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A TIME TO CHANGE
A PROPOSAL ON A NEW ACCREDITED INVESTOR STANDARD

Kyle Gaughan

I. Introduction

As participants in the American capital markets continue to seek new means to raise additional capital, both Congress and the Securities and Exchange Commission (hereinafter the “SEC”) have begun to devise new laws and regulations opening the markets to more investors. For instance, the Jumpstart Our Businesses Act (hereinafter the “JOBS Act”) recently lifted the ban on general solicitation under Regulation D and Rule 506(c).1 If the general solicitation is received by “accredited investors”, then there is no limit on how many of these investors purchase securities offered by the issuer. Additionally, following the passing of Dodd-Frank Wall Street Form and Consumer Protection Act (“Dodd-Frank”), the SEC has been instructed by Congress to consider adjustments to current definition of accredited investors.

With the changes in the laws and regulations of the US capital markets, this essay argues that it is time for the SEC to adjust the definition of the accredited investor. As currently defined, the accredited investor definition (for natural persons) is too narrow and overly focuses on income and net worth. This essay proposes a two-prong standard; one that focuses on income and net worth, but also introduces other factors (such as education and financial market knowledge) to establish other qualified investors as accredited investors under the American securities laws. To develop this thesis, this essay proceeds as follows: Part II focuses on the purpose behind establishing an accredited

investor standard, Part III explains the current definition of the accredited investor, Part IV proposes changes to the definition of accredited investors for natural persons and Part V concludes.

II. Purpose of Defining Accredited Investors

A. Generally

In general, the Securities Act of 1933 (hereinafter the “’33 Act”) was passed to serve two purposes: (i) to ensure that investors receive financial and other significant information about securities being offered and (ii) to prohibit deceit, misrepresentation and other fraud in the sale of securities. Thus, with this general background of the ’33 Act taken into consideration, it is clear that the general purpose of the 33 Act is for the protection of investors. Much of this protection comes from the disclosure requirements promulgated under Section 5 of the ’33 Act. However, the ‘33 Act and SEC have made certain cutouts allowing the issuer to avoid some of the disclosure requirements required under the ‘33 Act. The most obvious of these examples includes Section 4(2) of the ’33 Act and Regulation D as promulgated by the SEC. These private placements are viewed as riskier investments and could lead to a substantial loss of investment. Discussion of the private markets takes place more earnestly in Section B below.

Thus, the importance of this divide is to ensure that only investors capable of fending for themselves partake in private placements. In 1953, the Supreme Court helped establish this precedent by noting in Ralston-Purina that the private placement exemption

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“should turn on whether the particular class of persons affected needs the protection of the [33] Act.”\textsuperscript{4} The Court furthered this proposal by noting “[a]n offering to those who are shown to able to fend for themselves is a transaction ‘not involving a public offering.’”\textsuperscript{5} Thus, the Court in \textit{Ralston-Purina} helped establish a key distinction – one between transactions that involve investors viewed as incapable of fend for themselves (and thus subject the Section 5 “public offering” disclosure requirements of the ‘33 Act) and those investors that are allowed to partake in investments considered as private placements under Section 4(2) of the ’33 Act (as discussed in the next section).

\textbf{B. Why Public Markets Are Assumed Safer than the Private Markets}

By limiting the types of investors allowed to participate in private placements, Congress and the SEC are implicitly suggesting that the public markets are safer than the private markets. This begs the question: why are public markets considered safer than private markets and what different protections are provided in the public markets? The answer to this question begins with Section 5 of the ’33 Act which provides that unless a registration statement is in effect, it shall be impermissible “to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security.”\textsuperscript{6} Additionally, the ’33 Act prevents any “offers” for the sale of a security until such registration has been filed.\textsuperscript{7} Even after the registration statement has been filed, issuers cannot make any sales until the SEC has deemed the registration statement effective.\textsuperscript{8} Thus, in order to be compliant with Section 5 of the ’33 Act, an

\begin{itemize}
  \item \textsuperscript{4} \textit{SEC v. Ralston Purina Co.} 73 S. Ct. 981, 984 (1953).
  \item \textsuperscript{5} \textit{Id.}
  \item \textsuperscript{6} Securities Act of 1933 §77(e), 15 U.S.C. §§ 77(a) – 77(aa) (1933).
  \item \textsuperscript{7} \textit{Id.}
  \item \textsuperscript{8} \textit{Id.}
\end{itemize}
issuer needs to ensure this registration statement is properly filed, or it will be subject to liability for breaching the gun jumping rules.

By requiring issuers to file a registration statement, the ’33 Act affords investors the right to receive certain types of information.9 For the sake of registering an offering under Section 5, the registration statement comes in two parts. The first component is generally an S-1 form that contains basic information about the issuer (such as the issuer name, amount of securities expected to be offered and potential pricing).10 The second component of the registration statement comes in the form of a statutory prospectus.11 To qualify as a statutory prospectus under Section 10 of the ’33 Act, an issuer needs to provide items such as potential risk factors, financials pursuant to Regulation S-K and discussions by management of potential risks facing the issuer.12 By requiring such information to be pushed out by issuers, the SEC is attempting to provide investors with the requisite information to determine if they are making a sound investment.

Aside from disclosure requirements, public markets tend to be considered safer than the private markets given the illiquidity of securities placed in the private markets. For example, under Regulation D, the issuer is required to ensure that the securities listed are considered “restricted” and thus cannot be resold unless the securities are registered

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9 Additionally, the ’33 Act helps to ensure accuracy in registration statements by imposing liability on flawed registration statements via Section 11. See 15 U.S.C. § 77(k).
10 Form S-1: Registration Statement Under the Securities Act of 1933, SEC available at https://www.sec.gov/about/forms/forms-1.pdf [hereinafter, “Form S-1”]
11 Issuers will generally issue a prospectus pursuant to Section 10(b) of the ’33 Act. This allows issuers to issue securities and not be subject to liability under Section 5(b)(1) of the ’33 Act.
12 Form S-1, supra note 10.
or resold pursuant to an additional exemption from Section 5.\(^{13}\) Issuers are to take “reasonable care” to prevent unregistered, nonexempt resales by (i) having purchasers sign letters of investment intent; (ii) disclosing the securities restricted nature; and (iii) including a legend confirming the securities as restricted.\(^{14}\) Thus, unlike securities issued pursuant to Section 5 of the ’33 Act, investors in the private placement market will find themselves with minimal options to resell securities purchased. For those investors lacking substantial amounts of capital, this means that they may be unable to liquidate their portfolio at a time of need.

**C. Types of Private Offerings and Impact of the Accredited Investor**

As previously noted, Section 4(2) of the ’33 Act relieves issuers of complying with Section 5 of the ’33 Act if the offer does not constitute a “public offering”.\(^{15}\) Additionally, the Supreme Court in *Ralston Purina* noted the importance of investors being able to “fend for themselves” when determining whether the sale of securities constituted a “public offering”.\(^{16}\) When relying purely on Section 4(2), the key for determining whether investors can “fend for themselves” is whether the offerees are capable of obtaining the same information that would be provided for in a registration statement.\(^{17}\) While issuers can use this analysis in attempting to avoid the requirements of Section 5, almost all issuers will look to safe harbors promulgated by the SEC to ensure there is no liability.

\(^{13}\) 17 C.F.R. § 230.502(d) (1982).

\(^{14}\) Id.

\(^{15}\) 15 U.S.C. §§ 77(d).

\(^{16}\) *Ralston Purina Co.* 73 S. Ct. 984.

\(^{17}\) See generally, id.
The two most common types of safe harbors used by issuers looking to enter the private markets are Regulation D and Rule 144A (technically, Rule 144A is a resale exemption, but its frequent use by issuers merits discussion). Considering the exact rules for compliance with Regulation D and Rule 144A goes beyond the scope of this essay; what is important is a discussion on types of information required to be disclosed by issuers using these safe harbors. Under Rule 144A, Exchange Act reporters have no requirement to issue any type of information to the purchasers of securities. However, those issuers making an offering pursuant to Rule 144A that are not reporting companies must provide certain pieces of information to investors if the investors request such information. This information includes a very brief statement of the business and some key financial statements over the past two years (if reasonable, audited financial statements). Nevertheless, Rule 144A is not overly pertinent to the discussion of natural person accredited investors. This is because a Rule 144A offering can only be made to those entities the seller believes to be a “Qualified Institutional Buyer” or “QIBs.” Because QIBs are only entities, the protection of natural persons is not invoked under a Rule 144A offering.

Regulation D’s disclosure requirements are even less stringent than a Rule 144A offering. Under Regulation D, if issuers elect to distribute securities under Rule 505 or Rule 506(b), issuers must disclose certain types of key information (such as key non-financial information and financial information (the information required varies based on

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19 Id.
20 Id.
21 Id.
22 Id.
the size of the offering)).\textsuperscript{23} However, these disclosures are not mandated in the case of a Rule 504 offering or \textit{any offering involving an accredited investor}.	extsuperscript{24} Thus, natural persons designated as accredited investors partaking in a private offering under Regulation D are not required to receive any disclosures from the issuer.\textsuperscript{25} Consequently, in order to protect investors, it is important that the accredited investor standard only include those individuals that not only can understand key financial statements, but those that have the power to push these statements out of issuers.

Beyond disclosure requirements, the definition of an accredited investor is quite important to a private offering relying on Regulation D, specifically a Rule 506 offering. Under Rule 506, an issuer cannot offer securities to more than thirty-five purchasers.\textsuperscript{26} This limitation has two key cutouts. First, as defined in Rule 501(e), accredited investors do not qualify as “purchasers”\textsuperscript{27}. Thus, an issuer relying on the Rule 506 exemption can issue securities to more than 35 buyers so long as the buyers are accredited investors. Second, and perhaps more importantly, the JOBS Act removed the ban on general solicitation under a Rule 506 offering so long as (i) all purchasers in the transaction are accredited investors and (ii) the issuer takes reasonable steps to ensure that all investors

\textsuperscript{23} 17 C.F.R. § 230.502(b).

\textsuperscript{24} Id.

\textsuperscript{25} Id.; Note that even in the case of a Rule 506(c) offering, many issuers (and many investors demand) a “private placement memorandum” (PPM) containing key information about the potential investment. Such PPMs are generally not reviewed by any regulator. Thus, under a Rule 506(c) offering to accredited investors, it is up to the investor to not only push out this information, but also understand the danger of potential inaccuracies. \textit{See Investor Bulletin: Private Placements Under Regulation D SEC (Sept. 24, 2014) available at} http://www.sec.gov/oiea/investor-alerts-bulletins/ib_privateplacements.html.

\textsuperscript{26} 17 C.F.R. § 230.506(b)(1).

\textsuperscript{27} 17 C.F.R. § 230.501(e).
are accredited. Additionally, when relying on Rule 506(c), the issue does not have any of the disclosure requirements as discussed under Rule 505 and Rule 506(b).

For issues electing to offer securities outside of the private placement exemption under Section 4(2) of the ’33 Act (and almost always under a safer harbor such as Rule 144A or Regulation D, among others), issuers will be subject to the strict registration and disclosure requirements under Section 5 of the ’33 Act as discussed in Part B of this Section. These differences in disclosure requirements are the key to the remainder of this essay – which investors are capable to “fend for themselves” under private placements under Section 4(2) of the ’33 Act and which investors need to be protected under the additional disclosure requirements and protections under Section 5.

III. Current Definition of the Accredited Investor

Currently, the definition of an accredited investor is broken down into two categories: entities and natural persons. While the focus of this essay is on natural persons, it will be helpful to breakdown the current rules for each category.

A. Entities

As promulgated under Regulation D by the SEC, a variety of entities can qualify as accredited investors. These entities include any bank as defined under Section 3(a)(2) of the ’33 Act, any savings or loan association as defined under Section 3(a)(5)(A) of the ’33 Act, any broker or dealer as defined under Section 15 of the 1934 Securities Exchange Act (hereinafter the “34 Act”), any investment company as defined under the

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28 17 C.F.R. § 230.506(c).
29 The removal of the general solicitation ban and disclosure requirements is accomplished by exempting a Rule 506(c) offering from the requirements of Rule 502(b) and (c). Id.
1940 Investment Company Act, any Small Business Investment Company licensed by the U.S. Small Business Administration, plans such as pension and stock option plans (so long as these plans have total assets in excess of $5,000,000), any employment benefit plan (so long as the plan has total assets in excess of $5,000,000 or, if a self-directed plan, is managed by individuals qualifying as accredited investors). Regulation D also goes on to include any private development company as defined Section 202(a)(22) of the 1940 Investment Company Act and any corporation (or partnership or trust) defined under Section 501(c)(3) of the Internal Revenue Code with total assets in excess of $5,000,000 and not formed with the intention of investing in the securities being offered.

