racial Injustice?*, 16 CRIM. JUST. & BEHAV. 139, 151 (1989); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 44 (1991-1992).

[14] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

[15] *Id.* at 367 (Stevens, J., dissenting).

[16] *See* Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring).

most heinous of murders, could be purged of racial discrimination.[17]

The Tennessee Data

We turn now to an examination of the death penalty in Tennessee. We must stipulate at the outset that the database we have employed in this research is far from perfect. Evidently, some first-degree murder convictions are not included in the database.[18] Also, there are variables within the database for which a nontrivial number of cases are missing.[19] It should be recognized, though, that in the "real world" of social science research, datasets built from official records are often less than perfect. After working closely with these data for the past year, we do not believe that these problems pose a serious threat to the validity of our findings.

An initial examination of the data reveals that Tennessee prosecutors sought the death penalty in 34% of the 1,068 cases. In those 361 capital trials, juries returned death sentences 44% of the time (160 cases). Thus, 15% of the first-degree murder convictions we studied resulted in sentences of death. In looking at these outcomes over time, what is most striking is the decline in the proportion of cases resulting in death sentences (see Table 1). Between 1977 and 1990, prosecutors sought the death penalty in

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[17] James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1646 (2006).

[18] John Shiffman, *Missing Files Raise Doubts About Death Sentences,* THE TENNESSEAN, Jul. 22, 2001, *available at* http://www.hwylaw.com/CM/Articles/Missing%20files%20raise%20doubts%20about%20death%20sentences%2007.22.01.pdf.

[19] For example, the race of 26 defendants contained in the database is currently unknown. With respect to the race of the victim, the race of 65 victims contained in the database is currently unknown. However, with a large number of observations, the missing data have relatively little impact.

53% of cases that resulted in first-degree murder convictions. During the same period, juries returned death sentences 55% of the time, so that 29% of first-degree murder convictions led to sentences of death. By contrast, in the period from 2001 to 2007, the rate at which prosecutors sought the death penalty declined to 24% and the rate at which juries returned death sentences dropped to 30%; thus only 7% of convictions in the 2001-2007 resulted in the death penalty.

Table 1. Death Penalty Outcomes in Tennessee, 1977-2007

	# of Cases	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
1977-07	1068	100.0%	33.8%	44.3%	15.0%
1977-90	294	27.5%	53.1%	54.5%	28.9%
1991-00	379	35.5%	29.3%	42.3%	12.4%
2001-07	395	37.0%	23.8%	29.8%	7.1%

In Tennessee, 50% of the defendants convicted of first-degree murder were white; 45% were black.[20] Contrary to conventional wisdom, prosecutors were more likely to seek the death penalty against white defendants and juries were more likely to return death sentences in cases involving white defendants (see Table 2 below). Consequently, 19% of white defendants were sentenced to death, as compared with 11% of African-American defendants.

The story is somewhat different, however, with respect to the race of the murder victims. As Table 2 shows, prosecutors were considerably more likely to seek the death penalty in cases where victims were white. Although juries were only slightly more likely to return death sentences in these cases, the net result was that 18% of defendants who killed white victims were sentenced to death while only 10% of defendants whose victims were black received the death penalty.

[20] 5% of defendants were of another race or their race was not recorded; those cases will be ignored in this part of the analysis.

Table 2. Racial Classification of Defendants and Victims

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
White Δ*	50.4%	38.5%	48.8%	18.8%
Black Δ	44.9%	28.1%	37.8%	10.6%
White V**	64.0%	39.4%	44.7%	17.6%
Black V	33.0%	23.1%	41.0%	9.5%
White Δ/White V	52.4%	39.4%	51.8%	19.0%
White Δ/Black V	2.0%	21.1%	50.0%	10.5%
Black Δ/Black V	32.7%	23.2%	41.1%	9.5%
Black Δ/White V	12.9%	37.9%	29.8%	11.3%

Intersecting the race of defendants and victims produces some interesting results (again, see Table 2). Prosecutors were much more likely to seek the death penalty when victims were white irrespective of the race of the accused. Yet juries were much less likely to return death sentences in cases involving black defendants and white victims. The upshot is white defendants whose victims were white were almost twice as likely as other defendants to receive the death penalty. Obviously, other

* Δ = Defendant
** V= Victim

factors beyond race are in play here. We turn now to those other factors.

As shown in Table 3 below, there is an inverse relationship between the frequency of a type of homicide and the likelihood that it will result in a death sentence. For example, nearly 40% of the first-degree murder convictions involved killings committed in conjunction with burglaries or robberies; yet less than 20% of these convictions result in death sentences. Similarly, spousal or domestic killings account for 17% of first-degree murder convictions but only 12% of such convictions result in capital punishment. On the other hand, prison killings are very infrequent (less than 1% of our first-degree murder cases), yet half the convictions of this type result in death sentences. Killings by escapees are also rare types of first-degree murder cases; yet convictions of this type are the most likely to result in capital punishment.

There also appears to be a relationship between "atrociousness" and the death penalty. Thus, homicides stemming from sexual assaults on children and the elderly are more than four times more likely to result in death sentences than are drug-related killings and gang-related killings. Prosecutors and juries may mirror community attitudes in this regard—that murder victims who were involved in gang or drug activity deserve less sympathy or require less retribution than elderly persons and children killed during violent sexual assaults.

Table 3. Nature of Homicide

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
Killing by an Escapee	1.3%	76.9%	90.0%	69.2%
Prison Killing	0.4%	50.0%	100.0%	50.0%
Child Sexual Assault	1.3%	64.3%	66.7%	42.9%
Witness Killing	2.0%	57.1%	75.0%	42.9%
Killing Law Officer/Other Official	2.1%	54.5%	75.0%	40.9%
Convenience Store Killing	1.9%	60.0%	66.7%	40.0%
Elderly Sexual Assault	0.5%	60.0%	66.7%	40.0%
Rape Killing	3.8%	65.0%	57.7%	37.5%
Contract Killing	2.3%	41.7%	90.0%	37.5%
Kidnapping Killing	4.2%	61.4%	51.9%	31.8%
Elderly Killing	10.1%	57.1%	45.0%	25.7%
Torture/Depraved Killing	2.3%	25.0%	100.0%	25.0%
Burglary/Robbery Killing	38.7%	41.5%	46.1%	19.2%
Spousal/Domestic Killing	16.7%	26.0%	46.7%	12.1%
Drug Related Killing	7.7%	28.8%	34.8%	10.0%
Child Abuse Killing	2.2%	13.0%	66.7%	9.0%
Gang-Related Killing	2.4%	20.0%	20.0%	4.0%

As Table 4 shows, the behavior of prosecutors and juries also varies according to the defendant's motive. Murders to escape apprehension or punishment, for sexual pleasure or other gratification, or to silence a witness are much more likely to result in the death penalty. On the other hand, homicides motivated by racial or religious bias, jealously, or hatred of the victim are least likely to result in capital punishment.

Table 4. Motive

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
Escape Apprehension or Punishment	3.4%	66.7%	75.0%	50.0%
Sexual or Other Pleasure	4.8%	68.6%	57.1%	39.2%
Silence a Witness	3.0%	56.3%	61.1%	34.4%
Pecuniary or Other Gain	40.0%	41.7%	52.2%	21.8%
Revenge or Retaliation	6.5%	36.2%	52.0%	18.8%
Obsession, Control	4.6%	34.7%	41.2%	14.3%
Senseless Killing	3.4%	19.4%	71.4%	13.9%
Possible Drug Influence	2.2%	45.8%	27.3%	12.5%
Racial, Religious or Other Bias	7.0%	28.0%	38.0%	10.7%
Jealousy	2.8%	23.3%	42.9%	10.0%
Long-Term Hatred of Victim	1.0%	18.2%	50.0%	9.1%

The method of killing also appears to be important (see Table 5 below). Shooting, by far the most common means of committing murder, is much less likely to result in the death penalty than most other methods of killing. Murders by drowning and throat slashing, which are relatively rare, are most likely to lead to death sentences.

Table 5. Method of Killing

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
Drowning	1.3%	78.6%	54.5%	42.9%
Throat Slashing	1.9%	60.0%	66.7%	40.0%
Other	1.1%	50.0%	66.7%	33.3%
Strangling/Suffocating	8.5%	46.2%	45.2%	20.9%
Stabbing	12.3%	38.2%	50.0%	19.1%
Beating/Blunt Trauma	16.5%	34.7%	49.2%	17.0%
Shooting	63.8%	31.4%	39.7%	12.5%
Burning	2.0%	47.6%	10.0%	4.8%

As shown in Table 6 below, the location of the homicide also affects the likelihood of capital punishment. Murders committed in a field, the woods or some rural area and those committed at the victim's workplace are most likely to result in death sentences; while homicides committed "on the street" and in vehicles are least likely to receive capital punishment.

Table 6. Location of Crime

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
Field, Woods, or Rural Area	7.0%	56.0%	71.4%	40.0%
Victim's Workplace	5.0%	52.8%	71.4%	37.7%
Jail or Prison	1.1%	41.7%	80.0%	33.3%
Commercial Establishment	7.5%	50.0%	52.5%	26.3%
Hotel or Motel	1.6%	35.3%	66.7%	23.5%
Victim's Residence	31.9%	31.4%	44.9%	14.1%
Defendant's Residence or Workplace	5.4%	25,9%	40.0%	10.3%
Park or School Grounds	2.9%	19.4%	50.0%	9.7%
Street, Sidewalk, or Parking Lot	10.0%	21.5%	34.8%	7.5%
Public or Private Vehicle	2.5%	22.2%	16.7%	3.7%

The number of victims, too, has a substantial impact, especially on the prosecutor's decision to seek the death penalty (see Table 7 below). The net result is that when there are three or more victims, the convicted murderer is roughly twice as likely to receive a death sentence than when there are only one or two victims.

Table 7. Number of Victims

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
1 Victim	86.9%	32.1%	44.1%	14.1%
2 Victims	10.3%	38.2%	47.6%	18.2%
3+ Victims	2.8%	73.3%	40.9%	30.0%

Not surprisingly, the defendant's criminal history also plays a significant role (see Table 8 below) in the likelihood of receiving a death sentence. In particular, three or more prior felony convictions greatly increase the chances of a defendant receiving a death sentence. This is influenced more by jury behavior as opposed to prosecutorial decision making. Interestingly enough, when the prosecution sought the death penalty against individuals with no prior criminal history (the majority of all first-degree murder defendants), juries were least likely to sentence such defendants to death.

Table 8. Defendant's Criminal History

	First-Degree Murder Convictions in Database	Cases in which Prosecutor Sought Death Penalty	Death Penalty Cases in which Jury Returned Death Sentence	Cases Resulting in Death Sentence
No Criminal Record	24.6%	26.6%	30.0%	8.0%
Juvenile Record	10.8%	23.5%	51.9%	12.2%
Record of Misdemeanors	33.5%	28.2%	44.6%	12.6%
One or Two Prior Felonies	24.5%	38.9%	50.0%	19.5%
Three or More Prior Felonies	18.1%	44.0%	69.4%	30.6%

Conclusions

Ultimately, the best way to determine the impact of race, or any other independent variable, on the behavior of prosecutors and juries is to develop a multivariate model incorporating various controls simultaneously. That project is beyond the scope of this paper but will be the centerpiece of a paper currently in development. For now, based on the foregoing cross-tabulations, we can draw the following conclusions with respect to the role of race in the administration of capital punishment in Tennessee. First, there are racial discrepancies, both with regard to defendants and victims. However, the discrepancy with regard to defendants runs counter to conventional wisdom in that white defendants are significantly more likely to be selected for and to receive the death penalty. The discrepancy with respect to victims runs in the direction suggested by the literature—defendants whose victims are white are more substantially likely to be selected for capital punishment by prosecutors. However, juries appear to be less influenced by the race of victims in deciding which defendants will be sentenced to death. Second, the data suggest that numerous other factors influence prosecutors and juries with respect to the death penalty. It may well be, that once these other factors are incorporated into a multivariate model, the effect of race will be substantially attenuated.

ESSAY

JUST WHAT THE DOCTOR ORDERED: THE NEED FOR CROSS-CULTURAL EDUCATION IN LAW SCHOOLS

*Andrew King-Ries**

I. Introduction

In 2003, the United States Supreme Court affirmed the importance of diversity in legal education when it decided *Grutter v. Bollinger*.[1] Underlying the Court's decision was the recognition that a diverse student body benefits the education of all law students, which in turn, impacts society in important ways.[2] While recognition of educational diversity as a compelling state interest allows law schools to consider race in admissions, race-based admissions policies alone cannot address the truly compelling state interest underlying educational diversity: training lawyers to practice in a multicultural society, including effectively representing clients from different racial, ethnic, and socioeconomic backgrounds. Law schools must do more than simply attempt to create diverse classrooms. Law schools must implement cross-cultural education to teach law students the skills necessary to understand cultural differences and to effectively

* Assistant Professor, University of Montana School of Law; A.B., Brown University, 1988; J.D., Washington University in St. Louis, 1993. I would like to thank Amie Thurber of the National Coalition Building Institute and Professors Larry Howell and J. Martin Burke for their insightful comments to earlier drafts of this article. Finally, I owe many thanks to Jessie Lundberg for her outstanding research assistance.