**B. Natural Persons**

As currently defined, there are two standards to qualify as an accredited investor as a natural person. The first standard requires the investor to have a net worth of at least $1,000,000. This calculation of net worth does not include the investor’s primary residence, but may be counted as the joint net worth between the investor and the investor’s spouse. Under the second standard, an investor will qualify as accredited if the individual has a net income of $200,000 over the past two years or combined with a spouse has a net income in excess of $300,000 over the past two years. In both cases,

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33 17 C.F.R. § 230.501(a)(5).
34 Id.
the investor must have a reasonable expectation of meeting this income standard in the
upcoming year.\textsuperscript{36}

\textbf{IV. Problems and Proposed Changes to the Accredited Investor Standard}

\textbf{A. History of Changing the Accredited Investor Standard and SEC Proposals}

The accredited investor definition has remained very stagnant over the past thirty
years. This stagnant process began to slowly shift with the passage of Dodd-Frank in
2010. This took place in two parts. The first was to instruct the SEC to remove an
individual’s primary residence from the calculation of net assets under the current
accredited investor definition.\textsuperscript{37} The second part comes from Congress’ mandate that the
SEC consider changes to the accredited investor definition as it relates to natural persons
upon the passage of Dodd-Frank and every four years thereafter.\textsuperscript{38} Additionally, Section
911 of Dodd-Frank “established the new Investor Advisory Committee to advise the
Commission on regulatory priorities, the regulation of securities products, trading
strategies, fee structures, the effectiveness of disclosure, and on initiatives to protect
investor interests and to promote investor confidence and the integrity of the securities
marketplace.”\textsuperscript{39} The Investment Advisory Committee (IAC) is the committee that

\textsuperscript{36} Id.
\textsuperscript{37} Dodd-Frank Wall Street Reform and Consumer Protection Act, § 413(a) H.R. 4173,
\textsuperscript{38} Id.
initially undertook the review of the accredited investor definition and made several suggestions as to proposed changes.\textsuperscript{40}

After a few years’ delay, the IAC made its initial suggestion to the SEC on October 9, 2014. While this proposal from the IAC was simply a suggestion, the terms of the proposal were taken into consideration by the SEC. The IAC proposed a variety of options to change the accredited investor standard. These recommendations included the following: (i) suggesting that the SEC evaluate whether individuals currently qualifying as accredited investors are capable of protecting their own interests; if they are not, the SEC should promptly alter the accredited investor definition to better serve the SEC’s goal\textsuperscript{41}; (ii) the SEC should consider revising the accredited investor definition to include a financial sophistication analysis; (iii) if the SEC elects to not incorporate a financial sophistication test, the SEC should consider limiting the percentage of an individual’s assets that can be invested in a private placement; (iv) the SEC should consider limiting the burden on issuers in determining whether or not investors qualify as accredited; and (v) the SEC should strengthen protections to non-accredited investors that only qualify for accredited investor status due to investment solely via the use of a purchaser representative.\textsuperscript{42}


\textsuperscript{41} See generally, The Role of the SEC, http://investor.gov/introduction-markets/role-sec (last visited May 1, 2015) (noting that the SEC has a three prong mission statement: (i) \textit{protecting investors}; (ii) maintaining fair, orderly and efficient markets; and (iii) facilitate capital formation) (emphasis added).

\textsuperscript{42} See Investor Education Committee, supra note 40,
At this point, it is not yet clear which, if any, of these proposals the SEC will adopt. Nevertheless, it is clear that the SEC is at least considering changing the definition. Indeed, SEC Chairman Mary Jo White noted that the SEC is “undertaking a ‘deep-dive study into the [accredited investor] definition,’ but that she doesn’t know ‘where [the SEC] will land.’” As this essay moves forward, it will argue that as the SEC considers changes to the accredited investor definition, it should strongly consider a combination of the second and third proposal promulgated by the IAC.

B. Benefits of the Historical Definition

As previously noted, up until recently, the definition of the accredited investor has remained relatively stagnant. Indeed, aside from removing the natural person’s primary residence from the net worth calculation in 2010, there has not been a change to the accredited investor definition in over thirty years. Due to this lack of change and inflation, the accredited investor pool has progressively expanded. Notwithstanding the foregoing, the accredited investor definition is finally being looked at by the SEC. With the passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter “Dodd-Frank”), the SEC was mandated to review the current accredited investor definition. Among the tasks placed upon the SEC was to determine “whether

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45 See id. (noting that if the accredited investor standard were to be updated for inflation, the accredited investor pool would drop from 8.5 million to 3.75 million).

46 See Investor Education Committee, supra note 40.
the current definition [of accredited investors] achieves the goal of identifying a class of individuals who do not need the ’33 Act protections in order to make an informed investment decision and protect their own interests”.

As this section continues, this essay will review some benefits of the current definition and considers some alternatives the SEC should consider. Ultimately, this essay will propose a standard that is a hybrid between the current asset/income based standard and a sophistication standard.

The current definition of natural person accredited investors does come with some benefits. Perhaps the most obvious benefit is the certainty provided under the current standard. Indeed, based on the current standard promulgated, there is a clear test as to whether an investor is accredited; they either meet the financial criteria or they do not. The importance of this simplicity cannot be overstated; in cases where the burden is on issuers to determine whether or not the investor is accredited, the issuer has a clear-cut test to determine whether or not the investor meets the accredited status. Moreover, in terms of investors needing the most protection, it is at least arguable that investors with substantial assets are better suited to face potential losses (as discussed later in this essay, this is not always the case).

An additional criticism of adjusting the accredited investor standard (especially for inflation) is that altering the standard would substantially limit the pool of investors

\[\text{Id.}\]

\[\text{Id.}\] For example, an issuer offering securities to accredited investors under Rule 506(c) must take “reasonable steps” to determine the investor qualifies as accredited. The rule provides examples of reasonable steps which includes looking at the past two years of Internal Revenue Service forms, such as W-2s (for accreditation under the income standard), reviewing bank statements, brokerage statements, etc., consumer reports and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed. 17 C.F.R. § 203.506(c)(2)(ii).
available for the startup community. This criticism does come with some merit; according the Angel Capital Association simply adjusting the current accredited investor definition for inflation would lead approximately 60% of the current accredited investor pool being taken out of the $1.4 trillion dollar private placement market.\(^{49}\) Moreover, in the angel investment market approximately over a quarter of accredited investor angel investors would fall out of the category of accredited investors if the definition were to be adjusted for inflation.\(^{50}\) The importance of these investors in the startup atmosphere cannot be denied; in 2013, angel investors invested approximately $25 billion into 71,000 startup companies.\(^{51}\) Moreover, these angel investors account for approximately 90% of investment in startup companies after entrepreneurs invest their own savings or receive investment from friends and family.\(^{52}\) As such, any alteration to the accredited investor definition could substantially hurt the startup community.

This potential limit on the number of possible investors should not be taken lightly. As noted earlier in the essay, while the SEC’s mission involves protecting investors, its mission also includes facilitating capital formation.\(^{53}\) Even though the SEC noted that “only a small percentage of these [accredited investor] households are likely to participate in securities offerings, especially exempt offerings,”\(^{54}\) the number of investors


\(^{50}\) Id.


\(^{52}\) Id.

\(^{53}\) Role of the SEC, supra note 37.

\(^{54}\) See Investor Education Committee, supra note 40.
being removed from accredited status is substantial. As discussed below, this is why this essay proposes a two-prong test; one involving an asset-backed test, but with an exception for those investors that are able to pass a financial literacy test.

C. Problems with the Current Standard

Notwithstanding the foregoing, the problems with the current definition are too robust and must be addressed by the SEC. Perhaps the most important issue in the current definition is that this definition does not take into consideration which investors are most in need of the protections provided by the ’33 Act. Indeed, simply being wealthy does not necessarily constitute financial savvy; “using money as a stand-in for financial sophistication is a fairly unsophisticated solution.” Some investors may have simply inherited money and may not have any idea about how to wisely invest this money. Other classes of individuals that could qualify as accredited investors, but still lack the necessary financial savvy to be accredited investors include orphans and those receiving large insurance settlements.

Or, perhaps as the most important class of investors, elderly individuals may have accumulated enough wealth over their lifetime to qualify as accredited investors. Based on the current definition of natural persons accredited investors, approximately 6.7% of

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57 Luis A. Aguilar, SEC Comm’r, Revisiting the “Accredited Investor” Definition to Better Protect Investors (Dec. 17, 2014), available at http://www.sec.gov/news/statement/spch121714laa.html#_edn8. (Noting that “[i]n fact, many households meeting the accredited investor threshold are likely to be elderly, with savings accumulated over the course of decades (which must, in turn, last the rest of a lifetime).”).
households meet the $1 million dollar asset standard; however, 9.7% of households with individuals above 65 years of age and 12% of households with individuals between the ages of 50-64 meet the requirements of the current accredited investor definition.\(^{58}\) While $1 million may seem like a substantial amount of assets, this is not the case when these assets are expected to last the remaining lifetime. Additionally, many elderly individuals rely on investments as a means to assist in rent payments and other bills. Investing in the private market hurts these individuals due to their illiquidity.\(^{59}\) Moreover, these elderly individuals frequently lack the necessary financial understanding to make investments not covered by the ‘33 Act. This is exemplified by the fact that at the state level, many enforcement actions related to scams apply to the elderly.\(^{60}\)

Outside of state law claims, the elderly are subject to fraud in private markets as well. One example held true in Colorado where the SEC charged a “self-described institutional trader” for defrauding elderly investors into making investments into purported government-secured bonds, but instead used the investments to pay his mortgage.\(^{61}\) The majority of the investments in this case came from IRAs or other retirement accounts.\(^{62}\) This example again shows the potential vulnerability of the

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\(^{58}\) See Investor Education Committee, supra note 40.

\(^{59}\) See generally, id.


\(^{62}\) Id.
elderly; fraudsters target these individuals due to large retirement accounts – accounts that are intended to last the remainder of an elderly individual(s) life.

**D. Proposed New Standard**

With these issues taken into consideration, this essay proposes a two pronged approach to adjusting the accredited investor standard for natural person; creating a financial literacy test and increasing (as well as limiting the percentage of assets allowed to be invested in a given year) the asset limits. The process for this standard would work as follows; first, investors would be given the option to take a financial literacy test (as discussed below) to prove they have an appropriate level of financial understanding to participate in investment opportunities not affording the protections of the ’33 Act. These investors would have no limit on how much they would be able to invest. If investors elect to not take this test, the financial asset test would apply, subject to adjustments (also discussed below).

The proposed financial literacy test would consider a variety of factors. Some examples include an understanding of compound interest, an understanding of inflation, the importance of diversification, the difference between stocks and bonds, types of fraud, other risks in investment (such as liquidity) and the ability to understand key financial statements. These factors are meant to test not only basic financial education, but also an understanding of more complicated factors such as fraud and risk. The importance of including fraud and risk in this financial literacy test is key; the purpose of the natural person accredited investor definition is to allow certain investors to take on riskier investments so long as they have adequate knowledge of the risks facing them.
In all likelihood, many investors will be unable to pass this test. Indeed, an SEC report recently indicated that most investors lack even basic knowledge related to financial literacy.\textsuperscript{63} Specifically, the SEC noted that “[t]he studies demonstrate that investors have a weak grasp of elementary financial concepts and lack critical knowledge of ways to avoid investment fraud.”\textsuperscript{64} Indeed, this study specifically indicated that investors do not understand concepts such as compound interest, inflation, diversification, investment costs and “critical knowledge that would help prevent themselves from investment fraud.”\textsuperscript{65} Clearly, many of these factors are included in the proposed natural person accredited investor test. Thus, this test ensures that these investors will not be subject to risky investments not afforded the full protections of the ’33 Act.

If an investor does not meet the financial literacy test, this proposal includes two alternative means for an individual to invest in securities restricted to accredited investors: a purchaser representative exclusion and an asset/income test similar to the current accredited investor standard, albeit with some proposed adjustments. As currently drafted, the definition of accredited investor does not include investors that solely rely on the expertise of a purchaser representative.\textsuperscript{66} However, to qualify as a “sophisticated investor”, and thus be allowed to invest in a Rule 506(b) offering under Regulation D (subject to the limits discussed above),\textsuperscript{67} an investor may utilize a purchaser

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} 17 C.F.R. § 230.501(a).
\textsuperscript{67} See infra Section II(C).
representative to obtain qualified status. 68 This essay will argue that with the addition of certain protections, an investor relying on the expertise of a qualified purchaser representative should qualify as an accredited investor.

As currently drafted, Rule 501 of Regulation D provides a definition of a “purchaser representative”. 69 There are four requirements to qualify as a purchaser representative under Rule 501. 70 First, the purchaser representative cannot be “an affiliate, director, officer or other employer of the issuer”, nor can the purchaser representative have an equity interest of ten percent or more in the issuer. 71 Exceptions to this first prong are made in the case of closely related individuals and entities. 72 Second, the purchaser representative must have “such knowledge and experience in financial and business matters that he is capable of evaluating” the benefits and risks associated with the investment. 73 This knowledge can be from the purchaser representative on its own right, combined with other purchaser representatives or combined between the representative and the purchaser. 74 Third, the purchaser must identify the representative as his purchaser representative to the issuer. 75 Finally, the purchaser representative must disclose in writing to the purchaser any material relationship that exists, existed in the

69 17 C.F.R. § 230.501(i).
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
previous two years or is mutually contemplated between the issuer and the purchaser representative and the representative’s affiliates.\textsuperscript{76}

This basic test provides the framework for how using a purchaser representative can allow an otherwise unaccredited investor to qualify as accredited. However, this essay argues that there should be more added to the “purchaser representative” requirement in order to allow an otherwise unaccredited investor to qualify as accredited: (i) adding a financial literacy test and (ii) adding a fiduciary relationship between the purchaser and purchaser representative. Under this proposed standard, the financial literacy test would replace the second prong and would test the same knowledge and skills applied above in relation to the individual. This helps to ensure that the purchaser representative is qualified and has sufficient legal knowledge to represent the purchaser.

On the other hand, the establishment of a fiduciary relationship is designed to ensure that the purchaser representative does not take advantage of the purchaser. The Investor Education Subcommittee has already argued for a similar standard in regards to the sophistication requirement.\textsuperscript{77} Specifically, the committee explicitly stated that when an investor is otherwise unqualified to participate in an investment opportunity (i.e. an otherwise unsophisticated investor obtaining sophisticated status via a purchaser representative), additionally requirements should be added to the current standard.\textsuperscript{78} The committee argued that beyond the original requirements of a purchaser representative, a purchaser representative must (i) not have a financial stake in the investment being recommended (ii) not accept direct or indirect payment from the issuer; and (iii) if

\textsuperscript{76} Id.

\textsuperscript{77} Investor Education Subcommittee, supra note 41.

\textsuperscript{78} Id.
compensated by the purchaser, establish a fiduciary relationship with the purchaser.\textsuperscript{79}

This essay believes that these standards should be applied not only to purchaser representatives in the context of a sophisticated investor, but should also be applied to purchaser representatives that in turn can transform otherwise unaccredited investors into accredited investors. This is because the use of a purchaser representative helps protect an individual that cannot otherwise “fend for himself” from the risks of investing in an unregistered offering. Additionally, the establishment of a fiduciary relationship helps ensure that the investor will not being taken advantage of by his representative. By allowing otherwise unaccredited investors to rely on a purchaser representative, the SEC will expand the investor pool (and thus help facilitate capital formation) while also helping to ensure investors are protected against risky investments.

Finally, as previously noted in this essay, the current definition of accredited investor has not been adjusted for over thirty years. The first step to adjusting the accredited investor definition would be to adjust the asset/income based test for inflation. As such, the new numbers for the asset test of an accredited investor would be a net worth of $2,500,000 in total assets and an annual income test of $500,000 for individuals and $625,000 combined for spouses.\textsuperscript{80} This adjustment alone would substantially limit the size of the accredited investor pool, and thus limit the amount of investors partaking in investments not subject to the protections of the ’33 Act. Consequently, many investors (such as the elderly) would not be able to partake in such risky investments.

\textsuperscript{79} Id.
However, this essay argues that accredited investors meeting the second prong of the test should be subject to some limitations in the amount allowed to invest in investments not covered by the ’33 Act. Specifically, accredited investors not electing to follow the financial literacy test, but qualifying as an accredited investor under the assets/income test would be subject to investment limits of 10% of their total assets or annual income (so, with inflation taken into consideration and assuming at the bare minimum, if under the asset test, the limit would amount to $250,000 or under the annual income test, the amount would be $50,000 for individuals and $62,500 for spouses).

E. Reply to Criticisms

While groups such as the Angel Capital Association argue that adjusting the accredited investor definition for inflation would cause problems for startup companies, this proposal helps alleviate some of this concern. By offering the financial literacy test as an alternative to the asset based definition, angel investors that otherwise would fail to meet the asset/income based test as adjusted for inflation would still have the opportunity to qualify as accredited simply by passing the financial literacy test. And for those angels that are unable to pass the financial literacy test as currently drafted, these are the individuals the SEC is trying to protect: those lacking the assets and financial savvy to partake in risky investments not subject to the registration requirements of the ’33 Act.

Additionally, other proposals to reforming the accredited investor standard call for scrapping the accredited investor standard in its entirety.81 One of the rationales for this is that by leaving the private markets only for investors the SEC considers

sophisticated, a system is established that “unfairly excludes those with less money from the best investments.” 82 This is a flawed view of the private markets. Aside from the illiquidity involved in the private markets, 83 many investments in the private markets are subject to failure, especially in the startup community. 84 Thus, while the potential for extreme upside is apparent, the potential for failure is substantial. Moreover, as discussed in Section II(B), these investments are illiquid. Given that those with less capital would likely be the ones needing to liquidate investments, this poses a substantial risk on them. It seems difficult to fathom how such investments constitute the “best”.

In order to protect investors in a world without an accredited investor definition, such proposals consider capping any one investor’s investment in any one entity in the private markets at 1%. 85 Such a concept is flawed for two reasons. First, this will put a substantial burden on issuers to determine if their investors have broken this 1% standard. Second, while these proposals argue that eliminating the accredited investor standard will open the door to more investment, this does not seem to be accurate. Indeed, many accredited investors in the private markets today invest more than 1% in a single investment. It is not clear that non-accredited investors entering the pool would make this loss of investment up, nor is it clear that the 1% cap would be large enough to even allow lower income individuals to invest in the private markets. For instance, in an attempt to open investment to more individuals, a recent Carlyle Group buyout fund lowered its

82 Id.
83 See infra Section II(B).
85 Shane, supra note 81.
required minimum investment from between $5 and $20 million to $50,000.\textsuperscript{86} A more extreme example is KKR & Co., which provided for a minimum investment of $10,000.\textsuperscript{87} This would require investors to have a net worth of at least $500,000 or $100,000 to make the minimum investment under the 1% standard. While the KKR offering would start to open the door to lower income individuals, it is not clear that other private placements would offer such a low threshold for investment.

\textbf{V. Conclusion}

After thirty plus years, it is time for the SEC to act and change the accredited investor definition for natural persons. The flaws with the current standard are undeniable: due to inflation, the accredited investor standard has expanded the accredited investor pool extensively and even those with substantial assets may not be financially sophisticated enough to understand even basic financial terms. Because many accredited investors are not able to protect themselves in the private markets, it is time for the SEC to act on one of its key missions: protecting investors. This essay proposes a three-prong standard to alleviate the issues with the current standard. By considering (i) a financial literacy test; (ii) a revamped financial threshold test; and (iii) a fiduciary purchaser representative, only those sophisticated enough to enter the private placement markets,\textsuperscript{86,87}

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those protected by a representative or those with enough assets to bear potential losses will be allowed to invest in these risky transactions.

Moreover, this proposal should alleviate some concerns from the startup community about pulling a substantial amount of accredited investors from current pool. While many angel investors may not qualify under an income/asset standard that is simply revamped for inflation, these investors still will have an opportunity to enter the market via a financial literacy test. Thus, as long as these angel investors are capable of “fending for themselves”, they can remain in the private placement market. In short, after thirty plus years, it is time for action – the SEC needs to revamp the natural person accredited investor definition.
NEVER REFUSE A BREATH MINT
CHANGE IMPLEMENTATION FOR LAW SCHOOLS: AN INSIDER’S CORRELATION BETWEEN
CHANGE MANAGEMENT TOOLS AND HOW TO TAILOR THEM TO MEET THE
“NEW NORMAL”

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The course of legal education is facing change. With budget cuts ever-present, admission numbers plummeting, acceptance standards lowering, increasingly under-prepared students, lower bar passage rates, and fewer legal jobs available, law schools find themselves standing nose to nose with change. And now, after decades of quietly and coyly turning away from the harrumph of the media, there is a full-frontal assault on law schools to better prepare students to think and act like lawyers; a monumental task it seems.

The American Bar Association (ABA) has drawn the proverbial line in the sand with changes to the Standards and Rules of Procedure for Approval of Law Schools 2014-2015. Changes under §3 draw first blood. Specifically, Standard 302 establishes that “a law school shall establish learning outcomes …” Looking to Standard 314, the ABA states that a law school should “utilize assessment methods to measure and improve student learning and provide meaningful feedback….“ Standard 315 requires “ongoing evaluation of…learning outcomes, and

* 2L at Ave Maria School of Law. Former Series 7 stock trader and analyst. Former management consultant and business analyst. Special thanks to Dr. Brett Brosseit, Director of Advanced Critical Thinking (ACT) at Ave Maria School of Law. Also, thank you to Ave Maria’s amazing leaders at the Law library: Ulysses Jean, Law Library Director, and Rebekah Skiba, Emerging Technologies Reference Librarian. I am grateful and blessed to have never-ending access to these three dynamic professionals, along with the entire faculty and staff. Thank you to Dean Kevin Cieply and Monsignor Frank McGrath for their continued support and empowerment. Ave Maria School of Law is truly one of a kind.


2 Id. at 23.
assessment methods;” using these evaluation results to “determine the degree of student attainment.”

This author emphasizes particular words of the ABA’s Standards above, because it is in these terms that the possible solutions exist. As a former management consultant and effective business analyst in the midst of a career change, and faced with these issues as a current law student, the connection between the two sectors becomes abundantly clear. The Educational Sector has a problem, and the Change Management Sector has a solution.

Part I of this article explores the crisis looming in the law school landscape; examining the problem of entering students being grossly under-prepared, and explains how and why this poses a problem. Several key indicators contribute to the volatile cocktail. One ingredient is the 2001 enactment of No Child Left Behind and the “teach to the test” methodology that ensued. Another component are the generational differences that have changed the mold for what is now the “new normal” student. Other factors in the concoction were a severe economic downturn in 2008 that left new legal employment critically injured and stifled, coupled with the frustration of law schools as the expectations for critical thinking and reading skills sharply declined on their admissions roster, resulting in a need for change.

Part II frames the correlation between the existing problems that law schools face, and solutions that exist in Change Management sectors. Specifically, this section looks at how tests, measures and tools developed from the global Toyota Production System of Change (Lean

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3 Id. at 24.
8 See generally 2005 National Assessment of Adult Literacy (NAAL).
Manufacturing) can successfully deploy in other sectors. The Toyota Production System (TPS) effectively executes Barrier Identification and Removal by setting levels of reasonable expectations, measured against the standard. Upon meeting the expectations, the standard rises again, until all barriers are identified and eliminated, creating the “capacity” at which the organization is optimized. The use of Skills Flexibility Training creates cross-training across multiple disciples, to cut down-time and maximize schedule attainment and adherence; which is the goal charged by the ABA in Standard 315. Finally, TPS eliminates bottom-up management styles, in favor of top-down approaches that add coherence and unity for completion of the “whole,” goal, compared to completion of the “task” as a piece of the “whole.”

Finally, Part III uncovers how TPS can be modified to create a complete Law School Management Operating System that effectively identifies barriers, triggers deployment of the tools and techniques available, and measures the results from both the role of the student (Employee) and the faculty (Management). In the end, the result will create a “Lean” Law School whose “product” is “practice-ready” with the critical reading and analytical skills required to effectively “think like a lawyer.”

I. A BAD TASTE IN THE MOUTH

With the best intentions, law schools’ efforts to produce practice-ready lawyers brimming with critical reading and thinking skills, adept in big-picture analytics, and fresh from first-time bar passage, continue to fall short in these once-attainable goals. Attempts to reform law school for the changing needs of the incoming students uncovers the monolithic iceberg that remains below the surface; a task that seems too herculean. This is the current landscape of the “New Normal” in legal education; where entering 1L’s do not possess the skills required to effectively

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absorb the time-honored curriculum required to produce quality lawyers.\textsuperscript{10} Training students to think like lawyers includes critical reading, analysis, legal writing and problem-solving, bundled together as the primary function of law school.\textsuperscript{11}

However, legal educators generally operate under the assumption that entering law students already have some foothold on these skills via their formative and undergraduate education.\textsuperscript{12} This “skills deployment assumption” leads to the belief that pre-law skills include the ability to read and comprehend complex legal opinions, along with the other analytical and writing skills legal educators assume students possess upon matriculation to law school.\textsuperscript{13} It is not unreasonable to conclude that most legal educators view their roles as simply to refine and hone these pre-acquired skills.\textsuperscript{14} Recently, however, many law professors have observed that new students greet them with significant and often surprising deficiencies in basic critical reading, thinking, analysis, and writing skills, usually manifested as an overall lack of preparedness . . . the “new normal.” \textsuperscript{15}

College students are working less and receiving higher grades, but failing to acquire the thinking skills that provide the foundation for later success.\textsuperscript{16} While these changes in undergraduate education have been hotly debated since the 2011 publication of Academically Adrift: Limited Learning on College Campuses\textsuperscript{17}, law schools have not been engaged in the discussion. Legal education has not dealt with changes that leave students less prepared for the type of disciplined thinking, reading, and analytical rigor required to succeed in law school.\textsuperscript{18}

\textsuperscript{11} Id. at 42.
\textsuperscript{12} Id. at 42.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{17} Richard Arum and Josipa Roksa, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES (2011).
\textsuperscript{18} Flanagan, supra note 16 at 1.
The problem became tantamount when even Harvard Law School recognized the problem in 2010, and by 2012, implemented a mandatory winter term problem-solving course for first-year students to emphasize practical skills, creative thinking, and exercising judgment in efforts to better equip young lawyers.¹⁹ The program’s pioneering leaders saw a real opportunity to find better ways to prepare students to become lawyers.²⁰ In fact, even after Harvard’s curriculum change in 2006, the Problem Solving Workshop is the most striking departure from standard legal pedagogy—and it is winning passionate advocates.²¹