[1] 539 U.S. 306, 343 (2003).

[2] *See id.* at 330.

communicate with clients and colleagues whose cultural backgrounds differ from their own.

Several years ago, the medical profession recognized that its professionals, while not overtly racist, reflect the prejudicial attitudes and perceptions prevalent in American society.[3] As a result of doctors' and nurses' prejudices, stereotypes, and biases, American racial and ethnic minorities receive lower quality healthcare than white Americans, independent of insurance status, income, education, or other factors that influence access to healthcare.[4] In response to that disturbing finding, the medical profession called for the inclusion of cross-cultural education into medical school curricula.[5] The American Medical Association (AMA) subsequently adopted[6] cross-cultural education standards for all medical schools seeking accreditation.[7] The same societal biases influencing medical professionals influence lawyers, perhaps to an even greater degree given the legal system's central place of power in American society. Yet, the legal profession has not undertaken a similar self-assessment.

Given the changing demographics in the United States and law schools, the time is ripe to reassess what law students need to know to be effective advocates in our multicultural society. In *Grutter*, the Supreme Court focused on the importance of the diversity of the next

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[3] INST. of MED., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTHCARE 76–77, 79 (Brian D. Smedley et al. eds., 2003) ("*Unequal Treatment*").

[4] *Id.*

[5] *See* Patricia A. Thomas, *Leading through Diversity—My Version of the Dream: Comfortable Shoes*, SELAM INT'L NEWS, July 2002, at 12, 13.

[6] *Id.*

[7] LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE 15 (June 2007) (standards ED-20 and ED-21) ("*LCME Cultural Competency Standards*").

generation of law students.[8] The United States Census Bureau predicts that the demographics of the United States will undergo a massive transformation in the next forty years.[9] By 2050, the United States will be a "minority-majority" country in which non-Hispanic white Americans will become a plurality rather than the majority population.[10] Future generations of law students will represent an increasingly diverse population of clients. Without cross-cultural education, lawyers will lack the basic skills needed to fulfill their ethical obligation of competent representation, and the legal profession will continue to reflect societal prejudice toward minorities, rather than fulfill the American Bar Association's command to rid the profession of discrimination based on race and ethnicity. [11]

Currently, momentum is building toward retooling legal education in the United States. In the past year alone, two major assessments of legal education were released: *Best Practices for Legal Education*[12] by the Clinical Legal Education Association (CLEA) and *Educating Lawyers*[13] by the Carnegie Foundation for the Advancement of Teaching. Both of these reports advocate the need to

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[8] *See Grutter*, 539 U.S. at 343 ("The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

[9] U.S. Census Bureau, *The Face of Our Population* (Oct. 13, 2004), http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?-pageID=tp9_race-ethnicity (" *Face of Our Population*").

[10] *Id.*

[11] *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 1992, A.B.A. SECT. L. EDUC. & ADMISSIONS BAR, 141, 216-17, *available at* http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html (" *MacCrate Report*").

[12] ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) ("*CLEA's Best Practices*").

[13] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) ("*Carnegie Report*").

improve legal education to ensure the health, morality, and competence of lawyers and the legal profession. In addition, CLEA's *Best Practices* recognizes the importance of cross-cultural skills for lawyers.

This article urges law schools to follow their medical counterparts by incorporating cross-cultural education into their curricula. Part II discusses the *Grutter* decision and the Supreme Court's recognition of the benefits of diversity to legal education. Part III highlights the changing demographics of the United States and how those demographics require immediate response from the legal academy. Part IV considers the experience of medical education. This section begins by exploring a study of the medical profession conducted by the Institute of Medicine. The section then addresses medical schools' response to the Institute of Medicine report and the subsequent incorporation of cross-cultural education into medical school curricula. Part V addresses the recent assessments by CLEA and the Carnegie Foundation regarding cross-cultural competency of lawyers. Part VI argues that the American Bar Association must take the lead and require law schools to incorporate cross-cultural competency into the education of America's next generation of lawyers.

II. *Grutter* and Educational Diversity

In 2003, the Supreme Court of the United States issued its opinion in *Grutter v. Bollinger*,[14] addressing whether educational diversity in law schools constitutes a compelling state interest.[15] The Court affirmed the constitutionality of Michigan Law School's admissions policy allowing consideration of race as a factor in order to

[14] *Grutter*, 539 U.S. at 310.

[15] *Id.* at 322. The Court issued a separate opinion dealing with the use of race in undergraduate admissions. *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

further the school's goal of creating a diverse law student body.[16]

Justice O'Connor, in drafting the opinion of the Court, began by reviewing Justice Powell's opinion in *Regents of the University of California v. Bakke*[17] that educational diversity could constitute a compelling state interest.[18] According to Justice Powell, the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[19] Before *Grutter*, many lower courts had interpreted Justice Powell's opinion as the holding of the Court.[20] However, in *Grutter*, a majority of the Court held for the first time that educational diversity constitutes a compelling state interest.[21]

In holding that the state has a compelling interest in achieving diversity in its educational institutions, the Court highlighted several "substantial" benefits of ethnic and racial diversity.[22] First, the Court agreed with the district court's finding that diversity in educational programs "promotes 'cross-cultural understanding'" and helps decrease racial stereotypes.[23] The Court found that educational diversity "enables [students] to better understand persons of different races."[24]

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[16] *Grutter,* 539 U.S. at 343.
[17] 438 U.S. 265 (1978).
[18] *Grutter*, 539 U.S. at 322–23.
[19] *Id.* at 324 (quoting *Bakke*, 438 U.S. at 313).
[20] *Id.* at 321; *see, e.g.*, Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1199 (9th Cir. 2000) (quoting Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal citations omitted)).
[21] *Grutter*, 539 U.S. at 325.
[22] *Id.* at 330.
[23] *Id.*
[24] *Id.*

In addition, the Court found that educational diversity produces professionals better trained to deal with America's diverse population.[25] The Court, quoting from the amicus brief of the American Educational Research Association, noted that "student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[26]

Third, the Court identified the significant role that diversity plays in the legitimacy of American leaders.[27] Harkening back to Justice Powell's connection of effective leadership with cross-cultural understanding, the Court stated that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders . . . . Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives."[28] The Court continued in this vein, stating:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[29]

Finally, the Court noted that educational diversity—namely, law schools' ability to train students to understand

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[25] *Id.* (quoting Brief for the Am. Educ. Research Ass'n as Amici Curiae, *Grutter* 539 U.S. (No. 02-241)).
[26] *Grutter*, 539 U.S. at 330.
[27] *Id.* at 332.
[28] *Id.*
[29] *Id.*

different cultures and effectively work with those differences—played an important role in the future health of American society and America's ability to realize its democratic values:

> We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society . . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized . . . . As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts."[30]

The Court's finding that educational diversity is a compelling state interest, therefore, was premised on the central place of law schools in educating lawyers, the critical leadership role lawyers play in American society, and the importance of American lawyer-leaders being able to work effectively with a diverse population.

III. The Changing Demographics of the United States and Law Schools

Due to dramatic changes in the racial and ethnic makeup of the United States population, tomorrow's

[30] *Id.* at 331–32 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1949)). Interestingly, the *Grutter* Court left out the sentence immediately preceding the language it quoted from Sweatt v. Painter: "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one." *Sweatt*, 339 U.S. at 634.

lawyers will practice law in a truly multicultural society.[31] In one generation, America will be a "minority-majority" country for the first time.[32] Four states—Texas, California, Hawaii, and New Mexico—are currently "minority-majority" states.[33] Even in the legal profession, where minorities are underrepresented,[34] minority participation has followed larger demographic trends.[35] As a result, the next generation of American lawyers will be required to maneuver cultural differences and intricacies, with regard to both colleagues and clients, to a far greater degree than any previous generation of legal professionals.

The face of lawyers' future clients is changing dramatically. The current United States population is roughly 300 million people.[36] Non-Hispanic white

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[31] While race and ethnicity are just some of the many important aspects of culture, the projected changes in this area merit examination. Similar, but more difficult to quantify, changes are also taking place in other aspects of culture: sexual orientation, family structure, and gender, for example. Although this section focuses on race and ethnicity, it should not be taken to mean that these are the only important aspects of culture about which law schools needs to educate future lawyers.

[32] *Face of Our Population*, *supra* note 9.

[33] U.S. Census Bureau, Texas Becomes Nation's Newest "Majority-Minority" State, Census Bureau Announces (Aug. 11, 2005), *available at* http://www.census.gov/PressRelease/www/releases/archives/population/005514.html. Both terms—"minority-majority" and "majority-minority"—are used to describe the phenomenon of minority populations exceeding majority populations. For purposes of this paper, I prefer the term, "minority-majority" because it places the emphasis on the minority populations rather than white population.

[34] A.B.A. Commission on Racial & Ethnic Diversity in the Profession, *Statistics about Minorities in the Profession from the Census*, Sept. 28, 2008, http://www.abanet.org/minorities/links/2000census.html ("*ABA Statistics about Minorities*").

[35] U.S. Equal Employment Opportunity Commission, *Diversity in Law Firms* (2003), *available at* http://www.eeoc.gov/stats/reports/diversitylaw/index.html.

[36] U.S. Census Bureau, *2006 American Community Survey Data Profile Highlights* (2006), *available at* http://factfinder.census.gov/

Americans constitute nearly three-fourths of that population.[37] Minorities make up the remaining one-fourth, or slightly less than 100 million people.[38] According to the United States Census Bureau, by the year 2050, the United States will experience a 188% increase in the Hispanic population, a 71% increase in the Black population, and a 213% increase in the Asian population.[39] As a result, by 2050, minorities and whites will make up equal portions of the American population.[40]

Immigration also contributes to increasing diversity in American society. The United States draws two-thirds of the world's immigrants.[41] In 1940, 70% of immigrants to the United States came from Europe.[42] Today, 85% of immigrants to the United States come from Central and South America,[43] further adding to this country's diversity.

In addition to racial and ethnic differences, future lawyers will face increasing language challenges in their practices. According to the Census Bureau, nearly 20% of the United States' population speaks a language other than English at home.[44] With continued immigration and

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servlet/ACSSAFFFacts?_submenuID=factsheetI&sse=on ("*American Community Survey Highlights*").

[37] *Id.*

[38] Press Release ,U.S. Census Bureau, *Minority Population Tops 100 Million* (May 17, 2007), http://www.census.gov/Press-Release/www/releases/archives/population/010048.html. This figure probably underestimates illegal immigrants, who may avoid participating in census surveys.

[39] *Face of Our Population*, *supra* note 9.

[40] U.S. Census Bureau, *Projected Population of the United States, by Race and Hispanic Origin: 2000 to 2050* (Mar. 18, 2004), *available at* http://www.census.gov/ipc/www/usinterimproj/natprojtab01a.pdf).

[41] American Medical Student Association, *Cultural Competency in Medicine*, http://www.amsa.org/programs/gpit/cultural.cfm (accessed Jan. 31, 2008) (citing RACHEL E. SPECTOR, CULTURAL DIVERSITY IN HEALTH AND ILLNESS 169 (5th ed., Prentice-Hall 2000)).

[42] *Id.*

[43] *Id.*

[44] *American Community Survey Highlights*, *supra* note 36.

globalization, knowledge of languages other than English will increase in importance.

The face of the legal profession is changing as well. In the past twenty years, minority participation in law schools more than doubled. In the 1984–1985 academic year, minorities received 8.6% of all Juris Doctor degrees awarded;[45] two decades later, in the 2004–2005 academic year, 22.4% of juris doctors were awarded to minorities.[46] While this trend has slowed—in the past eight years, minority enrollment in law schools has consistently hovered around 20% of total law school enrollment [47]—minority enrollment rates have not decreased, and continue to show small increases each year. Despite these increases, minorities remain underrepresented in the legal profession as they currently represent one-fourth of the total United States population.[48]

In August 2006, an understanding of the importance of educational diversity and a concern about underrepresentation of minorities prompted the American Bar Association to adopt an accreditation standard requiring law schools show a "commitment to diversity":

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[45] American Bar Association, *Total Minority J.D. Degrees Awarded 1983–2004* (2006), *available at* http://www.abanet.org/legaled/statistics/charts/stats%20-%209.pdf.