Not only tier one law schools like Harvard recognize a call to action. True, the impact hits harder when the best law schools in the country take action; however, the impact under-prepared students is making on every tier of law school has pushed all innovators of change into action. At Ave Maria School of Law, three dedicated professionals, led by Dr. Brett Brosseit, JD, PhD, comprise the Advanced Critical Thinking (ACT) department.²² There, with the use of proven Learning Sciences tools designed to identify critical thinking and reading skills deficits, coupled with classroom team-based, and problem-based learning techniques, the results of this structured, event-based approach are beginning to show a difference in students’ ability to improve their once-lacking skills. In fact, Dr. Brosseit presented his groundbreaking research on "Accelerating the Development of Critical Thinking Skills in Law Students" at the Oxford Education Research Symposium on December 8, 2015 at Pembroke College, in Oxford, UK.²³

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²⁰ Id.
²¹ Id.
²³ Brett Brosseit, Director, Advanced Critical Thinking department, Ave Maria School of Law, CHARTING THE COURSE: AN EMPIRICALLY BASED THEORY OF THE DEVELOPMENT OF CRITICAL THINKING IN LAW STUDENTS, Address at the Oxford Education Research Symposium. (DEC. 8, 2015).
Dr. Brosseit conducted a qualitative grounded theory study to formulate a comprehensive conceptual model of the development of critical thinking skills in law students that may assist legal educators in establishing best practices for the advancement of higher order thinking skills in law students. The resulting “Critical Thinking in Law Students” model provides the legal academy with empirical guidance to formulate new strategies to improve learning outcomes and comply with regulatory mandates, while also offering the broader academy insight into the intricate combination of factors that affect the ability of higher education institutions to provide their students with effective education for the development of higher order thinking skills.

Departments like ACT at Ave Maria School of Law, and problem-solving courses like those at Harvard Law School described above, cannot solve the problem by themselves; however, these program directors endeavor to persevere toward change. Dedicated professionals are the first step. Commitment to change is the next. Both Ave Maria Law and Harvard have made changes that attack the problem at their schools, leaving a model guide for other schools to follow, but this does little to solve the problem in the Educational sector itself, where sector-wide changes need Top-Down support, both on the Administration level at schools and the U.S. Department of Education at the very top.

So, exactly what are these “critical thinking skills” that students are becoming increasingly void of? It is one thing to state that students lack critical thinking skills, but quite different to provide a solution if no one knows what we are trying to solve. While no single accepted definition of “critical thinking” exists, the American Philosophical Foundation conducted one of the largest and most comprehensive studies on critical thinking and reasoning to date, publishing its findings

\[24\text{ Id.}\]
\[25\text{ Id.}\]
in *The Delphi Report*. The *Delphi Report* defined critical thinking as “purposeful, self-regulatory judgment which results in interpretation, analysis, evaluation, and inference, as well as explanation of the evidential, conceptual, methodological, criteriological, or contextual considerations upon which that judgment is based.” The 46 critical thinking experts, who contributed to *The Delphi Report*, reached a consensus that critical thinking is comprised of six primary cognitive skills: interpretation, analysis, evaluation, inference, explanation, and self-regulation.

The ability to “think like a lawyer”, long-considered the primary objective of legal education, means the ability to reason effectively in order to formulate sound solutions to complex, abstract problems. The critical thinking skills embodied in *The Delphi Report* reflect the types of skills that legal educators should identify as learning objectives and endeavor to develop in their students, because law students must develop strength in these skills in order to become effective problem solvers.

A. The Germs that Cause Bad Breath

The likely cause of law students being unprepared is a unique combination of factors that came together while the Millennial Generation matured. For starters, Millennials’ K–12 education was affected by the No Child Left Behind Act (NCLB) where teachers taught students to pass standardized tests, and higher education lowered its once rigorous standards, resulting in a significant number of college students graduating without learning the higher–level cognitive skills necessary to deal successfully with complex issues.
The NCLB intent was to ensure that all children are able to meet minimum state proficiency requirements in education, with the goal of improving overall academic achievement.\textsuperscript{34} As a condition for federal funding, public school test scores must meet NCLB benchmark accountability standards. . . and if they do not, the government imposes heavy penalties: from changes in funding, to allowing parents to transfer their children to different public schools, to major curricular re-form and, in extreme cases, school closure.\textsuperscript{35} The high-stakes nature of NCLB testing arguably created an incentive for schools to cut corners by diluting proficiency standards, thus lowering the bar to reach students rather than building students' skills to reach the bar. Proficiency scores also vary from state to state, as does the rigor of the tests themselves.\textsuperscript{36} The demands burdening teachers encouraged an environment of “teaching to the test,” moving schools away from curriculums that develop fundamental critical thinking skills, and although premised on good intentions, NCLB reforms have brought negative consequences in relation to basic critical thinking skills.\textsuperscript{37}

Included in this substandard cocktail was the synchronicity of the technology age meshed with the birth of Millennials; culminating into the virtual “digital crib toy,” and later, the “security blanket” that soothed the ever-increasing shortened attention span; causing dampened brain circuits used for sustained, deep, critical thinking.\textsuperscript{38} This “pruning” of old neural circuitry occurred to make way for the strengthening of the brain circuits used for the quick shifts of attention that enable multitasking and disable prolonged thought processes that involve problem solving and critical analysis.\textsuperscript{39}

\textsuperscript{34} Lee, Supra note 9.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 135
\textsuperscript{38} Bringing a Knife to the Gunfight, supra note 8.
The next ingredient is the generational issue the Millennials faced by being raised and protected by Baby–Boomer parents and a society that avoids failure; creates a false sense of high self-esteem; asserts over-confidence; and an overall belief that no matter what, they are special.\textsuperscript{40} Often deemed the “everyone gets a trophy” ideal, this mentality and belief of entitlement has edged out the essence and foundation of the skills that constitute the backbone of legal education.\textsuperscript{41} This peculiar body of knowledge calls on students to engage in increasingly sophisticated critical thinking skills essential to becoming practice-ready.\textsuperscript{42} The gross misconception is that the legal academy presumes their students already have familiarity with these processes—application, analysis, synthesis, evaluation, creation—as a function of their undergraduate training and a foundation for the new discipline of law. This assumption now fails; consequently, law schools, once tasked only with teaching students how to think like a lawyer, find themselves also tasked with teaching them just how to think.\textsuperscript{43}

\textbf{B. Chronic Bad Breath}

Students bearing the full effect of NCLB are just now starting to enter colleges and graduate schools. For more than a decade, they have been subject to education deficient in critical thinking skills, resulting in a shift to college educators to fix the problem if those students are to advance to law school with the fundamental skills first-year law professors generally expect.\textsuperscript{44} Questions remain unanswered about how to teach underprepared law students who are overly confident of their proficiency in the requisite skills, despite evidence to the contrary.\textsuperscript{45} Law professors grapple with how to get an overconfident law student to accept critical feedback and learn from it, when

\begin{footnotesize}
\textsuperscript{40} Id. at 134
\textsuperscript{41} Bringing a Knife to the Gunfight, supra note 8 at 4.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Lee, supra note 9.
\textsuperscript{45} Of Moby Dick and Tartar Sauce, supra note 27, at 136.
\end{footnotesize}
that student is convinced he need not change and is not motivated to change.\textsuperscript{46} This phenomenon of the extremely overconfident, incompetent student is something the legal academy has to confront as long as underprepared students keep entering law school.\textsuperscript{47}

However, success in law school depends upon accurate and disciplined self-assessment, rather than overconfidence. In particular, law students “must be able to self-assess accurately in order to be autonomous agents of their own learning to make correct self-assessments of strengths and deficits.”\textsuperscript{48} That leaves the conundrum of persuading the overconfident law student to become competent through the mechanism of feedback, which their overconfidence inclines them to resist.\textsuperscript{49}

By and large, law schools can survive and even thrive in “the new normal” if they reevaluate their programs and teach with a focus on the unique needs of their incoming students.\textsuperscript{50} Change is not easy, however, especially in an established law school with tenured professors who may have been teaching for decades, have the best intentions, are dedicated to their craft, focused on helping their students succeed, and using what they believe are the best methods possible.\textsuperscript{51} Solutions begin to bottle-neck here, because, despite best intentions, they may not be open to drastically changing their current methods, or in some cases, even changing them at all.\textsuperscript{52} To rise to the challenge of adapting to “the new normal” in legal education law schools must foster a culture of innovation and openness to meaningful change.\textsuperscript{53}

\textbf{II. \hspace{1em} BREATHE MINTS PROVIDE A SOLUTION}

\textsuperscript{46} Id.
\textsuperscript{47} Id. at 135
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Lee, supra note 9.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 73.
\textsuperscript{53} Id.
Who is responsible for ensuring entering law students are prepared to tackle introductory legal problems, and how is the problem of the fundamental skills deficit addressed in a time of constrained budgets, declining enrollment, and rampant criticism? Law schools typically answer by rethinking the traditional curriculum to include additional skills instruction, but the broader legal community should deeply reflect on how to answer these questions, because the right answers will require all stakeholders to invest in changes to undergraduate and legal training across the board.

The first problem facing reform of legal education is how to allocate responsibility for legal training. However, embedded in the problem of responsibility, is the problem of preparing to change the law school curriculum as an answer. Consequently, a “catch-22” exists, whereby, before law schools can reform the curriculum, they must understand the level of skill deficiency in higher-order thinking that their student possess. Law schools may find themselves “chasing their own tail” as they try to predict any level of curriculum change, because unless the root cause of the problem drives the change, the reformation efforts remain futile and unproductive. The

54 Flanagan, supra note 15.
55 Id. at 3.
56 Id. at 30.
57 Id.
58 Author. Root cause analysis (RCA) is a hallmark base indicator that drives the change reformation effort. As a former consultant, RCA established which change tools to implement for the desired result in my projects at Lexington Precision Corp. (Rochester, New York), Sunlife Financial (Toronto, Canada), and the U.S. Navy (NavAir) (Jacksonville, Florida). For example, skills deficiencies as a root cause called for cross-training solutions with ongoing skills flexibility matrices in place to identify which skills needed attention for unit-wide coverage. Measurable increases in overtime; run-time; employee turnover; machine down-time, scrap, etc. as a root cause, called for barrier identification through Daily Schedule Control. Decreased efficiency, schedule adherence, or output attainment as a root cause, called for Resource Load assessments to find weak areas of production support. In short, solutions cannot be implemented until the root cause is identified.
question of curriculum change is not “what changes” to make, but rather, “what direction” will that change drive us, in relation to the desired result.  

Before Law schools consider curriculum changes to meet the skills deficit, the goal needs identified: increased bar passage. Then, the focus should naturally point to asking, “Does law school curriculum affect bar examination passage?” In 2006, a quantitative, empirical study on bar-passage rates launched to determine whether there was a relationship between the number of bar examination subject matter courses taken in law school and bar examination passage. After reviewing data from almost 900 first-time test takers, no statistically significant relationships were found between bar examination subject matter courses taken and bar examination passage for graduates ranked in the first, second or fourth quartiles of their graduating class. The authors concluded that mandating students to take more bar examination subject matter courses will not improve bar examination passage rates for at-risk law school students who rank in the lowest quartile of their graduating class.

Although a singular solution will not work, all law schools should be asking questions to determine if they can address the problem through internal changes, or, more likely, whether they

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59 Author. The desired result is established by management, in the form of a standard of optimal “capacity.” Capacity is the maximum amount of something, in the form of volume, size, magnitude, etc. For Lexington Precision Corp., “capacity” was maximum run-time for the machines. For SunLife Financial, “capacity” was the maximum amount of forms and calls processed. For the U.S. Naval Air station, “capacity” was in the form of maximum reduction of unproductive time usage by Engineers. Metrics drive the change, as the standard is measured against current performance. Effective change cannot be driven blindly. By asking “what direction will this proposed change take us, and how will it affect the overall standard to capacity?”, proposed changes can be implemented based on their measurable effectiveness to steer the result toward that capacity.


61 Id.

62 Id.
will need to work in concert with other types of solution providers. By starting the process of asking questions about pre-law preparedness, law schools can examine their role in law school reform by asking who is responsible for ensuring entering law students are prepared to tackle the 1L curriculum. However, before law schools can tackle the problem of underprepared law students, they must wrestle with how to frame the problem. As a “quick fix,” law schools may add or modify programs to help students succeed once they matriculate, but law schools cannot solve the problem of underprepared law students on their own. Help exists in sectors outside of education, and law schools must take it upon themselves to face change with their help.

A. **Never Refuse a Breath Mint**

The burden faced by law schools does not place them “out in the cold.” The U.S. Department of Education has taken charge to answer the call from President Barack Obama.