[46] *Id.*

[47] LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 852, 856 (2008 ed.).

[48] *ABA Statistics about Minorities*, *supra* note 34; A.B.A. COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION v (2000); *see also American Community Survey Highlights*, *supra* note 36.

Standard 212. EQUAL OPPORTUNITY AND DIVERSITY.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race, and ethnicity.[49]

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[49] American Bar Association Section of Legal Education and Admissions to the Bar, *2007–2008 Standards for Approval of Law Schools* 16 (2007), *available at* http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%202.pdf ("*ABA Accreditation Standards*"). In September 2007, this standard came under attack from an unlikely source: the United States Commission on Civil Rights. U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools: Briefing Report* 141–45 (2007); U.S. Commission on Civil Rights, *U.S. Civil Rights Commission Warns that Affirmative Action Might Harm Minority Law Students* (Aug. 28, 2007) press release, *available at* http://www.usccr.gov/index.html. In 2004, the Commission, which is supposed to be a bipartisan panel, underwent a makeover—after two of the Commission's four Republican members switched their voter registration to Independent, President Bush appointed two more Republicans, creating a Commission of six Republicans and two Democrats. Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, THE BOSTON GLOBE (Nov. 6, 2007), *available at* http://www.boston.com/news/nation/washington/articles/2007/11/06/maneuver_gave_bush_a_conservative_rights_panel/; *see* Daniel Levin, Office of Legal Counsel, *Memorandum Opinion for the Deputy Counsel to the President: Political Balance Requirement for the Civil Rights Commission* 1–2 (Dec. 6, 2004). Shortly thereafter, the

At the same time, the American Bar Association amended and adopted the following interpretations of Standard 212:

> ***Interpretation 212-1***
> The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 212. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provisions.
>
> ***Interpretation 212-2***
> Consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups, and backgrounds.

Commission began to question the ABA's diversity standards and law schools' affirmative action efforts, sparking harsh criticism from civil rights and affirmative action advocates. Peter Schmidt, *Civil-Rights Commission Pressures Law Schools on Affirmative Action*, THE CHRON. OF HIGHER ED. (Sept. 7, 2007), available at http://chronicle.com/weekly/v54/i02/02a03601.htm; Martha Neil, *Government Report Pans Law School Affirmative Action*, A.B.A. J. (Aug. 30, 2007), *available at* http://abajournal.com/news/govt_report_pans_law_school_affirmative_action/.

> ***Interpretation 212-3***
> This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.[50]

Given the recent adoption of Standard 212 and the accompanying interpretations, minority enrollments in law schools will likely continue to increase—albeit at less than representative rates—creating greater diversity in future law school classes.

IV. The Medical Profession

A. The Institute of Medicine Report

In 1999, Congress commissioned the Institute of Medicine to assess disparities in healthcare received by minorities in the United States.[51] Prompted by multiple medical studies indicating that the health of American

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[50] *American Bar Association Accreditation Standards*, *supra* note 49, at 17 (emphasis removed).
[51] *Unequal Treatment*, *supra* note 3, at 30.

minorities contrasts negatively with that of white Americans,[52] Congress charged the Institute to "assess the extent of racial and ethnic differences in healthcare", identify potential sources for any disparity found—including discrimination and bias in the healthcare industry—and make recommendations to alleviate the issues.[53] In 2003, after an eighteen-month study, the Institute of Medicine issued its report, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Healthcare*.[54]

The Institute's report confirmed that racial minorities receive lower-quality healthcare than whites.[55] This disparity results in higher morbidity and mortality rates among minority patients.[56] The Institute conducted an extensive literature review and documented negative disparities in care provided for cardiovascular disease, cancer, HIV/AIDS, diabetes, and mental illness.[57] The Institute concluded that the disparities in health care are "consistent and extensive across a range of medical conditions and healthcare services [and] are associated with worse health outcomes."[58]

Significantly, the fact that minorities receive worse healthcare is independent of insurance status, income, education, and other access issues.[59] The Institute found that healthcare provider bias, stereotyping, prejudice, and clinical uncertainty significantly contributed to the healthcare disparities.[60] While the Institute of Medicine did not find evidence of overt racism on the part of doctors and nurses, the report documented that medical professionals'

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[52] *See id.* at 29–30.
[53] *Id.* at 30.
[54] *See generally id.*
[55] *Id.* at 29.
[56] *Id.*
[57] *Id.* at 38, 39, 52, 57, 58, 61, 62, 64, 66, 68, 69.
[58] *Id.* at 79.
[59] *Id.*
[60] *Id.*

unconscious attitudes, stemming from America's history of racial discrimination and socialization in a racist society, impacted the quality of care:

> Racial and ethnic disparities in healthcare emerge from [a] historic context in which healthcare has been differentially allocated on the basis of social class, race, and ethnicity. Unfortunately, despite public laws and sentiment to the contrary, vestiges of this history remain and negatively affect the current context of healthcare delivery. And despite the considerable economic, social, and political progress of racial and ethnic minorities, evidence of racism and discrimination remains in many sectors of American life.[61]

In reaching this conclusion, the Institute of Medicine recognized that discrimination in the healthcare profession could not be separated from the larger social, political, and economic context of American society.[62] The Institute of Medicine examined American racial attitudes, drawing heavily from the work of social scientists such as Lawrence Bobo.[63] In his work, Bobo documented that white Americans tend to hold racist attitudes even though they would not self-identify as racist or bigoted.[64] According to Bobo, white Americans "continue to express support for negative stereotypes of minority groups in surprisingly large numbers."[65] Bobo's findings are supported by the results of the 1990 General Social Survey, which found that whites held negative views towards blacks, Hispanics, and Asian Americans.[66] Specifically, a

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[61] *Id.* at 123.
[62] *Id.* at 91.
[63] *Id.* at 92.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 93.

majority of whites viewed blacks as being less intelligent and more prone to violence. Nearly two-thirds of whites believed that blacks are lazier than whites, and over three-quarters of whites rated blacks as preferring to live off of welfare as compared to whites.[67] White Americans exhibited similar trends in their attitudes toward Hispanics and Asian Americans.[68] These findings have also been confirmed by Project Implicit's on-going study of attitudes, biases, and stereotypes. A joint project between Harvard University, the University of Washington, and the University of Virginia, Project Implicit documents that "75–80 percent of self-identified whites and Asians show an implicit preference" for whites as opposed to blacks.[69]

Not surprisingly, while white Americans did not self-identify as racist, even when holding negative attitudes toward other Americans based on race, white Americans held profoundly different views as to the prevalence and source of racial discrimination in America.[70] Compared to minorities, whites tend to see America as more egalitarian and view racism as isolated incidents rather than part of the fabric of American society.[71] Moreover, "[minorities] not only perceive more discrimination, they also see it as more 'institutional' in character . . . [whereas] many whites tend

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[67] *Id.*

[68] *Id.*

[69] Project Implicit, *General Information*, *available at* http://www.projectimplicit.net/generalinfo.php (last visited Mar. 14, 2008); *see also* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 84 (2005) ("[M]ore than 80 percent of all those who have ever taken the [Implicit Association Test] end up having pro-white associations, meaning that it takes them measurably longer to complete answers when they are required to put good words into the "Black" category than when they are required to link bad things with black people.").

[70] Project Implicit, *supra* note 69 (finding that people who harbor negative associations towards various social groups also self-perceive as being without bias).

[71] *Id.*

to think of discrimination as either mainly a historical legacy of the past or as the idiosyncratic behavior of the isolated bigot."[72]

In 2001, the Washington Post, the Henry J. Kaiser Family Foundation, and Harvard University released results of a study on racial attitudes in America.[73] The study found that "whether out of hostility, indifference, or simple lack of knowledge, large numbers of white Americans incorrectly believe that blacks are as well off as whites in terms of their jobs, incomes, schooling, and healthcare."[74]

These findings parallel those from a study conducted in the late 1990s examining the perceptions of a class of medical students regarding diversity and its effects in their school.[75] Students overwhelmingly reported that diversity of gender, race, sexual orientation, culture, and class were simply not an issue in medical school.[76] One class concluded that racism and sexism were not problems because their class was "racially diverse and gender-balanced."[77] Most students reported that lesbians and gays could comfortably be open about their sexual orientation, but did not think there were any lesbian or gay students in their class.[78] Most students reported that none of their classmates came from poverty or a working class background, while in reality 15% of the class reported

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[72] *Unequal Treatment*, *supra* note 3, at 94, (quoting Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, *in* AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 281 (N.J. Smelser et al., eds, National Academy Press 2001)).

[73] *Unequal Treatment*, *supra* note 3, at 94.

[74] *Id.* (quoting Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST (July 11, 2001, at A01)).

[75] Brenda L. Beagan, *Teaching Social and Cultural Awareness to Medical Students: "It's All Very Nice to Talk About it in Theory, But Ultimately it Makes no Difference,"* 78 ACAD. MED. 605, 605 (2003).

[76] *Id.* at 609.

[77] *Id.* at 610.

[78] *Id.*

coming from those backgrounds.[79] Finally, although students denied the existence of prejudice or stereotypes based on class, one finding was particularly telling: students "suggested these are generational issues or problems restricted to 'redneck' places and/or the uneducated."[80]

The Institute of Medicine drew several major conclusions from the work of the sociologists who have studied discrimination in America. First, American society experiences a "lasting residue" of racism from its history of legally sanctioned racism.[81] This institutional racism exists even though America is a society that "overtly abhors discrimination."[82] Second, dominant white culture generally espouses adherence to the values of equality at the same time that it is blind to the inequality existing in America. This split between reality and rhetoric poses significant problems for American society because "[t]he discrepancy between Americans' widely held values and beliefs regarding the importance of equality and the reality of persistent racial inequalities tears at the social fabric of the nation and contributes to the gulf of understanding between racial, ethnic, and socioeconomic groups."[83]

In keeping with its congressional charge, the Institute of Medicine did not merely document the disparities in quality of healthcare based on race and ethnicity.[84] The Institute also sought ways to overcome those disparities and to address the gap between equality rhetoric and reality.[85] Interestingly, one of the Institute of Medicine's primary recommendations was not directed at healthcare providers, but rather at educators of healthcare

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[79] *Id.*
[80] *Id.* at 609–10.
[81] *Unequal Treatment*, *supra* note 3, at 95.
[82] *Id.*
[83] *Id.* at 37.
[84] *See generally id.*
[85] *See generally id.*

providers.[86] The Institute of Medicine found that cross-cultural education can improve the ability of doctors and nurses to meet the medical needs of diverse patient populations.[87] Based on this finding, the Institute of Medicine made the following recommendation to medical schools:

> Integrate cross-cultural education into the training of current and future health professionals. Strategies should be developed to fully integrate cross-cultural curricula into undergraduate, graduate, and continuing education of health professionals. These curricula should be expanded to include modules documenting the existence of racial and ethnic disparities in healthcare, and the impact of social cognitive factors and stereotyping on clinical decision-making. Required, practical, case-based curricula based on a set of core competencies, amenable to evaluation, should be the desired standard of training.[88]

B. The Response of Medical Schools

In response to the congressional charge to the Institute of Medicine and the Institute's report documenting provider bias, medical education has embraced the need for cross-cultural education for doctors. While acceptance has not always been smooth, it has largely progressed in three stages. First, the accrediting agency for medical schools adopted cultural competence standards.[89] Second, medical schools responded to the new accreditation standards with a

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[86] *Id.* at 214.
[87] *Id.*
[88] *Id.*
[89] Selam Newsletter *supra* note 5, at 13.

variety of piecemeal approaches.[90] Third, several of the primary governing bodies for medical education recognized the need to move beyond piecemeal approaches and now advocate for institutionally integrated approaches to cross-cultural education.[91] Medical education is currently in the third stage, which has seen the development of more sophisticated model curricula and assessment tools.[92]

In 1999, before release of the Institute of Medicine's report, the Liaison Committee on Medical Education (LCME) proposed cross-cultural competency standards for medical schools.[93] The LCME is the national accrediting authority for medical education programs in the United States and Canada, and is sponsored by both the Association of American Medical Colleges (AAMC) and the American Medical Association (AMA).[94] The LCME proposed two amendments to the standards for the educational program for the M.D. degree.

The first cultural competence standard stated:

> The faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments.[95]

The following commentary accompanied the proposed standard:

> All instruction should stress the need for students to be concerned with the total medical needs of their patients and the effects that social and

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[90] *Cultural Competence Education, infra* note 100.
[91] *Cultural Competency in Medical Education, infra* note 101.
[92] *See generally id.*
[93] *See generally LCME* Cultural Competency Standards, *supra* note 7.
[94] *See generally id.*
[95] *Id.* at 15.

> cultural circumstances have on their health. To demonstrate compliance with this standard, schools should be able to document objectives relating to the development of skills in cultural competence, indicate where in the curriculum students are exposed to such material, and demonstrate the extent to which the objectives are being achieved.[96]

The second cultural competence standard LCME proposed was:

> Medical students must learn to recognize and appropriately address gender and cultural biases in themselves and others, and in the process of health care delivery.[97]

The commentary accompanying the standard stated:

> The objectives for clinical instruction should include student understanding of demographic influences on health care quality and effectiveness, such as racial and ethnic disparities in the diagnosis and treatment of diseases. The objectives should also address the need for self-awareness among students regarding any personal biases in their approach to health care delivery.[98]

These standards were adopted by the AMA and the AAMC in 1999 and finally adopted by the LCME in 2000.[99] In response, medical schools introduced a variety

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[96] *Id.* at 16.
[97] *Id.*
[98] *Id.*
[99] Selam Newsletter *supra* note 5, at 13.

of cultural competence education.[100] Much of this education has been piecemeal and has taken the form of lectures, interactive sessions, workshops, student clerkships, elective courses, immersion programs, specific clinical rotations, and language training.[101]

More recently, the AAMC and the Health Resources and Services Administration of the Department of Health and Human Services have criticized the piecemeal approach, calling instead for a more fully integrated model.[102] According to a recent report from the Department of Health and Human Services, teaching cultural competence in isolated contexts did not fully address the goal of producing culturally competent doctors:

> [T]his shortsighted view might yield students a glimpse of cultural competency in the form of an elective whose lessons are quickly forgotten in the stresses of clinical training, but it will not do much to create what is really required to forge change: culturally competent medical education. It is only with the whole picture that one can be effective. When cultural competency isn't a thread that runs seamlessly through all levels of a medical school philosophy and curriculum, its importance is underestimated and underexposed—those who need training the most remain the farthest from the experience.[103]

In light of this assessment, these reports have called for a more systematic, institutional incorporation of cultural

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[100] *See* Ass'n of Am. Med. Colls., *Cultural Competence Education* 1 (2005) ("Cultural Competence Education").

[101] U.S. Department of Health and Human Services, Division of Medicine and Dentistry, *Cultural Competency in Medical Education: A Guidebook for Schools* 2 (Sept. 2004).

[102] *See id.*

[103] *Id.*

competency throughout medical school curricula and administrations.[104]

The AAMC now asserts that an effective cultural competence curriculum mandates five institutional requirements.[105] First, the curriculum must have the support of the administration, faculty, and students.[106] As one professor of medicine noted, "[s]tudent resistance to studying these issues in medical school finds quick and comfortable companionship in institutions that marginalize or undermine efforts to construct these educational venues."[107] Second, institutional and community resources must be committed to the curriculum.[108] Third, the curriculum must be designed in collaboration with community leaders.[109] Fourth, administration and faculty must commit to provide "integrated educational interventions appropriate to the level of the learner."[110] Fifth, the cultural competence curriculum must have a clearly defined assessment and evaluation process.[111]

Medical educators have recognized that cultural competency efforts must address three components: attitudes, knowledge, and skills.[112] All are essential to providing competent care to patients from diverse backgrounds; none alone are sufficient.[113] Medical educators have also recognized that cultural competence

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[104] *See Cultural Competence Education*, *supra* note 100, at 1.
[105] *Id.*
[106] *Id.* at 2.
[107] Melanie Tervalon, *Components of Culture in Health for Medical Students' Education*, 78 ACAD. MED. 570, 575 (June 2003).
[108] *Cultural Competence Education*, *supra* note 100, at 2; Tervalon, *supra* note 107, at 575.
[109] *Cultural Competence Education*, *supra* note 100, at 2.
[110] *Id.*
[111] *Id.*
[112] Joseph R. Betancourt, *Cross-Cultural Medical Education: Conceptual Approaches and Frameworks for Evaluation*, 78 ACAD. MED. 560, 561 (June 2003).
[113] *Id.*

requires more than memorization of facts and characteristics about various cultures.[114] Rather,

> preparing students to become competent practitioners requires that students learn to care for those perceived as different from self; that they learn to care as connected members of a community and the larger society; and that students learn to care with a commitment towards changing existing social, health, and economic structures that are exclusionary.[115]

In addition to calling for greater integration of cultural competency into curricula, medical educators have identified certain shortcomings of cultural studies models.[116] One example of such a model is the "cultural sensitivity/awareness" approach, which focuses on individual attitudes and attempts to transform them through discussion of and exposure to different cultures.[117] Another example is the "cultural competency" approach, such as that adopted by the Institute of Medicine, which seeks to decrease bias and improve services by teaching students the characteristics of various racial and ethnic minorities.[118]

Critics find both approaches naïve in their assumption that the problem lies solely in, and is solvable through, individual attitudes.[119] The approaches are also

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[114] *See generally* Taylor, *infra* note 115.
[115] Janelle S. Taylor, *Confronting "Culture" in Medicine's "Culture of No Culture"*, 78 ACAD. MED. 555, 558 (June 2003), (quoting M.K. Canales & B.J. Bowers, *Expanding Conceptualizations of Culturally Competent Care*, 36 J. OF ADVANCED NURSING 102–111 (2001)).
[116] *See generally* Wear, *infra* note 117.
[117] Delese Wear, *Insurgent Multiculturalism: Rethinking How and Why We Teach Culture in Medical Education*, 78:6 ACAD. MED. 549, 550 (June 2003).
[118] *Id.*
[119] *Id.*

criticized for their ethnocentric definition of "difference" as "nonwhite, non-Western, non-heterosexual, [and] non-English-speaking."[120] The cultural competency approach in particular raises a real risk of further perpetuating stereotypes.[121] Lumping any group of people together under common beliefs, values, and characteristics ignores the reality that each individual is unique, and may or may not share those traits with the group.[122]

Another criticism, stemming from both approaches' focus on individual attitudes, calls into question their resulting lack of inquiry into larger, institutional sources of inequality.[123] One author, expounding on Henry Giroux's concept of "insurgent multiculturalism,"[124] explained:

> [M]ost multicultural studies have kept the focus off structures, institutions, and governmental policies by limiting discussion to individual attitudes. A more insurgent multiculturalism . . . does not limit itself to "communicative competence" or the "celebration of tolerance" but shifts the discussion to power and the foundations of inequalities.[125]

The author proposes that, in addition to learning about specific racial, ethnic, and other groups, "students would also learn to identify and analyze unequal distributions of power that allow some groups, but not others, to acquire and keep resources, which would also include the rituals,

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[120] *Id.*

[121] Taylor, *supra* note 115, at 555.

[122] *Id.* at 555; Wear, *supra* note 117, at 551.

[123] *Id.*

[124] Henry Giroux, *Insurgent Multiculturalism and the Promise of Pedagogy*, *in* FOUNDATIONAL PERSPECTIVES IN MULTICULTURAL EDUCATION, 195–212 (Eduardo Manuel Duarte & Stacy Smith eds., Allyn & Bacon 1999).

[125] Wear, *supra* note 117, at 551, (quoting Giroux, *supra* note 124).

policies, attitudes, and protocols of the very institution educating them."[126] By placing both care provider and patient within a larger sphere of social and institutional oppression, this approach addresses the tendency of cultural competency studies to view non-dominant groups as the "other."[127] Members of dominant society tend to see "culture" as something "others" have, "in which . . . 'we' must become competent,"[128] forgetting that culture is something that belongs to and shapes everyone. Some medical educators have suggested replacing the term "cultural competence" with "cultural humility,"[129] to reflect that cultural learning is an ongoing process in which everyone is both teacher and learner. Bringing systemic and institutional factors into the picture provides students with a better understanding of their patients' cultures as well as their own.

V. Lessons for Law Schools

In response to overwhelming evidence that societal biases negatively impact the healthcare racial and ethnic minorities receive, medical schools dramatically altered their curricula. Medical schools now require cross-cultural education for all future doctors. While there has not been a corresponding finding of provider bias in the legal profession, the legal system is not immune to similar societal attitudes toward racial and ethnic minorities.[130] The legal academy should learn from its medical counterpart and incorporate cross-cultural education in a similarly positive and institutional manner.

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[126] *Id.*
[127] *Id.* at 553.
[128] *Id.*
[129] Taylor, *supra* note 115, at 556.
[130] *See generally* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

Many commentators contend that legal education has not changed significantly in the last hundred years. The majority of law students are still taught to "think like lawyers" using the Socratic and case study methods. These methods were created long before legal practice was open to minorities or women, when the make-up of the profession closely resembled the power structure in society. Momentum, however, appears to be building to re-examine law school curricula. In 1992, the American Bar Association (ABA) released its landmark study of legal education, commonly known as the "MacCrate Report."[131] More recently, two major collaborative reports on legal education were released: CLEA's *Best Practices for Legal Education*[132] and the Carnegie Foundation for the Advancement of Teaching's *Educating Lawyers*.[133] These studies stress that the health, morality, and competence of lawyers and the legal profession compel legal education to wean itself from its total reliance on the casebook method of instruction. Considering the changing demographics in the United States and law schools, legal education must reassess what law students need to know to be effective advocates in our increasingly multicultural society.

A. The MacCrate Report

The release of the ABA's MacCrate Report in 1992 advanced calls for reform of legal education. The MacCrate Report identified essential skills and values needed for competent representation. The report viewed the development of these skills and values as an educational "continuum" starting with law school and continuing throughout a person's legal career.[134]

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[131] *MacCrate Report*, *supra* note 11.
[132] *CLEA's Best Practices*, *supra* note 12, at 5.
[133] *Carnegie Report*, *supra* note 13, at 83–84.
[134] *MacCrate Report*, *supra* note 11, at 8.

Specifically, the report recognized that skills training for law students and lawyers was lacking and called for greater emphasis on skills training both in law schools and in continuing legal education.[135]

The Task Force that drafted the MacCrate Report skills and values recommendations recognized the changing face of the legal profession. The report identified that minority participation in the legal profession was a relatively recent phenomenon after years of exclusionary policies and practices.[136] Largely, the MacCrate Report was responding to these discriminatory practices when it called on bar associations and law schools to strive for greater minority participation in the profession.[137] As a result, the primary value expressed in the report relating to diversity is found in Value 3 relating to improving the profession.[138] Specifically, Value 3.3 stated a lawyer should be committed to the value of "Striving to Rid the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, Age, or Disability, and to Rectify the Effects of These Biases."[139] In its commentary, the report stated:

> Despite the substantial efforts of the organized bar to eliminate bias within the profession, its effects continue to be felt in numerous ways . . . . Elimination of bias within the profession is essential in order to preserve "public . . . confidence in the integrity and impartiality" of the profession and "the system for establishing and dispensing [j]ustice" which it administers.[140]

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[135] *Id.* at 123–25.
[136] *Id.* at 23–26.
[137] *Id.* at 27.
[138] *Id.* at 216.
[139] *Id.*
[140] MacCrate Report, *supra* note 11, at 217 (quoting A.B.A., CANONS OF PROFESSIONAL ETHICS, Preamble (1908)).

While the MacCrate Report's focus on diversity primarily focused on increasing minority participation in the legal profession, it did make passing reference to a "cultural skill" needed for effective communication. The report identified that lawyers must have the essential communication skill of being able to "effectively assess the perspective of the recipient of the communication (the client, decision maker(s), opposing counsel, witnesses, and so forth)."[141] The report noted that the lawyer must be aware that "insufficient understanding of the other person's culture, personal values, or attitudes" may hinder communication.[142] The report recognized that cross-cultural communication could be an essential skill for lawyers. However, it primarily dealt with diversity as an issue of equal opportunity as opposed to an issue of quality representation.

B. The Carnegie Foundation's *Educating Lawyers*

In 2007, the Carnegie Foundation for the Advancement of Teaching released a study, *Educating Lawyers: Preparation for the Profession of Law*.[143] The report determined that current law school pedagogy emphasizes legal analysis over both practical skills and professional development. This "triumph of formal knowledge" over "practical knowledge" is largely a by-product of the historical development of the American university system and the law school quest for legitimacy within the academy.[144] Currently, law schools excel at developing students' analytical expertise. According to the authors of the report, this success of law schools comes at

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[141] *Id.* at 173.
[142] *Id.*
[143] *Carnegie Report*, *supra* note 13.
[144] *Id.* at 7.

the expense of greater development of other aspects of legal practice and of full professional and human development.[145]

The Carnegie Report made two essential recommendations to law schools. First, legal education needs to reunite practice and theory:

> Students cannot proceed very far in even their technical mastery of the law without encountering issues concerning matters of policy or the equities implied in particular rulings or general rules. Legal thinking naturally opens out onto the concerns of political philosophy, ethics, and religion, though . . . the case dialogue's emphasis on formal and procedural issues tends to convey the view that a lawyer need not take matters of policy or "the equities" very seriously. Yet, law regulates the world of human activity. In this way, it is quite unlike the physical or biological systems underlying engineering or medicine, which can be adequately described in abstraction from intention and purpose. As we have seen, this cultural and ethical aspect of the law receives far less attention in the critical first year than its formal, analytical features. From the point of view of professional identity, the missing complements to legal analysis imply the need for a serious effort to re-integrate the severed components of the educational experience.[146]

Second, law schools must fully embrace their ability and responsibility to form the professional characters of future lawyers. According to the report:

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[145] *Id.* at 50-55, 78-79.
[146] *Id.* at 83–84.