“I’m calling on our nation’s governors and state education chiefs to develop standards and assessments that don’t simply measure whether students can fill in a bubble on a test, but whether they possess 21st century skills like problem-solving and critical thinking and entrepreneurship and creativity.”

National Education Secretary Arne Duncan responded to President Obama, stating:

“My message is that this challenge can, and should be, embraced as an opportunity to make dramatic improvements. I believe enormous opportunities for improving the productivity of our education system lie ahead if we are smart, innovative, and courageous in rethinking the status quo. It’s time to stop treating the problem of educational productivity as a grinding, eat-your-broccoli exercise. It’s time to start treating it as an opportunity for innovation and accelerating progress.”

Beginning in the 1990’s, parents inserted themselves into the educational process, demanding better customer service in exchange for their tuition payments, and distorting the educational

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63 Lee, supra note 9.
64 Id. at 33.
65 Id. at 31.
process by treating the learning process like a co-purchased consumer transaction.\textsuperscript{68} This change from student-as-learner to student-as-customer has strong negative implications for motivation and personal investment in the learning process.\textsuperscript{69} Recent research has found that instrumental motives, (or motives extrinsic to the primary activity), weakens internal, intrinsic motivation, such as a desire to learn and understand.\textsuperscript{70} Students with extrinsic motivation, such as a consumer orientation towards college, are less likely to seek and persist at challenging learning experiences that lead to gains in thinking skills.\textsuperscript{71}

The “student-as-customer” focuses on the end product of the transaction—a satisfactory grade—instead of the process of learning and knowledge.\textsuperscript{72} A customer orientation reduces the opportunity for students to challenge themselves to grow intellectually and personally.\textsuperscript{73} An essential element of legal education is the ability to challenge uncertainty in order to develop professional judgment. Consequently, a “consumer orientation” leaves college students unprepared for the pedagogical challenges they face as law students.\textsuperscript{74}

While a student-as-consumer mentality can undermine the learning process, the solution itself lies quietly in the problem. If the mentality has turned higher education into a “consumer” system, then the solution should lie in processes that address streamlining operations and processes with a “consumer satisfaction” end goal in mind. Enter the \textit{Toyota Production System} and the “Lean” model of reducing waste, identifying barriers, and mapping value, ultimately creating “Lean Education.”

\section*{B. The Toyota Production System as “Lean Education”}

\textsuperscript{68} Flanagan, supra note 15.
\textsuperscript{69} \textit{Id.} at 14
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 15
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
The Toyota Production System (TPS), also referred to as “Lean Manufacturing,” is the unique manufacturing system pioneered, created and implemented at the Toyota Motor Company in Japan after World War II.\textsuperscript{75} Originally created as a manufacturing system, it is now widely recognized for its revolutionary approach in any business, in any sector. TPS provides enhanced productivity and efficiency by identifying and eliminating barriers to “capacity.”\textsuperscript{76} That capacity is determined according to the end goals of the business model and within the sector deployed. TPS “Lean” centers on three principles. (1) Understanding the “value stream” — how every step in the process adds value to the end product — means a process can be implemented without waste or unnecessary steps. (2) Creating an organizational culture that fosters continuous improvement through formal testing of alternative processes and procedures. (3) Efficiency and Productivity must closely tie to demands of the sector, so processes built specifically for change address the demand for improvement, and come at the appropriate time.\textsuperscript{77}

However, TPS Lean can look like a paradox. On the one hand, every activity, connection, and production flow is rigidly scripted, yet at the same time, operations are enormously flexible and responsive to customer demand.\textsuperscript{78} How can that be? After an extensive four-year study of the TPS in more than 40 plants, researchers came to understand that it is the very rigidity of the operations that makes the flexibility possible, because the company’s operations are a continuous series of controlled experiments.\textsuperscript{79} Every activity, connection, and production path designed according to these rules must have built-in tests that signal problems immediately, and it is the

\textsuperscript{75} See gen. \textit{A Brief History of Lean}, \textsc{Lean Enterprise Institute}, \url{http://www.lean.org/WhatsLean/History.cfm}.

\textsuperscript{76} See gen. \textit{Toyota Production System}, \textsc{Toyota} \url{http://www.toyota-global.com/company/vision PHILOSOPHY/toyota_production_system/}.


\textsuperscript{79} \textit{Id.}
continual response to those problems that makes this seemingly rigid system so flexible and adaptive to changing circumstances.\textsuperscript{80}

TPS’s “Lean” commitment to standardization is not for the purpose of control or even for capturing a best practice, but rather, an explicit specification of how work is going to be done before it is performed, coupled with testing work as it is being done.\textsuperscript{81} The end result is that gaps between what is expected and what actually occurs become immediately evident.

“Not only are problems contained, prevented from propagating and compromising someone else’s work, but the gaps between expectations and reality are investigated; a deeper understanding of the product, process, and people is gained; and that understanding is incorporated into a new specification, which becomes a temporary “best practice” until a new problem is discovered.”\textsuperscript{82}

Applying the principles of TPS to accountability and organizational improvement in education means a translation of the concepts of the company and assembly line production into the context of schools and educators. While the analogy is imperfect, two elements can inform educators. First, a focus on the educational value stream would encourage teachers to think about how each step in the educational process contributes to the desired outcomes, which activities add value, and which tasks are wasteful. Second, a culture that makes teachers responsible for hypothesis-testing, experimentation, and continuous improvement could facilitate an increase in research on educational practices, better student outcomes, and a move toward the scientifically based teaching practices.\textsuperscript{83}

C. Lean Higher Education

\textsuperscript{80} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See \textit{Improving Educational Outcomes}, supra note 65.
The Toyota Production System, while arguably the most important invention in operations, has spawned numerous approaches to improving operations, all based on the same principles: relentless attention to detail, commitment to data-driven experimentation, and charging workers with the ongoing task of increasing efficiency and eliminating waste in their jobs.  

There is no shortage of companies and organizations that argue Lean does not work, generally saying, Lean has become cliché. Overused, commonplace and, like the origin of the word itself, stereotyped. What is worse is that, for many companies, Lean does not actually work very well, if at all. Other’s oppose Lean’s reason and foundation for eliminating waste and streamlining operations, arguing that eliminating waste, and getting rid of "excess" activities and materials often translates to employees into getting rid of most things that make work life bearable, like breaks, or a reasonable pace, or a set work schedule, or a decent paycheck, or job security. This misunderstanding of the core principles of Lean leads employees to think a Lean Transformation stresses workers to the limits of their capacities, through speeding up work, or doing the same work with fewer people. When a gross misunderstanding prevails, Lean efforts are sure to fail, and word spreads quickly that Lean does not work.

To test this misconception of Lean, and to see why Lean transformation efforts fail, researchers conducted interviews among leading Lean experts. Key criterion for selection of interviewees was that they had to have first-hand experience in successfully implementing Lean itself or in one of its manifestations. The data source comprised a group of senior people whose expertise was in a wide range of industries and companies, from Fortune 100 companies like GE

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87 Why Lean Doesn’t Work & what you can do about it, supra note 87.
and Disney, to small/medium companies with revenues of under $50 million. Although there was a wide ranging diversity of opinion and approach to the practices of Lean implementation, in one core area there was almost unanimous consensus that when Lean implementations fail, it is not because of poor process application or because companies did not attempt to do the right things, but instead, they failed because they did not align and fully integrate people’s mindset with Lean and because they did not engage the power of organizational culture in its implementation.  

The basic reason why the implementation of Lean fails boils down to the corporate culture and the quality of leadership from the top. Most leaders fail to realize that Lean is a management philosophy, not simply a collection of tools for information flow or problem solving. Most corporate leaders either do not understand its value or do not have the patience and control to implement it. Successful implementation requires something that is very rare in both people and organizations: constant purpose. The problem that failed Lean efforts show is that leaders look for the “big bang” project or turbocharged effort of their employees, which sounds good and comes with great fanfare or personal sacrifice, but are usually not sustainable.

Attempts to apply Lean approaches to knowledge work can be difficult, and critics believe that knowledge work does not lend itself to Lean principles, because, unlike car assembly, it is not repetitive, nor unambiguously defined. Consider a bank officer deciding whether to make a loan, an engineer developing a new product, and a social worker ruling on whether a child’s environment is safe. In each instance the work involves expertise and judgment that depend heavily on tacit knowledge—knowledge locked inside the worker’s head.

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88 Id.


90 Id.

91 Lean Knowledge Work, supra note 84.

92 Id.
However, research in information technology, engineering, financial, and legal services reveals that such work can in fact benefit from the principles of the Toyota Production System.\textsuperscript{93} For one thing, a substantial amount of knowledge assumed to be tacit does not have to be; it can be articulated and captured in writing if the organization makes the effort to pull it out of people’s heads. For another, all knowledge work includes some activities that have nothing to do with applying judgment and can streamline by training employees to continually find and root out waste. Even when knowledge is genuinely tacit, creating systems and rules to guide worker interactions can lead to more-effective collaboration.\textsuperscript{94}

In manufacturing, there is a common understanding of how to make an operation Lean, and many of the same techniques deploy to different organizations. In fact, as the same research found, Lean principles apply in some form to almost all kinds of knowledge work and can generate significant benefits: faster response time, higher quality and creativity, lower costs, reduced drudgery and frustration, and greater job satisfaction.\textsuperscript{95}

Lean lends itself for use in education because results are measurable and implemented processes benefit when tested against the results. Higher education generally, and law schools especially, with the ABA mandates for assessment, can leverage the power of Lean to measure what matters and use assessment data for continuous improvement.\textsuperscript{96} Most of the assessment done in schools today is \textit{after-the-fact} and designed to indicate only whether students have learned, but little is done to assess student thinking \textit{during} learning, so they can get help to learn better.\textsuperscript{97} Collection of aggregate student-learning data needs to be compiled into ways that make the

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} See \textit{Improving Educational Outcomes}, supra note 65.

\textsuperscript{95} See \textit{Lean Knowledge Work}, supra note 72.


\textsuperscript{97} \textit{Id.}
information valuable to and accessible by educators, schools, districts, states, and the nation to support continuous improvement and innovation.\textsuperscript{98}

A strategic approach to increasing student achievement often includes improving the operational efficiency of districts. Having the data systems, financial systems, and business processes in place to make informed decisions can result in long-term positive impacts on the distribution of resources.\textsuperscript{99} Automating and streamlining processes, and collecting and linking key sets of data, can help to increase transparency and drive smart decisions about how resources are spent. Rethinking practices, processes, and systems can also help to evaluate spending decisions and ensure that priorities align to improve student outcomes.\textsuperscript{100}

\section{III. USING LEAN TOOLS}

\subsection{A. Value Stream Mapping}

A Lean philosophy is not hard to implement once a law school adopts the underlying theme: continuous improvement and innovation leads to value creation and the elimination of waste. The Lean system provides a good model for legal education, because it integrates well with the work of professional learning communities that bring together educators and school leaders on an ongoing basis for collective problem identification and problem solving.\textsuperscript{101} Law schools are in a prime position to consider Lean thinking and applications. For instance, if instructional delivery, the core business of schools, were placed into a Lean system, then leadership would promote Lean thinking, and several improvement tools would be used.\textsuperscript{102} One such tool is Value Stream Mapping. This analysis solicits the views of key stakeholders — students, teachers, parents, policy

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Shannon Flumerfelt, \textit{Lean Thinking for Schools: Learning to Identify Value and Eliminate Waste}, MACINAC CTR. FOR PUB. POL’Y (July 21, 2008), http://www.educationreport.org/9674.
\item \textsuperscript{102} Id.
\end{itemize}
makers, administrators and board members — in regard to what is of value.\textsuperscript{103} Then, stakeholders map out a student’s instructional day, looking at allocations of time and resources for various activities. Based on the views of the stakeholders, decisions determine what is of value during that instructional day and what is not.\textsuperscript{104} Finally, results of these determinations conclude that what has value is therefore worth keeping, and what is not of value either gets improved so it becomes valuable, or it gets eliminated from the instructional day altogether.\textsuperscript{105}

Using a value-stream map to jump-start the process helps to identify small sources of waste, and not only captures the detailed, individual stages of a project in progress but also identifies value added and wasted. A team must track each step it takes and ask, “Why did we do that?” This allows a team to create a prioritized list of elements to eliminate, as to devote much more time to real, value-added work.\textsuperscript{106}

In addition to value stream mapping, other Lean tools will facilitate continuous improvement of instructional delivery. The idea is not to improve a process once and then leave it alone, but rather to set up the dynamics and protocols for continuous improvement and the elimination of waste through use of “The 5 Why’s.”

\textbf{B. Eliminate Waste using “5 Why’s”}

The principle theme in TPS Lean is to eliminate waste. TPS identified “seven wastes” that everyone in a manufacturing operation should strive to eliminate: overproduction; unnecessary transportation, inventory, and worker motion; defects; over-processing; and waiting.\textsuperscript{107} While designed for manufacturing, knowledge facilities are also loaded with these types of wastes,
because many routine activities that do not involve judgment or expertise eat up huge amounts of time: printing documents, requesting information needed to make a decision, and setting up meetings, to name just a few. Knowledge workers tend to grossly underestimate the amount of time inefficiency in their processes; time ultimately not spent on additional skills enhancement. The key is to get everyone in the organization to systematically make waste visible and do something about eliminating it.