> The challenge is to align the practices of teaching and learning within the professional school so that they introduce students to the full range of the domain of professional practice while also forming habits of mind and character that support the students' lifelong growth into mature knowledge and skill.[147]

Interestingly, the drafters of the Carnegie Report recognized that an overemphasis on analytical skills tends to remove the discussion to a level of abstraction that overshadows essential cultural components of the issue or dispute.[148] As many commentators have noted, this has the particular effect of removing issues of race, ethnicity, or class from "legal" discussions.[149] The result is discussion of legal doctrine as if it exists in a color-blind, classless society. As the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession found in its report, *Miles to Go 2000: Progress of Minorities in the Legal Profession*:

> Most law school curricula also ignore the history of racial exclusion in the profession, and the role of race, gender, and class stratification in the development of all professions. Thus, most law students graduate without any sense of how seemingly neutral practices (and the rhetoric of "merit" generally) can be used—in some cases

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[147] *Id.* at 45.
[148] *Id.* at 84.
[149] *See, e.g.*, Elizabeth Mensch, *The History of Mainstream Legal Thought*, in David Kairys, ed., The Politics of Law: A Progressive Critique 48 (3d ed. 1998); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L. Rev. 1547, 1554-61 (1993).

> cynically—to protect professional and economic turf.[150]

The Carnegie authors, however, asserted that a "good counselor . . . is one who can enter the world of the client with a legal eye and join the client there in order to translate the client's problems into legal concepts, all the while anticipating opposing counsel's likely arguments."[151] While the Carnegie Report did not elaborate on what it means to "enter the world of the client" or how to teach law students this skill, the report's authors clearly contemplated the skill as being critical to competent lawyering.

In its recommendations regarding the future of legal education, the Carnegie Foundation compared law school practice to medical school practice and asserted that law schools could learn from medical education. According to the Carnegie Report, medical schools use more of clinical educational methods and less traditional classroom instruction.[152] Medical schools have found that while students still learn the substantive material, providing context actually enhances their learning.[153] In addition, medical schools have found that the clinical setting allows a greater emphasis on professionalism and for personal development to occur naturally:

> This intensification of the practical apprenticeship in medical education has also opened the way to more authentic and powerful means of fostering professionalism. Students grapple with real issues of patient autonomy, inter-cultural communication, responsibility for public health, and the challenge of maintaining compassion in

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[150] Miles, *supra* note 48, at 29–30.
[151] *Carnegie Report*, *supra* note 13, at 13.
[152] *Id.* at 192.
[153] *Id.*

> the press of a fast-paced medical environment. When they confront these and related issues, professionalism becomes tangible and visible to them. Their teachers are models, for better or worse, and opportunities to reflect on what they are experiencing take on a new urgency. Although medical educators believe their field still faces serious unresolved problems . . . medical education has been receptive to pedagogical and curricular change to advance the goals of a more seamless integration of theory, practice, and professional responsibility.[154]

C. CLEA's *Best Practices*

2007 also saw the release of the much-anticipated Clinical Legal Education Association's *Best Practices for Legal Education: A Vision and A Road Map*.[155] Although complementary to much of the Carnegie Foundation's report, *Best Practices* starts from the premise that legal education does not adequately prepare law students for the actual practice of law. From this starting point, the report identifies "best practices" that would allow a law school to better fulfill this commitment to preparation for practice. The report sets out best practices for setting curriculum goals, organizing the curriculum, delivering instruction, assessing student learning, and evaluating institutional effectiveness. *Best Practices* also includes a "model" curriculum for a three-year legal education. The authors of the report hope to bring about fundamental changes in current law school curricula and provoke further engaged discussion about reform of legal education.[156]

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[154] *Id.* at 192–93.
[155] *CLEA's Best Practices*, *supra* note 12, at 5.
[156] *Id.*

The CLEA report establishes that the first principle for a law school's program of instruction should be a "commit[ment] to preparing students for practice."[157] The authors recognize that law schools are not fully committed to this idea and that law schools do not adequately prepare students to enter the profession. According to the report,

> Most law school graduates are not sufficiently competent to provide legal services to clients or even to perform the work expected of them in large firms. The needs and expectations of the workplaces awaiting law school graduates have changed since the traditional law school curriculum was developed, even in the large law firms that serve the legal needs of corporate America. Research conducted by the American Bar Foundation in the early 1990's reached the following conclusion:
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> > The [hiring] partners today, in contrast to the mid-1970s, expect relatively less knowledge about the content of law and much better developed personal skills. It appears that the law firms in the 1970s could afford to hire smart, knowledgeable law graduates with as yet immature communication and client skills, place them in the library, and allow them to develop. Today there is much less tolerance for a lack of client and communication skills; there is perhaps more patience with the development of substantive and procedural expertise in a world of increasing specialization.

[157] *Id.* at 39.

> Potential clients should be able to hire any licensed lawyer with confidence that the attorney has demonstrated at least minimal competence to practice law. Doctors' patients reasonably expect that their doctors have performed medical procedures multiple times under supervision of fully qualified mentors before performing them without supervision. Clients of attorneys should have similar expectations, but today they cannot.[158]

Best Practices asserts that a critical component of being prepared for practice is a greater commitment to professionalism.[159] Therefore, law schools should teach students "the values, behaviors, attitudes, and ethical requirements of a lawyer and . . . infuse a commitment to them."[160] The report extensively discusses professionalism and attempts to define it with concepts like commitment to justice, respect for the rule of law, honor, integrity, fair play, truthfulness, candor, and sensitivity and effectiveness with diverse clients and colleagues. In turn, the report explores each of these aspects of professionalism.

While all of these are important ideas, this article is primarily concerned with the idea that professionalism includes cross-cultural communication skills. According to *Best Practices*, law graduates must have the skills to "deal sensitively and effectively with diverse clients and colleagues."[161] The comments to this principle explain:

> It is important for law schools to help students develop their capacity to deal sensitively and

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[158] *Id.* at 26 (quoting Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence* 27 (Am. B. Found., Working Paper No. 9212, 1992)).
[159] *Id.* at 18.
[160] *Id.* at 79.
[161] *CLEA's Best Practices*, *supra* note 12, at 88.

> effectively with clients and colleagues from a range of social, economic, and ethnic backgrounds. Students should learn to identify and respond positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives.[162]

The authors of the report identify two ways law schools can develop students' cross-cultural skills. First, law schools can "promote diversity" by having a "critical mass" of minority faculty, students, and staff. In language reflecting the *Grutter* decision and the Supreme Court's discussion of the benefits of educational diversity, the authors assert the educational benefits of greater minority representation in all facets of the law school community:

> As students progress through law school, they identify and analyze their conscious and subconscious biases regarding race, culture, social status, wealth, and poverty through discourse with their teachers and fellow students. They test their own perceptions against those of their peers and teachers. If the law school community is racially, culturally, and socio-economically diverse, students develop better understandings of the ways in which race and culture can affect clients' and lawyers' world views and influence their objectives and decisions.[163]

Second, the report asserts that "cross-cultural competence" is a skill that can be taught and learned.[164] The report suggests that students must be able to effectively

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[162] *Id.*
[163] *Id.* at 89.
[164] *Id.* at 88.

communicate with people of diverse racial, ethnic, and socioeconomic backgrounds to be competent professionals. As to how students should obtain these skills, the report states that "[s]tudents can improve their cross-cultural skills by practicing and honing throughout their professional careers the five habits of cross-cultural lawyering developed by Susan Bryant and Jean Koh Peters."[165] It is interesting that the report seems to shift focus at this point from the responsibilities of law schools to those of the students. The report seems to suggest that the onus is on students to develop these skills "throughout their professional careers" as opposed to something that law schools should be providing students. This is particularly interesting given that Susan Bryant and Jean Koh Peters clearly contemplate clinical professors incorporating these "Five Habits" into clinical teaching.[166]

VI. The Need for a Cultural Competence Accreditation Standard for Law Schools

The recent experience of medical educators with cultural competence is instructive for law schools and the American Bar Association. Medical educators adopted cross-cultural education to address deficiencies in delivery of medical care and to develop fully competent professionals for the future.[167] In addition, medical educators learned that cultural competence must be integrated throughout the curriculum to avoid marginalization.[168] As a result, the accrediting body for medical schools adopted cultural competency standards for medical school graduates.[169]

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[165] *Id.* at 88–89, citing Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).
[166] Bryant, *supra* note 158, at 35.
[167] *See Cultural Competence Education*, *supra* note 100, at 1-2.
[168] *Id.* at 2.
[169] *Id.* at 1-2.

These lessons should compel legal educators to the same conclusions.[170] To successfully develop competent, professional lawyers, the ABA should adopt cultural competence standards for law school graduates. An accreditation standard will highlight the importance of cross-cultural education, fully integrate it into the academic program, and connect cross-cultural education to skills development for competent attorneys.[171] When viewed as a necessary skill for practice, students, faculty, and administrations will see and accept the relevance and importance of cultural competency, and law schools will graduate lawyers ready to practice in a multicultural society.

The ABA should adopt a cross-cultural education standard akin to that currently required for medical schools. The medical school accreditation standards require:

> The faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments.[172]
>
> Medical students must learn to recognize and appropriately address gender and cultural biases in themselves and others, and in the process of health care delivery.[173]

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[170] *See Carnegie Report*, *supra* note 13, at 84.

[171] *See generally* BRIAN D. SMEDLEY, ADRIENNE Y. SMITH, ALAN RAY NELSON, UNEQUAL TREATMENT: CONFRONTING RACIAL & ETHNIC DISPARITIES IN HEALTHCARE 203. (Inst. of Med. ed. 2003)(explaining why cross-culutral education became an accreditation standard for medical education).

[172] *LCME Cultural Competency Standards*, *supra* note 7, at 15 (commentary omitted).

[173] *Id.* at 16.

Combining the ideas incorporated in the medical school standards and those advanced by CLEA's *Best Practices*, law schools should be required to meet the following standard:

> Faculty and students must demonstrate an understanding of the manner in which people of diverse cultures perceive and respond to legal issues and the historical role the legal system has played in disparate treatment of racial, ethnic, and gender minorities. Students and faculty must demonstrate the capacity to deal sensitively and effectively with clients and colleagues from a range of social, economic, racial, and ethnic backgrounds, including the ability to identify issues of culture and difference and the skills to effectively communicate with and advocate for people from diverse backgrounds.[174]

There are three reasons supporting adoption of a cultural competence accreditation standard. First and foremost, an accreditation standard will emphasize the importance of cultural competence for lawyers.[175] The Institute of Medicine study established that highly educated professionals are not immune to societal bias and prejudice.[176] This applies equally to doctors and lawyers. In addition, the history of legal discrimination against

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[174] An alternative to a separate cultural competence accreditation standard could be to add cultural competence to current Standard 302 (a)(4). Standard 302(a)(4) requires law schools to provide professional skills programs. *See ABA Accreditation Standards*, *supra* n. 45, at 21. As I have argued, cultural competence is a skill that can be taught and that is essential for competent representation. In this way, cultural competence could be integrated effectively into professional skills courses such as trial advocacy, client counseling, and negotiation.

[175] *See Unequal Treatment*, *supra* note 3, at 203.

[176] *Id.* at 9-12.

women and racial and ethnic minorities in the United States further compels the legal system to address these issues. As recently as fifty years ago, laws barred blacks, women, Native Americans and others from equal participation in society.[177] Many laws continue to provide for different treatment of homosexuals. Finally, the face of society will continue to change dramatically in the next half century. By the year 2050, the United States will be a "minority-majority" country.[178] Since the rule of law will continue to be a foundation of our economic, social, and legal systems, lawyers must be skilled in dealing effectively with difference—differences of culture, race, gender, and ethnicity.

Second, an accreditation standard will assist in the effort to integrate cross-cultural education throughout the academic program.[179] As medical schools experienced, without integration throughout the curriculum and administration, issues of culture are marginalized,[180] which perpetuates societal bias and is counter-productive. Students who have already developed an interest in cultural differences from travel, family background, or language instruction tend to enroll in multicultural classes. Thus, those who would benefit the most from exposure to cross-cultural education would not be required to receive the training. In addition, without full integration into the curriculum, faculty and administration are much less likely to buy into the process.

Third, an accreditation standard can make explicit that cultural competence is a skill that future lawyers—like future doctors—need in order to be effective

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[177] *See e.g.,* GERALD DAVID JAYNES & ROBIN M. WILLIAMS JR., A COMMON DESTINY: BLACKS & AMERICAN SOCIETY (Comm. on the Status of Black Ams., Nat'l Research Council ed., 1989).

[178] *Minorities Set to be U.S. Minority,* BBC News, Aug. 14, 2008, http://news.bbc.ea.uk/2/hi/amencas/7559996.stm.

[179] *Cultural Competence Education, supra* note 100, at 1.

[180] *Id.* at 2.

professionals.[181] Certainly, CLEA's *Best Practices* identified the importance of cross-cultural communication skills to professionalism. In addition, *Best Practices* noted that cultural competency is a skill that is teachable and learnable.[182] The author, along with Amie Thurber of the Missoula Chapter of the National Coalition Building Institute and Jonathan Dunbar, a local attorney and NCBI trainer, recently developed and presented workshops to public defenders on cross-cultural communication and advocacy skills.[183] The trainers developed a full-day workshop that combined education about systemic oppression with development of concrete trial advocacy skills in the context of cultural difference.[184] Over three days, the trainers presented the workshop to nearly 100 criminal defense attorneys, ranging in experience from one to thirty years.[185] After each workshop, the participants completed evaluation and the response to the workshops was overwhelmingly positive.[186] Many participants expressed that this was the most practical continuing legal education seminar they had ever attended.[187] One person expressed, "The content opened my eyes to many things I had never thought of before."[188] Another stated that the workshop was "an aspect of lawyer education that is usually overlooked."[189] Ninety-seven percent of the participants stated that the workshop would enhance their ability to work with, and advocate for, diverse client

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[181] *See Cultural Competence Education, supra* note 100, at 1-2.
[182] *CLEA's Best Practices, supra* note 12, at 66.
[183] Andrew King-Ries, *Montana Public Defenders Advocate for Justice*, NAT'L COALITION BUILDING INST. MISSOULA NEWSL. (Nat'l. Coal. Bldg. Inst. Missoula, Mont.) Winter 2008, at 1.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *See id.*
[188] Workshop evaluation (on file with author).
[189] *Id.*

populations. It is the author's opinion that because the issues of cultural difference and systemic oppression were placed within the context of advancing advocacy skills, there was much greater acceptance of cultural difference and recognition of its relevance to the practice of law.

In meeting a cultural-competency accreditation standard, law schools should consider several lessons from the more fully developed experience of the medical profession. For instance, cultural competency should not just be a week of cultural studies inserted into an existing course, or even a stand-alone course. That makes it too easy to compartmentalize cultural competency instead of showing how it is an integral part of legal education and lawyering skills. In addition to integrating cultural competency throughout the legal curriculum, values and skills courses like professional responsibility, client counseling, and pretrial and trial practice provide logical venues for students to increase their cultural knowledge, learn and practice relevant skills, and gain a greater awareness of how culture affects them and their clients.

VII. Conclusion

To date, legal educators have largely left cross-cultural skills development to chance. Schools have assumed that greater minority representation in classrooms will translate into greater cultural competence for all students. Unfortunately, law, like medicine, "with its authority to define what is normal . . . tends to strengthen patterns of stereotyping and reinforce existing power inequalities."[190] Greater minority participation alone will not provide sufficient skill development to adequately prepare law students for practice in our increasingly multicultural society. Law schools must stop leaving cross-cultural communication—a fundamental skill for all

[190] Wear, *supra* note 117, at 552.

lawyers—to chance. It is only through the adoption of a cultural competence accreditation standard that law schools can effectively learn from the experience of medical education and prepare competent professionals.

NOTE

DUE PROCESS AND EQUAL PROTECTION: A CONSTITUTIONAL APPROACH TO SAME-SEX MARRIAGE

Ashley Musselman[1]

I. Introduction

On July 6, 2006, the Court of Appeals of New York decided *Hernandez v. Robles*.[2] At issue in that case was whether New York's Domestic Relations Law violated the Due Process Clause and the Equal Protection Clause of the New York constitution by limiting marriage to opposite-sex couples.[3] The plaintiffs were members of forty-four same-

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[1] J.D. Candidate, May 2009, The University of Tennessee College of Law.

[2] Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006).

[3] *Id.* at 6. The *Hernandez* decision was not the first decision to address the issue of the constitutionality of barring same-sex marriage under state law. Prior to the *Hernandez* decision, a number of states had already ruled on the constitutionality of same-sex marriage restrictions. In fact, by the time of the *Hernandez* decision, Arizona, Hawaii, Indiana, Massachusetts, New Jersey, and Vermont had all been asked to determine whether laws banning same-sex marriages violated their state constitutions. *Id.*

In *Baehr v. Lewin*, the Supreme Court of Hawaii vacated and remanded the Circuit Court's judgment. Hawaii's highest court declared that "the burden will rest on [the state official] to overcome the presumption that [the Hawaii statute] is unconstitutional . . . ." Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). The Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, went so far as to recognize that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." Goodridge v. Department of Public Health, 798 N.E.2d 941, 968 (Mass. 2003). Similarly, the Supreme Court of Vermont, in *Baker v. State*, held that same-sex couples "may not be deprived of the statutory benefits and protections afforded

sex couples who unsuccessfully attempted to obtain marriage licenses in the State of New York.[4] The case began as four separate lawsuits in which the plaintiffs sought a declaratory judgment against "the license-issuing authorities of New York City, Albany, and Ithaca; the State Department of Health, which instructs local authorities about the issuance of marriage licenses; and the State itself," for refusing to issue marriage licenses to same-sex couples, while issuing licenses to opposite-sex couples.[5] In the end, the Court of Appeals of New York held that "the New York Constitution does not compel recognition of marriages between members of the same sex."[6] The court emphasized that "[w]hether such marriages should be recognized is a question to be addressed by the Legislature"[7] and not by the courts.

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persons of the opposite sex who choose to marry." Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

The Vermont court, unlike its Massachusetts counterpart, explicitly left it to the Legislature to determine whether same-sex couples would be granted such rights under traditional marriage laws or under a new domestic partnership law. *Id.* The Court of Appeals of Indiana held, in *Morrison v. Sadler*, that "the Indiana Constitution does not require the governmental recognition of same-sex marriage . . . ." Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005). Similarly, the Arizona Court of Appeals, in *Standhardt v. Superior Court*, held that "the fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same-sex partner." Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. 2003). Finally, the Superior Court of New Jersey, in *Lewis v. Harris*, held that its "statutory limitation of the institution of marriage to members of the opposite sex does not violate our Constitution." Lewis v. Harris, 875 A.2d 259, 262 (N.J. Super. Ct. App. Div. 2005).

[4] *Id.* at 5.

[5] *Id.* In the original suits, the Supreme Court of New York granted summary judgment for the defendant, and the Appellate Division affirmed the ruling in every case except *Hernandez*. There the Supreme Court of New York granted summary judgment for the plaintiff, but the decision was reversed by the Appellate Division. *Id.*

[6] *Id.*

[7] *Id.*

The *Hernandez* decision is important because laws affording benefits to married couples are wide-ranging. The General Accounting Office (GAO) listed family law, taxation, health care law, probate, torts, government benefits and programs, private sector benefits, labor law, real estate, bankruptcy, immigration, and criminal law as areas where rights and responsibilities are automatically granted to married couples.[8] Moreover, state and local governments as well as private organizations provide hundreds of additional rights based on marital status.[9] Without the ability to marry, same-sex couples are unable to obtain benefits, which are automatically afforded opposite-sex couples when they marry. In fact, the GAO estimates that "[i]f recognition is given to same-sex marriages . . . more than one thousand rights and responsibilities of different-sex couples will be extended to cover couples of the same sex."[10] These statistics thus make it clear that decisions like *Hernandez* have the potential to affect every aspect of life for same-sex couples.

In addition, the *Hernandez* decision is important because the New York Constitution's Due Process and Equal Protection Clauses mirror the language found in the United States Constitution's versions of those same Clauses. Because the New York courts have used the same analytical framework for Due Process as the United States Supreme Court, the analysis would be the same.[11] Similarly, the New York Equal Protection Clause is no broader than that found in the Fourteenth Amendment[12]; thus, this analysis is applicable to the United States Constitution's Due Process and Equal Protection Clauses.

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[8] American Bar Association Section of Family Law, *A White Paper Analysis of the Laws Regarding Same-Sex Marriages, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 367-70 (2004).
[9] *Id.* at 347-48.
[10] *Id.* at 347.
[11] *Hernandez*, 855 N.E.2d at 9.
[12] *Id.*

Keeping in mind that the analysis of this New York decision parallels the federal constitutional analysis, this note will show that the reasoning of the *Hernandez* majority is flawed and that the repercussions of this flawed reasoning are grave. First, I will explain why the *Hernandez* majority made an unreasonable argument when it claimed that the Domestic Relations Law can be defended as a rational legislative decision. Second, I will show that the *Hernandez* majority used an incorrect standard of review in evaluating the constitutionality of the Domestic Relations Law by using a rational basis test when the proper standard for such a case is a strict scrutiny test. Last, I will demonstrate that by applying the correct standard of review, the New York Court of Appeals should have found that the Domestic Relations Law violates the New York constitution's Due Process and Equal Protection Clauses.

II. Repercussions of the *Hernandez* Decision

New York's Domestic Relations Law was adopted in 1909.[13] The law limits marriage to opposite-sex couples.[14] Specifically, §12 of New York's Domestic Relations Law states that marriage requires "[n]o particular form or ceremony . . . but [states that] the parties must solemnly declare in the presence of a clergy man or magistrate and the attending witness or witnesses that they take each other as *husband* and *wife*."[15] Section 15(1)(a) requires that certain duties be performed by the *groom* and the *bride*.[16] Additionally, §50 states that "[p]roperty . . . owned by a *woman* at the time of *her* marriage . . . shall continue to be *her* sole and separate property as if *she* were

[13] *Id.* at 6.
[14] *Id.* at 1.
[15] N.Y. DOM. REL. LAW §12 (Consol. 2007) (emphasis added).
[16] *Id.* at §15(1)(a).

unmarried, and shall not be subject to *her husband's* control or disposal nor liable for *his* debts."[17] As the New York Court of Appeal noted in the *Hernandez* decision, it is clear that the original intent of the law was to limit marriage to members of the opposite sex.[18]

The plaintiffs in the *Hernandez* case claimed that the Domestic Relations Law violates the New York constitution's Due Process Clause[19] and the New York constitution's Equal Protection Clause.[20] However, the New York Court of Appeals held that the Domestic Relations Law does not violate the state constitution. As a result, the court determined that there is no constitutional protection affording same-sex couples the right to marry under New York law.[21]

The repercussions of this decision are significant. Obviously one of the reasons that same-sex couples want to marry is so that they, like opposite-sex couples, may participate in marriage benefits. The benefits of marriage are widespread; in fact, it is estimated that "[m]ore than one thousand rights and responsibilities are automatically accorded to couples based on marital status."[22] In 2004, the GAO estimated that 1,138 federal statutes existed in which marital status was a factor.[23] A number of states have conducted their own studies and have found that while "[s]ome of these rights and responsibilities can be

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[17] *Id.* at §50 (emphasis added).
[18] *Hernandez*, 855 N.E.2d at 6.
[19] *Id.* New York's Due Process Clause states that "No person shall be deprived of life, liberty or property without due process of law."
[20] *Id.* New York's Equal Protection Clause states that "No person shall be denied the equal protection of the laws of this State or any subdivision thereof."
[21] *Id.*
[22] American Bar Association Section of Family Law, *supra* note 8, at 366.
[23] *Id.*

replicated partially by private agreements . . . most such rights and responsibilities cannot."[24]

Laws affected by marital status cover almost every aspect of life. For example, marital status affects family law.[25] Rights that automatically apply to married couples include the right to seek spousal support, the right to seek custody and visitation, the right to adopt, the duty to support one's spouse, the liability for family expenses, and the automatic coverage of spouses under most automobile policies.[26] Taxation is also affected by marital status.[27] The GAO lists the right to file jointly and the right to transfer property between partners without tax consequences as rights automatically afforded to married couples.[28] Health care laws affected by marital status include the right to automatically have access to medical records and the right to hospital visitation.[29] Married couples are also granted reciprocal rights to make funeral arrangements, dispose of remains, and consent to organ donation.[30] Marital status also affects probate.[31] Marriage automatically confers protection from disinheritance to intestate succession.[32] Under tort law, married couples can seek compensation for wrongful death and loss of consortium.[33]