C. Determine The Root Cause: Asking The “5 Whys”

Asking “Why?” can teach a valuable Lean quality lesson in reducing waste. The “5 Whys” is a technique used in the Analyze phase of a Lean Program. This simple tool does not involve data segmentation, hypothesis testing, regression or other advanced statistical tools, and in most cases, comes before implementation of other Lean tools. Waste may be obvious once discovered, but finding it in the first place is not always easy, because it has generally been part of the landscape for a long time. Instead of assuming that the approach used for a process is right, assume it is wrong by continually asking questions until you get to the root cause of every activity performed. Why am I attending this meeting? Why am I not measuring student comprehension more? Why do Bar Passage rates keep sliding lower?

Simply put, “5 Why’s” gets to the root core of a problem, so continuous improvement efforts are specifically targeted toward solutions. By repeatedly asking the question “Why?” (five is a good rule of thumb), you can peel away the layers of symptoms which can lead to the root cause of a problem. The reason for a problem will lead you to another question. Although this technique

108 Id.
109 Id.
111 Lean Knowledge Work, supra note 72.
112 Id.
calls for five “Whys,” you may find that you will need to ask the question fewer or more times than five before you find the issue related to a problem. Benefits of the 5 Whys are simple: it helps identify the root cause of a problem, and determine the relationship between different root causes of the same problem. Although basic in nature, the 5 Why’s is most helpful when problems involve human factors or interactions. To Complete the “5 Whys”:

1. Write down the specific problem. Writing the issue helps you formalize the problem and describe it completely. It also helps a team focus on the same problem.

2. Ask why the problem happens and write the answer down below the problem.

3. If the answer you just provided does not identify the root cause of the problem that you wrote down in Step 1, ask why again, and write that answer down.

4. Loop back to step 3 until the team is in agreement that the problem’s root cause is identified. Again, this may take fewer or more times than five “Whys.”

“5 Whys” Example In A Law School:

Problem Statement: The Law School is unhappy because Bar Passage rates keep falling.

1. Why are bar passage rates falling?
   – Because students are not completing the minimum required hours of preparation required.

2. Why aren’t the students completing the minimum hours required?
   – Because there is no accountability measure in place to ensure completion of the program.

3. Why is there no accountability measure in place?
   – Because students are expected to study on their own after they graduate.

4. Why do they have to study on their own after they graduate?
   – Because the school doesn’t require completion of the program before graduation.

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113 Id.
114 See Determining The Root Cause: 5 Whys, supra note 92.
5. Why doesn’t the school require completion before graduation?

– Because the school doesn’t have a Bar study monitoring program.

D. Looking for Small Forms of Waste Can Create a Big Win

Most successful companies have already eliminated large, obvious forms of waste, but higher education knowledge operations typically have plenty of loose change lying around that no one has bothered to pick up.\textsuperscript{115} “Think about your own workplace. How many e-mails clutter your in-box because someone cc’d you unnecessarily? How long did you have to wait to start a regularly scheduled meeting because attendees slowly trickled in? How many reports are created that nobody reads?”\textsuperscript{116} To continually identify and root out waste, an organization must learn to care about the small stuff by helping people see how much waste surrounds them, and recognize that eliminating it will free them up to do more valuable work.\textsuperscript{117} Applying the “5 Whys” in higher education and post-graduate study means devoting time and other resources to eliminating waste; creating valuable opportunities dedicated to increasing the skills deficit increasingly inherent in today’s students.

E. Lean Change Begins With Direct Observation and then Structured Experiments

Lean changes require watching people work and how processes operate. The goal is not to “figure out” why a process is not working or why there are failures, like a detective solving a crime already committed, but to wait until you can directly observe its failure—to wait for it to reveal what is needed to know to form a hypothesis.\textsuperscript{118} In the scientific method, experiments test a hypothesis, and the results are used to refine or reject the hypothesis, so that explicit and

\textsuperscript{115} \textit{Lean Knowledge Work}, supra note 72.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} \textit{Learning to Lead At Toyota}, supra note 88.
testable assumptions stem from analysis of the work. This means explaining gaps between predicted and actual results. To do this, changes must manifest as tests of causal relationships: stating the problem actually noticed, the root cause suspected, the change made, and the countermeasure’s actual effect on performance.

Of course, many people trying to improve a process have some idea of what the problems are and how to fix them, but the key difference with Lean is that it seeks to fully understand both the problem and the solution. For example, a Law School Administrator might say, “If we have mandatory Bar Prep classes before graduation, I’ll bet we’ll have a few more students pass.” If trying this and finding that eight more students passed the bar, he would be pleased and consider the problem solved. But in a TPS Lean Process, such a result indicates that the Administrator did not fully understand the work that he was trying to improve. Why hadn’t he been more specific about what types of Prep classes were required based on empirical data of weak areas of passage? And how many students did he expect to pass? Five? If the actual increase is eight, that is a cause for celebration—and also for additional inquiry. Why was there a three student difference? With the explicit precision encouraged through value mapping, barrier identification and removal, and root cause analysis, the discrepancy would prompt a deeper investigation into how the Bar Prep class change process worked and, perhaps more important, how a particular person studied and improved the results.

119 Id.
120 Id.
121 Id.
122 Author. Each tool is designed to deliver precise answers that lead to directional changes with capacity as the end goal. Positive results are fantastic, but just as much is learned from negative results when the vision is clearly pointed to capacity. In the Bar Prep class example above, a reasonable expectation of increased numbers due to the change shouldn’t stop when reaching the increase. Perhaps it’s an anomaly. Was the increase attributed to the class, or another factor? The takeaway should be the change itself, whether negative or positive. No matter the result, ask “why is there a change? Is the process designed for incremental changes or large jumps against
F. A Large Victory with Many Small Wins

Applying Lean principles to law school education is not just trying tools that have been successful in manufacturing. Instead, higher education as a whole must look to these tools to invent something new that is sustainable and repeatable, creating a sharp decline in the skills deficit that keeps going unchecked. It’s probable that “Lean Higher Education” isn’t going to get it right on the first try, but over time, with persistence to fix the Big problem, Law schools can put together a system of continual improvement by doing the following:

1. Start Small.

Launch small departmental pilot projects to explore whether a Lean approach is a viable option on just a few processes. Perhaps a law school might try monthly skills testing in 1L doctrinal courses, to see if there is early understanding of the broad legal doctrines. Inserting a skills flexibility matrix for skills desired versus skills learned and able to demonstrate, can show early signs that adjustment in teaching styles may be needed or additional skills training curriculum needs to be considered. If a test shows promising results, consider an all-out change effort. Slowly, one small step at a time, a law school learns which ideas work, which ones need tweaked, and which need abandoned.

2. Top-Down Support

It is important that leaders have a big-picture view of the project from all angles. For Educators, Administration can fill this role, reviewing every experiment, test and Lean process project, leading education efforts, and helping standardize practices that work; codifying them into the new “Lean” Process.

the standard? Is a change of three expected? If so and the number is higher, is the expectation reasonable? Is the process designed to include negative numbers?” Etc.

123 Lean Knowledge Work, supra note 72.
3. Lean Isn’t Useful In Every Situation

If the work at hand is visionary and experimental and requires inventing new ways to perform tasks, do not try to apply Lean principles everywhere. Repetitive tasks within the work can and should be addressed with Lean ideas, but innovation will suffer if the time needed to come up with and test wild ideas is classified as waste and eliminated. Turning a manufacturing plant into a Lean system requires enormous, relentless effort, where persistence is the key. Turning a knowledge operation, which has far fewer repetitive, codifiable processes, into a Lean system is harder still. But it can be done. And the very difficulty of it means the system will be tough to topple. This is its power.

CONCLUSION

With over 50 years of use in a broad variety of organizations, business sectors, and cultures; the effectiveness of Lean principles and practices provides strong support for the “transportability” of Lean to higher education. A growing number of applications of Lean Higher Education (LHE) demonstrate significant improvements in college and university processes that result in better service to students, reduced costs for the institution, and greater employee ownership over how their work is done. Overall, LHE holds great promise for improvements in higher education at a time where resources are declining, greater accountability is expected, and higher education’s role in economic development and quality of life is increasingly important.

One must take note, however, that in higher education, the application of Lean principles and practices mistakenly always begins with non-value-added but necessary

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124 Id.
126 Id.
127 Id.
administrative work, not core value-creating academic processes such as teaching. If higher education carefully studies and learns from Lean manufacturing and other Lean service businesses, they will begin LHE with academic processes: teaching, curriculum-change process, academic advising, new course development, academic support program development, etc.

They key in looking to adapt Lean manufacturing to Lean higher education is to not set the University up for failure by assuming the “Lean Change” to be unworkable because faculty may be resistant to change; would not participate in having their teaching processes looked at for methods of waste; or would not welcome thoughtful scrutiny toward changes of their work. But faculty are no different than anyone else, and Lean Change works everywhere else. Change can be uncomfortable at first, followed by the realization that nearly everyone can adopt the position that “my work can be significantly improved for customers and made much less burdensome on me.”

The perception of the downward spiral in public education is ever-growing. In its 2004 public opinion research, “Equity and Adequacy: Americans Speak Out on Public School Funding,” the Educational Testing Service (ETS) reports that the public “widely perceives waste in education spending and has doubts that additional funding necessarily would lead to a tangible improvement in education quality.” This is sobering news, but despite the negative view, solutions exist. In fact, in its landmark 2004 study, “Organizational Improvement & Accountability – Lessons for Education From Other Sectors”, the Rand Corporation concluded that Lean Process Improvement

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129 Id.
130 Id.
offers educators the most powerful improvement and accountability model available to meet the challenges of the 21st century.\textsuperscript{133} The Rand Study called for the Education Industry to adopt Lean Process Improvement Principles and reap the benefits other industries have realized.\textsuperscript{134} Lean Higher Education is the solution:

1. Continually rooting out waste should be an integral part of every knowledge worker’s job.
2. Strive to make tacit knowledge explicit.
3. Specify how workers should communicate with one another.
4. Use the scientific method to solve problems as soon as possible.
5. Remember, a lean system takes years to build.
6. Leaders must blaze the trail.\textsuperscript{135}

\textbf{A. Final Thoughts on Lean}

The lesson learned from successful cases of Lean implementation in higher education is: “The change process goes through a series of phases that, in total, usually require a considerable length of time, and skipping steps creates only the illusion of speed; never producing a satisfying result. A second very general lesson is that critical mistakes in any of the phases can have a devastating impact, slowing momentum and negating hard-won gains.”\textsuperscript{136}

Lean in higher education, done well, leads to fabulous results for students and teacher.\textsuperscript{137} The bottom line is that Lean in Higher Education means better teaching processes and produces better results for everyone – students, professors, courses, academic programs, the school, and the university.\textsuperscript{138}

It can be very challenging to get others interested in Lean teaching and the Lean Pedagogy. Most faculty are career academics, they do not know about Lean management, did not learn it in

\textsuperscript{133} See Organizational Improvement and Accountability: Lessons for Education from Other Sectors, RAND CORP. (2004), http://www.rand.org/publications/MG/MG136/.
\textsuperscript{134} See Doing More With Less, supra note 114.
\textsuperscript{135} Lean Knowledge Work, supra note 72.
\textsuperscript{137} See My Student Course Evaluations, THE LEAN PROFESSOR (May 9, 2014), http://www.leanprofessor.com/2014/05/09/student-course-evaluations/.
\textsuperscript{138} See How To Get Started With Lean In Higher Ed., supra note 110.
industry, and likely think that Lean is something bad. Lean management and Lean teaching is gaining traction because it works and will likely be a long-term solution to the problem of the under-prepared student. That is why it is imperative to take on this new challenge. Given that the bulk of the value proposition of higher education is in teaching, you would think that the few universities who have adopted Lean for administrative processes would start to broaden their focus to include teaching. But, administrators and faculty operate under the false assumption that teaching the way one was taught is acceptable. It is not.

The deficit in skills required to be successful lawyers becomes more prevalent as students enter post-secondary education under-prepared. Most professors make dozens of fundamental teaching errors resulting in poor quality teaching and, of course, dissatisfied students and payers. Looking to Lean Higher Education provides solutions that are repeatable and sustainable; creating measurable results that far exceed the ABA pedagogy mandates. The Solution exists for Law Schools in Lean, and to refuse a time-tested solution because it may be a difficult road is no excuse.

When bad breath looms, you should never refuse a breath mint . . . .