Additionally, government benefits and programs automatically afforded to married couples include survivor's benefits and military benefits.[34] In the private

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[24] *Id.* at 367.
[25] *Id.*
[26] *Id.* at 367-68.
[27] *Id.* at 368.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 369.

sector, automatic benefits for married couples include eligibility for life insurance and disability insurance, the right to take sick leave to care for a seriously ill partner, the right to family health insurance, and the ability to roll over a spouse's 401(k) or other retirement accounts.[35] Real estate law is also affected by marital status.[36] Eligibility for tenancy by the entirety, homestead rights, rent-control protections, and exemptions from transfer taxes are automatically afforded married couples.[37] Spouses can file jointly under bankruptcy laws.[38] Spouses can file joint petitions to immigrate under immigration laws.[39] Additionally, married couples have protections under criminal laws, including the privilege not to testify against a spouse and the protection of domestic violence laws.[40]

These privileges and protections illustrate that marriage comes with an "extensive legal structure that honors and protects a couple's relationship, helps support the family and its children through an unparalleled array of rights and responsibilities, and privileges a married couple as a single financial and legal unit."[41]

Fortunately, a few benefits afforded married couples have been granted to same-sex couples in New York.[42] In fact, three New York cases, two executive orders, and an act passed by the New York legislature have granted same-sex couples some rights and protections. In *Braschi v. Stahl Associates Co.*, the New York Court of

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 370.
[39] *Id.*
[40] *Id.*
[41] Jon W. Davidson, *Winning Marriage Equality: Lessons from Court*, 17 YALE J.L. & FEMINISM 297, 304 (2005).
[42] *See* The Association of the Bar of the City of New York Committee on Lesbian and Gay Rights, Committee on Sex and Law, and Committee on Civil Rights, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 70, 76-77 (2004).

Appeals declared that "the gay life partner of a tenant in a rent-controlled apartment is to be considered a family member under the rent control statute and entitled to protection from eviction."[43] In another case, *In re Jacob/In re Dana*, the Court of Appeals granted the right of "second parent" adoptions to same-sex couples.[44] The Court explained that "second-parent adoptions can be granted because they permit the creation of stable legal ties between one partner and the biological or adopted children of the other partner."[45] Additionally, in *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*, a surviving same-sex partner was allowed to "honor his deceased gay partner's preference for the treatment of his remains, over the objections of the decedent's mother and brother," despite a rule that "only the surviving spouse or next of kin may determine disposition absent testamentary directives to the contrary."[46]

Additionally, two recent executive orders and an act passed by the New York legislature granted New York same-sex couples rights and protections. An executive order, promulgated in 1983, prohibited discrimination based on sexual orientation when "providing health insurance benefits to same-sex domestic partners of state employees."[47] By 2001, health care benefits for same-sex partners were made available to all state employees.[48] In New York City, an executive order banning discrimination based on sexual orientation was implemented.[49] In addition, the New York legislature enacted the *Hate Crimes Act of 2000*, which imposed stricter penalties for crimes

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[43] *Id.* at 76.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 77.
[47] *Id.* at 80.
[48] *Id.*
[49] *Id.*

based on, among other things, discrimination based on sexual orientation.[50]

Despite the benefits that New York same-sex couples have won, it is important to remember that none of these rights were *automatically* afforded to same-sex couples as they would be if same-sex couples could marry. More importantly, while court decisions, statutes, and executive orders may be able to grant same-sex couples *some* rights, without recognition of their right to marry, many of the benefits of marriage will remain unattainable to same-sex couples. Therefore, it is clear that the implications of decisions like *Hernandez v. Robles* are momentous.

III. The Flawed Reasoning of the *Hernandez* Majority

The majority's reasoning in *Hernandez* is flawed. The majority uses an incorrect standard of review in both its Due Process and Equal Protection analyses. By applying the correct standard of review, the New York Court of Appeals should have found that the Domestic Relations Law violates the state's constitution. Therefore, under a correct reading of New York's constitution, same-sex couples should be allowed to marry, and the above-mentioned rights should be automatically afforded to same-sex couples.

A. A Rational Legislative Decision?

Although the focus of the *Hernandez* decision was whether the Domestic Relations Law violates the Equal Protection or Due Process Clauses, the *Hernandez* majority first considered whether the challenged limitation could be defined as a rational legislative decision. Because the

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[50] *Id.*

answer to this question is "critical in every stage of a due process and equal protection analysis,"[51] I will also begin my analysis by exploring whether the challenged limitation can be defined as a rational legislative decision.

In determining whether a there is a rationally related government interest in a limitation, "[t]he crucial question is whether a rational legislature could decide that [the benefits of marriage] should be given to members of opposite-sex couples, but not same-sex couples."[52] The majority offers two justifications for conveying such benefits to opposite-sex couples but not same-sex couples.[53] Both justifications are derived from the supposition that marriage is important to the welfare of children,[54] and both justifications are seriously flawed.

The majority's first argument is that "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships."[55] The majority explained that because heterosexual intercourse can lead to childbirth, while homosexual intercourse cannot, the legislature could rationally decide that it should grant opposite-sex couples the benefits of marriage, which creates stability in a child's life.[56] The majority then explained that the legislature could rationally find that same-sex relationships are more casual and more temporary than opposite-sex relationships.[57] Thus, the legislature could conclude that because "an important function of marriage is to create more stability and permanence in the relationships that cause children to be born," opposite-sex couples should be

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[51] *Hernandez*, 855 N.E.2d at 9.
[52] *Id.* at 7.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

offered "an inducement—in the form of marriage and its attendant benefits."[58]

The majority's first argument is flawed for a number of reasons. First, there is no evidence to support the majority's assertion that opposite-sex couples have more stable and less temporary relationships than same-sex couples. In fact, this assertion indicates a misperception of the gay and lesbian community in general and reflects a bigoted and biased belief. Further, it is unjust and irrational to place all homosexuals into a group as generally having unstable and temporary relationships and then to base a law on this generalization.

In addition, while it is true that homosexual intercourse cannot lead to childbirth, it is also clear that homosexuals can and do have children of their own. In addition to having their own children, some same-sex couples adopt children. Therefore, the majority's argument that opposite-sex couples need or deserve the institution of marriage because they can have children applies with equal force to same-sex couples and renders the majority's argument unpersuasive.

The majority's second argument is that "[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and father."[59] The majority explained, "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[60] The majority concluded that this is a "rational ground[] on which the Legislature could choose to restrict marriage to couples of opposite sex."[61]

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 8.

This argument is also seriously flawed. The majority cannot believe that children will only be exposed to male and female role models if their parents are in opposite-sex relationships. Surely the majority would agree that in addition to parents, people outside of a marital relationship are also role models for children. Therefore, while it may be true that an opposite-sex marriage would automatically supply a male and a female "role model," male and female role models from outside of a same-sex couples' marital relationship are still available to children of same-sex couples. More importantly, even if parents were the only role models available to children, there is no reason to believe that having both a male and female parent will automatically benefit children. Many would agree that having two positive same-sex role models is better than two negative opposite-sex role models. In such a case, the welfare of a child would be better protected in a same-sex home than an opposite-sex home.

Most importantly the majority rests its entire argument on the incorrect premise that the function of marriage is to promote the welfare of children.[62] The function of marriage is not, nor has it ever been, to create stable relationships for the benefit of children. While the creation of stable relationships that benefit children is definitely a *product* of marriage in many cases, the *function* of marriage is not to promote the welfare of children. Clearly not all couples marry to have and raise children. In fact, there are many married couples who cannot have children. In their case, the function of marriage *cannot* be to promote the welfare of children. Additionally, many couples are married for considerable periods of time before they have children. Can the majority seriously make the argument that the function of these childless couples' marriages is to promote the welfare of children?

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[62] *See id.* at 7.

Alternatively, if the function of marriage were really to promote the welfare of children, then why not reserve marriage for couples who have or intend to have children? Even the majority would not suggest this, because a rational argument could also be made that if the function of marriage were really to promote the welfare of children, homosexuals with children should be allowed to marry as well.

B. Due Process and Equal Protection Standards of Review

It is clear that the *Hernandez* majority's argument that the Domestic Relations Law can be defended as a rational legislative decision is flawed. This flawed argument led the majority to conclude that the law is valid under the New York Due Process and Equal Protection Clauses.[63] I will now explore the problems with the *Hernandez* majority's Due Process and Equal Protection analyses.

1. Due Process

When determining whether a right is properly protected under the Due Process Clause, it is necessary to first define the right asserted.[64] According to the *Hernandez* court, the right asserted could be broadly defined as "the right to marry" or narrowly defined as "the right to marry someone of the same sex."[65] In determining which "right" was at issue, the *Hernandez* majority looked to the Supreme Court cases of *Lawrence v. Texas* and

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[63] *Id.* at 9.

[64] *See generally*, Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986).

[65] *Hernandez*, 855 N.E.2d. at 9.

Washington v. Glucksberg.[66] The *Hernandez* majority claimed that these cases indicate that the "right" in question should be defined narrowly as "the right to marry someone of the same sex."[67]

In *Lawrence*, the Supreme Court held that the right in question should be defined broadly because a narrow definition of the right at issue would be arbitrary.[68] In *Glucksberg*, the Supreme Court held that the right in question should be defined narrowly because "the narrow definition of the right at issue was based on rational line-drawing."[69] Based on these Supreme Court cases, the *Hernandez* majority argued that the "right" at issue in that case was more like the "right" at issue in *Glucksberg*; thus, the majority concluded that the right should be narrowly defined.[70]

The *Hernandez* majority erred in defining the "right" asserted. A closer look at *Glucksberg* and *Lawrence* indicates that the *Hernandez* majority should have used *Lawrence's* broad definition rule rather than *Glucksberg's* narrow definition rule. The right asserted should have been defined as the "right to marry." This is because *Lawrence* overturns *Bowers v. Hardwick*,[71] a case where the Court used a narrow definition to define the right involved.[72] *Bowers's* treatment of the Due Process Clause mirrors *Glucksberg's* in at least three important ways.[73] First, both *Bowers* and *Glucksberg* held that the court is to "proceed with caution—and even skepticism—when asked

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[66] *Id.* at 10.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 9.
[71] *Lawrence*, 539 U.S. at 566-67.
[72] *See Bowers*, 478 U.S. at 191.
[73] *See* Brian Hawkins, *The* Glucksberg *Renaissance: Substantive Due Process since* Lawrence v. Texas, 15 MICH. L. REV. 409, 415 (2006).

to recognize a new constitutional right."[74] Second, both required a court to "define the proposed new right in the narrowest fashion possible, usually as the right to engage in an activity specifically forbidden by the statute."[75] Third, both "treat[ed] past decisions declaring new substantive due process rights as protecting no more than the specific right declared, rather than reflecting some overarching constitutional principle."[76] Given these important similarities in *Bowers's* and *Glucksberg's* treatment of the Due Process Clause, it is clear that when *Lawrence* overruled *Bowers's* narrow definition of the right involved, *Lawrence* also implicitly overruled *Glucksberg's* narrow application test. Therefore, the *Hernandez* majority ignored Supreme Court precedent in choosing the narrow definition over the broad definition of the right involved. Supreme Court precedent actually requires the court to use the broad definition of the right involved—"the right to marry"—over the narrow definition.

Under a Due Process analysis, once the right is defined, the next question is "whether the legislation restricts the exercise of a fundamental right."[77] According to the Supreme Court, a fundamental right is one that is "deeply rooted in this Nation's history and tradition."[78] Because the *Hernandez* majority defined the right involved as "the right to marry someone of the same sex," the majority argued the right at issue is not a fundamental right.[79] It explained that "the right to marry someone of the same sex" is not "deeply rooted" in our nation's history and "has not even been asserted until relatively recent times."[80]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Glucksberg*, 521 U.S. at 721 (citations omitted).
[78] *Id.* at 720-21 (citations omitted).
[79] *Hernandez*, 855 N.E.2d. at 9-10.
[80] *Id.* at 9.