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139 Id.
140 Id.
141 Id.
A CRUCIAL INADEQUACY OF CALIFORNIA’S MANDATORY MEDIATION AND CONCILIATION PROVISION AND WHAT CAN BE DONE TO IMPROVE IT

Brandon Hamparzoomian

I. INTRODUCTION

The Mandatory Mediation and Conciliation (“MMC”) provision of the California Agricultural Labor Relations Act (“ALRA”) sought to solve initial collective bargaining stalemates, but instead has created a new kind of intolerable problem.\(^1\) The MMC provision was added to the ALRA in 2002 to remedy the serious problem of agricultural employers’ refusal to bargain in good faith with certified labor unions.\(^2\) This resulted in farm workers waiting for extended periods of time without any collective bargaining agreement (“CBA”), let alone any good faith bargaining.\(^3\) Although the MMC provision has curbed some instances of farm worker abuse by employers, the particular construction of the provision still allows for farm workers to be abused by labor unions.\(^4\) This unintended and unforeseeable consequence of the MMC calls for a change in the MMC provision at the state legislative level.\(^5\)

Part II of this comment will establish a foundation by reviewing the history of the ALRA, the MMC provision, and the Gerawan Farming v. ALRB & UFW opinion of California’s Fifth District Court of Appeal. Part III will analyze the relevant authorities on the issue and demonstrate that farm employees do not, under existing law, have a right to be present during any part of the MMC

\(^{1}\) *Infra* Part II.


\(^{3}\) *Id.*

\(^{4}\) *Bill Analysis of A.B. 1389 Before the Assemb. Comm. on Labor and Emp’t*, 2015-16 Sess. (Cal. 2015). (Assembly Bill 1389 includes an abandonment provision which provides that a union commits an unfair labor practice if it “abandons or fails to represent the bargaining unit for a period of three years or more.” Such a provision is evidence that Assembly Bill 1389 was at least partially, if not entirely, drafted to provide protection to employees from their union representatives.)

\(^{5}\) *Infra* Part IV.
Part IV will explore the adequacy of proposed legislation, referred to as California Assembly Bill 1389 (2015) (“AB 1389”), which sought to amend the MMC provision. Part IV will also recommend the passage of AB 1389 as a pragmatic amendment which ought to handle any present or foreseeable difficulty. Finally, Part V will conclude that policy consideration dictates that the MMC process must be amended to afford agricultural employees access to the MMC proceedings and the right to ratify initial CBA’s.

II. HISTORY AND BACKGROUND

A. The Agricultural Labor Relations Act and the Mandatory Mediation and Conciliation Provision

In 1975, the California Legislature enacted the ALRA as an addition to the California Labor Code to give farm workers the right to bargain collectively through a representative of their own choosing. The ALRA was modeled after the National Labor Relations Act (“NLRA”) and is bound by the statutes and precedents of the NLRA. Among other things, the ALRA established the Agricultural Labor Relations Board (“ALRB”), which is responsible for preventing unfair labor practices and resolving claims of unfair labor practices.

The ALRA provides that farm employees have the right to self-organize and choose a labor union to represent them and bargain collectively on their behalf. Montebello Rose Co. v. Agricultural Labor Relations Board further interpreted the statute to hold that once employees select a particular labor union by way of voting and that union is certified as the employees’ bargaining representative.

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6 See Part III Section A for the relevant authorities (including Delaware Coal. v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) and NBC Subsidiary v. Superior Court, 980 P.2d 337 (Cal. 1999)).
9 Id. at § 1141(a); §§ 1142(b), 1153-1154.6 (listing all statutory unfair labor practices).
10 Id. at § 1152.
representative, the agricultural employer must bargain in good faith with that union until the union is decertified or replaced.\(^{11}\)

An important aim of the ALRA is to protect farm workers from farm employers.\(^{12}\) It provides for the protection of employees from any attempts by employers to hinder or frustrate the ability of their employees to bargain collectively.\(^{13}\)

1. The Mandatory Mediation and Conciliation Provision

The MMC provision was added to the ALRA in 2002 by way of Senate Bill 1156 (“SB 1156”) and Assembly Bill 2956 (“AB 2956”).\(^{14}\) Governor Gray Davis signed these companion bills into law, citing that there were many farm worker bargaining units\(^{15}\) in California that had elected labor unions to bargain on their behalf, but had been waiting for years without any meaningful progress toward a CBA.\(^{16}\) This resulted because many agricultural employers were refusing to bargain in good faith, thereby stalling the bargaining process.\(^{17}\) The MMC provision became effective at the beginning of the year in 2003, and amended the ALRA to provide for mandatory mediation in certain cases where labor employers and certified labor representatives are unable to reach an initial CBA.\(^{18}\) Pursuant to MMC provisions, a mediator attempts to guide the employer and union representatives toward an agreement.\(^{19}\) If these efforts prove unsuccessful, the mediator issues a

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\(^{11}\) Id. at § 1154(c).

\(^{12}\) California Bill Analysis, A.B. 2596 Assem., 8/31/2002 (“The Agricultural Labor Relations Act (ALRA) of 1975, encourages and protects the rights of agricultural employees to engage in organizational activities, and, under certain circumstances, collectively bargain with growers.”).

\(^{13}\) CAL. LABOR CODE § 1153.


\(^{15}\) A bargaining unit is a group of employees in one union that work together in collective bargaining. *Bargaining Unit*, BLACK’S LAW DICTIONARY (2nd ed. 1910).


\(^{17}\) Id.


\(^{19}\) *Bill Analysis of A.B. 1389 Before the Assemb. Comm. on Labor and Emp’t*, 2015-16 Sess. (Cal. 2015).
report that contains the terms of the initial CBA and it becomes binding on all parties, including employees, regardless of whether anyone manifests assent to the terms.\textsuperscript{20} Additionally, it is important to note that the MMC provision does not mention the right of farm employees to be present during MMC proceedings nor the right of employees to present evidence on the record during the binding interest arbitration phase of the MMC process.\textsuperscript{21}

\textbf{i. The Purpose and Scope of the MMC}

The MMC process may only be requested by a party (either the agricultural employer or the certified labor union) to establish an \textit{initial} CBA.\textsuperscript{22} The MMC process is referred to as interest arbitration.\textsuperscript{23} Typical arbitration involves resolving a dispute by interpreting an agreement that already exists and determining the legal rights of the parties involved.\textsuperscript{24} Interest arbitration, on the other hand, simply “determin[es] what the terms of an agreement should be.”\textsuperscript{25} The use of a mediator makes the MMC process appear like a regular arbitration, but it actually is compulsory interest arbitration.\textsuperscript{26} Supporters of the MMC provision would argue that the interest arbitration phase of MMC must be compulsory because of the fervent refusal of some employers to agree to the terms of CBA’s.\textsuperscript{27}

\textbf{ii. Filing a Declaration to the Board to Initiate MMC Proceedings and the Subsequent MMC Process}

\begin{itemize}
\item \textsuperscript{20} \textit{Id}.
\item \textsuperscript{21} \textit{See generally} CAL. LABOR CODE § 1164-1166.3(a) (mentioning neither of these rights).
\item \textsuperscript{22} CAL. LABOR CODE § 1164.
\item \textsuperscript{23} Hess Collection Winery v. Agric. Labor Relations Bd., 45 Cal.Rptr.3d 609 at 617 (Cal. Ct. App. 2006).
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{Id}.
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} California Bill Analysis, A.B. 2596 Assem., 8/31/2002.
\end{itemize}
For either party to file a declaration requesting the ALRB to order MMC proceedings, the parties must have gone through a specified period of impasse and satisfy other requirements.\(^{28}\) If the ALRB is satisfied that the requirements have been met, it shall order the parties to mandatory mediation of the issues that they cannot agree on.\(^{29}\) A mediator is then selected as prescribed by statute.\(^{30}\) After a mediator is selected, a thirty-day mediation process begins where both sides try to resolve their issues by mutual agreement.\(^{31}\) If a CBA cannot be reached by mutual agreement, the mediator then files a report to the ALRB that contains what the mediator thinks the terms of the CBA should be.\(^{32}\) In the event that neither party petitions the ALRB for review of the report, or if no cause for review is shown by either party, the mediator’s report becomes the CBA.\(^{33}\) However, if either party files for review and good cause is shown, then the ALRB will order the mediator to modify only the problematic areas of the CBA.\(^{34}\) The mediator then meets with the parties again before a second report is filed.\(^{35}\) If either party petitions for review of the second report and the ALRB again finds good cause for review, the mediator is relieved of his or her duties and the ALRB then steps in and determines the final terms of the CBA.\(^{36}\) After the ALRB issues the final CBA, the only recourse for either party is appeal to the California Court of Appeal or the California Supreme Court.\(^{37}\)

**B. Gerawan Farming v. ALRB and United Farm Workers**

\(^{28}\) **CAL. LABOR CODE** § 1164(a) (listing these other requirements).

\(^{29}\) *Id.* at § 1164(b).

\(^{30}\) *Id.*


\(^{32}\) **CAL. LABOR CODE** § 1164(d).

\(^{33}\) *Id.* at § 1164.3(b).

\(^{34}\) *Id.* at § 1164(a), (c).

\(^{35}\) *Id.* at § 1164.3(c).

\(^{36}\) *Id.* at § 1164.3(d).

\(^{37}\) *Id.* at § 1164.5(a).
Gerawan Farming v. ALRB and United Farm Workers grew out of a dispute with the Gerawan and the United Farm Workers of America (UFW) labor union. UFW forced Gerawan into MMC proceedings, and after several unsuccessful sessions of voluntary mediation with a mediator, the ALRB adopted the mediator’s second report which became the binding CBA of the parties. Gerawan subsequently filed an appeal to California’s Fifth District Court of Appeal.

Gerawan is a family owned business operating out of Fresno County since 1938. Gerawan employs several thousand farm workers to grow, harvest, and pack its 12,000 acres of fruit. For decades, the company has placed a premium on training and keeping quality employees. Gerawan also pays its direct-hire employees wages that are far above the industry standard.

In 1990, Gerawan farm workers elected UFW to be their labor union. In 1992, UFW finally sent a request to Gerawan to begin negotiations. In 1995, Gerawan and UFW held one meeting, and there is no record of them having any further contact. It was not until October 2012, nearly twenty years later, that UFW contacted Gerawan to reassert its status as the collective bargaining unit and asked to resume bargaining. Gerawan agreed to bargain in good faith, but also questioned UFW about why they had remained absent for almost twenty years. UFW refused to give an explanation.

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40 Id. at 268.
41 Id. at 266.
42 Id.
43 Id.
44 Id. at 267.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
Nevertheless, both parties resumed bargaining, and after holding at least ten bargaining sessions over the course of approximately two months, UFW filed a request to the ALRB to initiate MMC proceedings.\textsuperscript{51} Gerawan filed an objection to the request arguing that UFW had not satisfied the statutory requirements to compel MMC proceedings and that UFW had abandoned its labor union status.\textsuperscript{52} The ALRB denied these arguments and ordered the MMC proceedings.\textsuperscript{53}

The parties met several times with a mediator, but were unable to reach a CBA.\textsuperscript{54} Thereafter, the mediator conducted on the record hearings at which the mediator heard testimony, received other evidence, and made rulings on objections.\textsuperscript{55} The mediator excluded Gerawan employees from the hearings, and the ALRB agreed that it was proper to exclude them.\textsuperscript{56} Gerawan challenged the exclusion of employees in Fresno County Superior Court, arguing that it was unconstitutional.\textsuperscript{57} However, this issue of the farm workers’ right to be present during the proceedings was not briefed for appeal and therefore remains unprecedented.\textsuperscript{58} At the end of the proceedings, the mediator crafted the CBA and submitted it to the ALRB.\textsuperscript{59} Gerawan filed a petition for review which the ALRB granted, and the matter was sent back to the mediator.\textsuperscript{60} The second report of the mediator, however, was adopted by the ALRB and it became the legally binding CBA.\textsuperscript{61} The \textit{Gerawan v. ALRB} lawsuit followed.\textsuperscript{62}

\begin{footnotes}
\item[51] Id.
\item[52] Id.
\item[53] Id.
\item[54] Id. at 268.
\item[55] Id.
\item[56] Id. n.7.
\item[57] Id.
\item[58] Id.
\item[59] Id. at 268.
\item[60] Id.
\item[61] Id.
\item[62] Id.
\end{footnotes}
The California Fifth District Court of Appeal ruled the MMC provision of the ALRA unconstitutional, and the California Supreme Court has granted certiorari. However, the issue of farm workers’ right to be present and offer evidence during MMC proceedings will not be considered by the Court.

III. THE CONTROLLING AUTHORITIES

A. The Constitutional Law Issues

1. Authorities governing the right of access pursuant to the First Amendment

Lupe Garcia, a Gerawan employee, argued that there is a right of public access to the MMC proceedings under the First Amendment of the United States Constitution. Garcia cited *NBC Subsidiary, Inc. v. Superior Court of Los Angeles* and *Delaware Coalition for Open Government v. Strine* as support for his argument “that the First Amendment provides a right of access to civil trials and proceedings in general and to quasi-arbitration procedures specifically.” Garcia argued that the MMC proceedings are comparable in substance to the facts of *NBC Subsidiary* and *Delaware Coalition*, and therefore the employees should be allowed to avail themselves of these cases and have a right to be present during MMC proceedings. The ALRB disagreed with Garcia and found that the facts of *NBC Subsidiary* and *Delaware Coalition* were differentiable from the facts in *Gerawan*.