However, if the majority had properly defined the right involved as "the right to marry" it is clear that the Domestic Relations Law clearly restricts a fundamental right. For, as the history of New York marriage law indicates, marriage is deeply rooted in history and tradition, even though it has undergone widespread changes over the years.[81] In fact, even the *Hernandez* majority conceded:

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[81] The history of marriage laws in New York is not static, but reflects adjustment and change. Not only have the marriage laws themselves changed, but the understanding of what marriage means has also undergone regular transformation. In fact, "marriage has undergone near-constant evolution to the point that marriage today bears little resemblance to marriage in the past." *See* Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 251 (2006). For example, under the New York Common Law, in the nineteenth and early twentieth centuries, "the wife . . . and her husband constitute[d] but one person." *Id.* at 257. This meant that once married, a woman's property and ability to contract became her husband's. *Id.* In fact, in 1820, the Supreme Court of Judicature stated, "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife." *Id.* at 258. However, "by the middle nineteenth century, the institution of marriage had changed considerably." *Id.* In 1848, New York passed legislation allowing women to own property independent of their husbands, and in 1849, the act was amended to allow women to make contracts independent of their husbands as well. *Id.* at 258-59.

In the 1850's and 1860's, New York passed the Earnings Act, which "protect[ed] married women's savings deposits, ensur[ed] married women the right to vote as stockholders in elections, and protect[ed] a woman's right to sue and be sued and to keep her earnings during marriage." *Id.* at 259. In 1908, New York Courts recognized "the separate existence of a husband and his wife . . . and [gave] to each the same right and remedies." *Id.* at 260. The New York Courts also struck down "[t]raditional requirements that a husband be joined to any tort action against a married woman" and "recognized a married woman's right to sue third parties for personal torts." *Id.* Soon after, the doctrine of inter-spousal immunity under which "neither spouse could sue the other civilly for injuries wrongfully inflicted upon the other . . . was written out of existence." *Id.* at 261-62. In 1954, the New York Court of Appeals, "extend[ed] the abrogation of inter-

"The right to marry is unquestionably a fundamental right."[82]

i. Due Process Under a Strict Scrutiny Test

Had the *Hernandez* majority correctly defined the right involved and correctly deemed the right to be fundamental, the court should have proceeded under a strict scrutiny test. This is because the Supreme Court has determined that "classifications affecting fundamental rights are given the most exacting scrutiny."[83] Therefore, if a fundamental right is restricted, a strict scrutiny test must

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spousal immunity to include criminal cases so that husbands could be convicted of larceny for theft of his wife's property." *Id.* at 262.

In 1958, the New York Court of Appeals upheld loss of consortium rules, which traditionally allowed husbands but not wives to recover for the loss of a spouse. *Id.* at 262-63. But the Court of Appeals soon rejected this rule, holding that loss of consortium applied equally to husbands and wives. *Id.* at 263. The doctrine of necessaries, which held that "husbands, but not wives, were obligated to support the family," was declared outmoded in 1989. *Id.*

In addition, "the treatment of sexual relations between spouses as an element of marriage has also undergone significant change." *Id.* at 264. Under the Common Law, "a man could have sexual relations with his wife any time he chose," and the wife was presumed to have given consent. *Id.* However, in 1984, the New York Court of Appeals rejected this rule. *Id.*

Traditional rules regarding gender roles also changed. For example, the Common Law rule that fathers "[were] entitled to the custody of their children" was statutorily changed in 1860 to "grant[] married women joint custody of their children." *Id.* at 266. By the late 1800's, the presumption that fathers should have the children "gave way to a maternal presumption in child custody disputes." *Id.* at 267. However, the New York Courts later declared: "[W]hile the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law." *Id.*

[82] *Id.*

[83] Clark v. Jeter, 486 U.S. 456, 461 (1988). *See also*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966).

be applied.[84] When a strict scrutiny test is applied, the law must "further a compelling government purpose" and cannot be justified if there is a "less restrictive alternative."[85] Under a strict scrutiny test, "the ordinary presumption of constitutionality is reversed."[86] In such a case, the government must show that there is a compelling government interest in furthering the law or policy.[87] Applying the correct standard to the correctly defined right, it is clear that the Domestic Relations Law does not further a compelling government purpose.

The *Hernandez* majority defines the interest involved as protecting the "welfare of children."[88] Under a strict scrutiny test, the interest in protecting the welfare of children must be compellingly furthered by the Domestic Relations Law. As shown above, the *Hernandez* majority's conclusion that the law is a rationally related legislative decision is seriously flawed. The rationally related legislative decision test is a lower threshold than the compelling government interest test; therefore, it is clear that there is not a compelling government interest in limiting marriage to only opposite-sex couples.

Further, even if there were a compelling government interest, there are less restrictive alternatives to protecting the interest asserted. When determining whether there is a less restrict alternative, the government has the heavy burden of showing that the law is narrowly tailored

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[84] *Clark*, 468 U.S. at 461.

[85] Regents of California v. Bakee, 438 U.S. 265, 357 (1977) (Brennan, J., dissenting) (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972)).

[86] OTIS H. STEPHENS AND JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW VOLUME II: CIVIL RIGHTS AND LIBERTIES 28 (4th Ed. Thompson Wadsworth 2008) (2003).

[87] *Id.*

[88] *Hernandez*, 855 N.E.2d at 7.

to achieve the compelling government interest.[89] Common sense shows that there are several "less restrictive" alternatives to advance the interests that the government asserts. There are numerous ways to protect the welfare of children without limiting marriage to opposite-sex couples. For example, to obtain the majority's goal of benefiting the welfare of children through stable relationships, the state could implement mentor or educational programs that teach child-raising skills. For these reasons the Domestic Relations Law cannot be justified under a strict scrutiny test.

ii. Due Process Under a Rational Basis Test

More importantly, even if the *Hernandez* majority correctly defined the right involved and correctly deemed the right to be non-fundamental, the reasoning would still be flawed. This is because had the *Hernandez* majority been correct in defining the right involved as "the right to marry someone of the same sex" and had the *Hernandez* majority been correct in defining the right as non-fundamental, the law would still have to pass the rational basis test.[90] However, as explained above, the *Hernandez* majority's argument that the Domestic Relations Law can be defended as a rational legislative decision is flawed. This means that even if the *Hernandez* majority was correct in defining the right involved as "the right to marry someone of the same sex" and even if the right is not a fundamental right because there is no rationally related government interest for limiting the right, the *Hernandez* majority still should have found the Domestic Relations Law violative of New York's constitution.

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[89] STEPHENS & SCHEB, *supra* note 86.
[90] *Id.*

2. Equal Protection

The same determination of whether to use a rational basis or strict scrutiny test under the Due Process Clause applies to the Equal Protection Clause. The *Hernandez* majority again proceeded under a rational basis test when it should have proceeded under a strict scrutiny test.

The *Hernandez* majority believed that the Domestic Relations Law does not discriminate based on sex.[91] It explained:

> By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Men and women are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.[92]

Finding no sex-based discrimination, the majority proceeded under a rational basis test. This reasoning is unsound. The Domestic Relations Law does discriminate based on sex. It does not allow a woman to marry a woman or a man to marry a man. Because of her sex, a woman is not allowed to marry another woman, and because of his sex, a man is not allowed to marry another man. In other words, the sex of the individual seeking marriage determines whether an individual will or will not be allowed to marry his or her partner. This sex based discrimination means that a suspect classification is involved.

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[91] *Hernandez*, 855 N.E.2d at 10.
[92] *Id.* at 10-11.

i. Equal Protection Under a Strict Scrutiny Test

When a fundamental right or suspect classification is involved, a strict scrutiny test is applicable.[93] As mentioned above, the right involved, properly defined, is the "right to marry"—a fundamental right. Additionally, as explained above, the classification involved is suspect. According to two constitutional experts:

> Operationally speaking, strict judicial scrutiny means that the ordinary presumption of constitutionality is reversed; the government carries the burden of proof that its challenged policy is constitutional. To carry the burden, government must show that its policy is "narrowly tailored" to further that interest.[94]

As mentioned above, the policy involved is neither narrowly tailored nor does it further the expressed government interest in promoting the welfare of children. For these reasons, the Domestic Relations Law is unconstitutional under New York's Equal Protection Clause.

ii. Equal Protection Under a Rational Basis Test

More importantly, even if there was no sex-based discrimination, the classification must still pass the rational basis test. In order to pass the rational basis test, the Domestic Relations Law must be rationally related to a legitimate state interest. The *Hernandez* majority argued that the legitimate state interest is to benefit the welfare of

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[93] *See e.g.*, Loving v. Virginia, 518 U.S. 515 (1996).
[94] STEPHENS & SCHEB, *supra* note 86, at 455.

children. However, as explained above, this argument is unreasonable.

A classification does not meet constitutional muster under a rational basis test, if (1) the purpose of the challenged discrimination is an illegitimate state objective, and (2) the means employed by the state are not rationally related to achievement of the objectives.[95] In other words, "where individuals in the group affected by the law have distinguishing characteristics relevant to the interest the State has the authority to implement," the law passes muster under the rational basis test;[96] otherwise, it does not. As mentioned above, there is no rational basis for such a law; therefore, there is no rational basis for the classification, and the law does not even pass the rational basis test.[97]

C. Alternative Standard of Review: Intermediate Scrutiny

Alternatively, plaintiffs argued that even if a strict scrutiny test were not applied, an intermediate scrutiny analysis would also be appropriate.[98] Intermediate scrutiny "generally has been applied to discriminatory classifications based on sex or illegitimacy."[99] The Supreme Court has held that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[100]

The majority recognized that "[t]hose who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike, since only opposite-sex relationships may

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[95] *Id.* at 454.
[96] *Hernandez*, 855 N.E.2d at 11 (citations omitted).
[97] Graham v. Richardson, 403 U.S. 365, 371 (1971) (citations omitted).
[98] *Id.* at 10.
[99] *Clark*, 486 U.S. at 461.
[100] *Id.*

gain the status and benefits associated with marriage."[101] Despite this recognition, the majority argued that there was no gender-based discrimination in restricting same-sex couples from marrying because the Domestic Relations Law "does not put men and women in different classes, and give one class a benefit not given to the other."[102] According to the majority's rationale, "[w]omen and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex."[103]

However, the majority misconstrued intermediate scrutiny. The purpose of applying intermediate scrutiny to gender-based classifications is to bar the government from discriminating against an individual based on his or her gender. By barring same-sex couples from marrying, the state of New York is clearly barring individuals from marrying based on their gender. The state is saying, for example, that because an individual is a woman, she cannot marry another woman, and because an individual is a man, he cannot marry another man. This is discrimination based on gender classification.

When discrimination is based on gender classification, the intermediate scrutiny test applies, and the "proffered justification [must be] exceedingly persuasive."[104] As noted above, the majority's proffered justification for restricting marriage to opposite-sex couples is unreasonable. An unreasonable justification cannot be "exceedingly persuasive;" therefore, the Domestic Relations Law does not pass intermediate scrutiny either.

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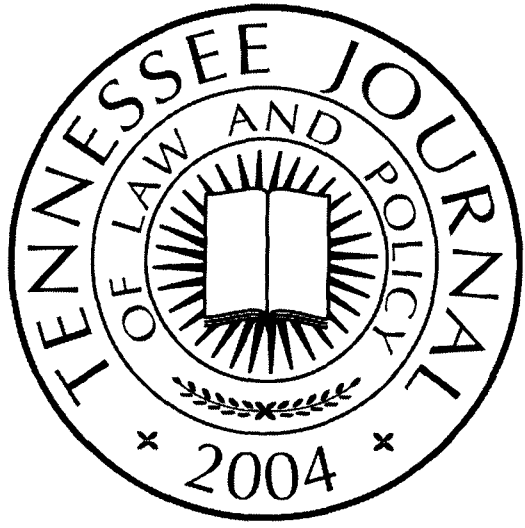
[101] *Hernandez*, 855 N.E.2d at 11.
[102] *Id.* at 10.
[103] *Id.* at 10-11.
[104] United States v. Virginia, 518 U.S. 515, 532-33 (1995).

IV. Conclusion

The reasoning of the *Hernandez* majority is flawed, and the repercussions of this flawed reasoning are grave. Many benefits of marriage remain unavailable to same-sex couples because their right to marry has not been recognized. Same-sex couples are left with few options with respect to gaining benefits that are automatically afforded to married couples. Same-sex can wait for the Court of Appeals of New York to overrule its own decision or wait for the Supreme Court of the United States to take a case and declare laws barring same-sex marriage to be in violation of the United States Constitution, options which are not likely in the foreseeable future. Alternatively, they can convince the New York legislature to overturn the Domestic Relations Law and grant same-sex couples the right to marry under a new law. At this point, however, it seems that their best bet is to petition the courts for individual benefits, as has already been done in several cases. Additionally, same-sex couples can lobby for executive orders and other acts to protect their rights. Such efforts, however, will never give same-sex couples the array of rights that are automatically afforded to opposite-sex couples when they enter into marriages. More importantly, many rights are unattainable without the legal ability to marry. Therefore, without a favorable decision by the courts, it is unlikely that same-sex couples will receive the benefits of marriage they deserve.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