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63 Id. at 261 (explaining the Court’s holdings, including the holding that the MMC process is unconstitutional); Id. at 299 (“We conclude the MMC statute involves an unconstitutional delegation of legislative authority, because it leaves the resolution of fundamental policy issues to others and it fails to provide adequate direction and safeguards for the implementation of the policy.”).
64 Id. at 268 n.7.
65 Gerawan Farming, Inc. (2013) 39 ALRB No. 13 at p. 3.
66 Id. at 3.
67 See generally id. at 3.
68 Id. at 3.
“In NBC Subsidiary, the California Supreme Court held that the First Amendment right of access to trials encompassed civil proceedings” and not just criminal proceedings. In that case, a state district court judge presiding over a civil trial ordered every member of the public out of the courtroom whenever the jury was not present. The judge expressed concern that the jury was not sequestered and was therefore liable to hear things outside of the courtroom from members of the public that could prove be prejudicial. The California Supreme Court determined that the trial court’s exclusion of the public was inappropriate, ruling that such exclusion would be impermissible in criminal court and ought to be impermissible in civil court as well. If MMC proceedings are to be considered ordinary civil proceedings like the ones in NBC Subsidiary, it stands to reason that the vindication of public rights would have to be involved in MMC proceedings in order for them to be so considered.

In Delaware Coalition, the Third Circuit Court of Appeals held that employees had a First Amendment right of access to a certain “confidential arbitration proceeding” pursuant to Delaware law. The arbitration proceeding in question was much like a civil trial in that a judge presided over the proceedings, the same discovery rules applied, the judge determined the obligations of the parties, and then a final order was issued by the judge. Because of these substantial similarities between the arbitration proceedings and a civil trial, the Delaware Coalition court held that the proceedings were “essentially a civil trial.”

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69 Id. at 5, citing NBC Subsidiary v. Superior Court, 980 P.2d 337, 358-59 (Cal. 1999).
70 NBC Subsidiary, 980 P.2d at 341.
71 Id.
72 See generally id. at 358-59.
73 See generally Gerawan, 39 ALRB No. 13 at 5-6.
74 Gerawan, 39 ALRB No. 13 at p. 5.
75 Id. at 6, citing Delaware Coal. v. Strine, 894 F. Supp. 2d 493, 502-03 (D. Del. 2012), aff’d, 733 F.3d 510 (3d Cir. 2013).
76 Id.
Whether access to MMC proceedings is protected by the First amendment depends upon whether such proceedings can be equated to either the court-conducted arbitration in *Delaware Coalition* or to the civil trials in *NBC Subsidiary*.\(^{77}\) If the employees cannot avail themselves of the holdings in either *Delaware Coalition* or *NBC Subsidiary*, their last resort would be to present an argument using the “experience and logic test” from *Press Enterprise Co. v. Superior Court*.\(^{78}\)

The United States Supreme Court held in *Press Enterprise* that an “experience and logic” test should be applied when a court is determining whether a qualified First Amendment right of access exists for a particular proceeding.\(^{79}\) The “experience and logic” test calls for (1) the consideration of “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant role in the functioning of the particular process in question.”\(^{80}\) In any given case, if it can be shown that the place and process have historically been open to the public and that public access plays a significant role in the functioning of the process, that is a compelling argument that a qualified right of access exists.\(^{81}\)

2. **Farm workers do not have a right of access pursuant to the First Amendment**

MMC proceedings cannot be equated to court-conducted arbitration like in *Delaware Coalition* or to civil trials like in *NBC Subsidiary* for the purpose of finding a right of access under the First Amendment.\(^{82}\)

Civil trials, like the one in *NBC Subsidiary*, involve the adjudication of the parties’ preexisting rights and obligations.\(^{83}\) In MMC proceedings, however, the rights of the parties have not been created yet because no CBA exists, and thus there are no rights to adjudicate in MMC

\(^{77}\) See infra notes 82-93 and accompanying text.

\(^{78}\) Gerawan, 39 ALRB No. 13 at 6-7.

\(^{79}\) Id. at 4, citing Press Enter. Co. v. Superior Court (“Press Enterprise II”) 478 U.S. 1, 8 (1986).

\(^{80}\) Id.

\(^{81}\) See supra notes 78-80 and accompanying text.

\(^{82}\) See infra notes 83-95 and accompanying text.

\(^{83}\) See supra notes 69-73 and accompanying text.
proceedings. The ALRB ruled in 39 ALRB No. 13 that MMC is not an adjudication and does not involve the resolution of claims or the vindication of rights. Rather, the ALRB ruled that MMC proceedings are quasi-legislative in character, and are not invoked to resolve legal claims, but to force the parties to negotiate. Furthermore, the result of MMC is a CBA - a binding contract - and not a vindication of rights. Thus, MMC proceedings clearly cannot be equated to a civil trial.

Additionally, MMC proceedings are not like court-conducted arbitration. Unlike in Delaware Coalition, a judge is not involved in MMC. Moreover, while a mediator may receive evidence and make rulings on objections, the mediator does not apply any law and does not vindicate the rights of the parties. Put simply, the Delaware Coalition court found that the court-conducted arbitration in that case was sufficiently similar to a civil trial and should therefore be considered one for the purposes of finding a First Amendment right of access. However, the type of arbitration prescribed by the MMC cannot be equated to that in Delaware Coalition, and, as a result, the employees in Gerawan are unable to avail themselves of the holding in that case.

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84 See generally CAL. LABOR CODE §§ 1164-1166.3(b) (noting that the purpose of MMC is CBA (a form of a contract) creation).
85 Gerawan, 39 ALRB No. 13 at 6.
86 Id.
87 Id.
88 See supra notes 83-87 and accompanying text.
89 See infra notes 90-93 and accompanying text.
90 CAL. LABOR CODE §§ 1164-1164.3(e). (Only a mediator and, maybe, the ALRB are involved in the creation of a CBA during MMC proceedings.)
92 See generally CAL. LABOR CODE §§ 1164-1164.3(e).
93 Gerawan, 39 ALRB No. 13 at 6.
95 See supra notes 89-94 and accompanying text.
i. The Two-Part Experience and Logic Test Applies in Gerawan’s Labor Dispute Against UFW

Notwithstanding that employees cannot avail themselves of the holdings in either NBC Subsidiary or Delaware Coalition, the two-part “experience and logic test” from Press-Enterprise is still available and applicable to the issue at hand.96

First, it must be determined whether the place and process of MMC is of the type that has historically been open to the general public and the press.97 MMC is comparable to labor contract negotiation, and the ALRB notes that it does not know of any instance of labor contract negotiations being open to the public.98

Second, it must be determined whether public access to MMC proceedings plays a significant role in the functioning of the particular process in question.99 The ALRB noted that the purpose of MMC is not only to accomplish the short-term goal of getting an initial CBA, but also to further future negotiations between the parties.100 Furthermore, tactical compromises are made during MMC in order to reach agreements necessary for achieving a CBA and building good relationships.101 There could be a potential disincentive for party representatives to make such compromises if MMC proceedings are public because of the representatives’ fear of members of the bargaining unit and the public demanding explanations.102 Benjamin S. Duval, Jr., the project director at the American Bar Foundation, explained that labor negotiations are private so that representatives may speak openly without fear of upsetting constituencies.103 Duval also pointed

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96 Gerawan, 39 ALRB No. 13 at 6-7.
97 See id. at 7.
98 Id.
99 Id.
100 Id.
101 Id.
102 See id. at 7-8.
103 Benjamin S. Duval, Jr., The Occasions of Secrecy, 47 U. Pitt. L. Rev. 579, 669 (Spring, 1986).
out that representatives may also have a fear of appearing weak in front of their constituencies, which may lead members of the bargaining unit to harbor serious doubts about their representative’s ability to adequately represent their interests.\(^{104}\)

A proponent of Duval would assert that his explanations are valid justification for excluding the general public from MMC proceedings.\(^{105}\) However, the ALRB failed to explain whether the “experience and logic test” provides a justification for why the farm workers should not be permitted to attend.\(^{106}\) Even if the presence of the general public would not help the functioning of MMC, it does not necessarily follow that the presence of farm workers would create similar problems. Indeed, Gerawan employees have never asked that the general public be allowed into MMC meetings.\(^{107}\) Rather, they have only requested that employees be afforded the right to enter the proceedings.\(^{108}\) It appears the ALRB may have failed to recognize this distinction, and this would imply that the ALRB incorrectly applied the “experience and logic test.”\(^{109}\)

**B. The Contractual Issues**

1. **Authorities governing whether employees have a right to be present under a contractual theory of arbitration.**

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\(^{104}\) *Id.*

\(^{105}\) *See supra* notes 101-102 and accompanying text.

\(^{106}\) *Contra* Gerawan, 39 ALRB No. 13. (The ALRB only considered whether the general public had a First Amendment right of access, and not more specifically whether farm workers had such a right.)

\(^{107}\) *Contra* Gerawan Farming, 187 Cal.Rptr.3d 261 (lacking any citation to facts indicating that Gerawan employees made such a request).

\(^{108}\) *See generally id.* at 268 n. 7.

\(^{109}\) *See generally supra* notes 95-106 and accompanying text. (If the second part of ALRB’s experience and logic test involved the determination of whether the attendance of the public in general would improve the function of MMC, that would be irrelevant and ultimately incorrect. This is because Gerawan and their employees have never asked for the general public to be allowed to attend. Rather, they have only asked for employees to be allowed to attend, and therefore the second part of the experience and logic test needs to involve the determination of whether the attendance of employees would improve the functioning of MMC proceedings.)
The right to arbitrate is afforded to a party by an arbitration contract.\textsuperscript{110} \textit{Cobb v. Ironwood Country Club} illustrates the principle that because arbitration is derived from contract law, many of the rights a party would have in a court of law are not necessarily afforded to it in arbitration proceedings unless they are expressly set out in the arbitration clause.\textsuperscript{111}

In \textit{Securitas Security Services USA, Inc. v. Superior Court of San Diego County}, the court held that arbitration is a matter of contract and courts must “rigorously enforce arbitration agreements according to their terms.”\textsuperscript{112} Contrasted with court proceedings, arbitration proceedings are determined on a contractual basis.\textsuperscript{113} For a person to participate in an arbitration proceeding, it is absolutely necessary for them to have entered into an agreement to arbitrate beforehand.\textsuperscript{114}

In his Penn State Law Review comment, Dr. Stavros Brekoulakis made a key differentiation between litigation and arbitration.\textsuperscript{115} The parties in litigation “are determined on the basis of interest(s) [, and] [a]ny legal or natural person is entitled to commence court proceedings to protect its legal or financial interests.”\textsuperscript{116} Contrasted with arbitration, whether a party can commence or otherwise be a part of arbitration proceedings is “exclusively determined on a contractual basis.”\textsuperscript{117}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{111} See generally \textit{id.} at 288.
  \item \textsuperscript{113} See \textit{Securitas Sec.}, 184 Cal.Rptr.3d at 1125, citing \textit{Rebolledo v. Tilly’s, Inc.}, 175 Cal.Rptr.3d 612, 619 (Cal. App. Ct. 2014).
  \item \textsuperscript{114} \textit{Id.} at 1125 (explaining that public policy does not favor “arbitration of disputes the parties have not agreed to arbitrate.”).
  \item \textsuperscript{115} Dr. Stavros Brekoulakis, \textit{The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room}, 113 Penn St. L. Rev. 1165, 1166 (Spring 2009).
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
\end{itemize}
\end{footnotesize}
In other words, for a person to participate in an arbitration proceeding, it is absolutely necessary for that person to have entered into an agreement to arbitrate beforehand.\textsuperscript{118} Dr. Brekoulakis also discusses the importance of the principle of “procedural party autonomy” in arbitration contracts.\textsuperscript{119} This principle holds that parties ought to have the freedom to determine for themselves who is entitled to be a party to arbitration, and largely contributes to why arbitration is vastly different from litigation.\textsuperscript{120} One of the key differences between arbitration and litigation is flexibility, and the principle of procedural party autonomy allows parties to create arbitration agreements that are going to be best-suited to meet their particular needs.\textsuperscript{121} With this in mind, one argument is that it is the party’s responsibility to bargain for the right to be a party in arbitration proceedings. However, problems may foreseeably arise when a party seeks to be included as a party to the arbitration contract, but the other parties refuse or otherwise fail to include them.

2. Why Employees Have No Standing Pursuant to Contractual Nature of Arbitration to be Treated as Parties in MMC

The ALRA holds that employees have the right to bargain collectively through a representative of their own choosing.\textsuperscript{122} The court in \textit{N.L.R.B. v. American National Insurance Co.} held that it is the union representative, and not the employees individually, who get to bargain with the employer in CBA negotiations.\textsuperscript{123} This illustrates that workers do not have the same opportunity to speak directly and bargain with employers as their elected representatives do.\textsuperscript{124} Since arbitration is contractual in nature, either the contract or a statute must designate the parties to a potential

\begin{footnotesize}
\textsuperscript{118} Id. \\
\textsuperscript{119} Id. \\
\textsuperscript{120} Id. \\
\textsuperscript{121} Id. \\
\textsuperscript{122} \textsc{Cal. Labor Code} § 1140.2 (West 2012). \\
\textsuperscript{124} See generally id.
\end{footnotesize}
arbitration process. Therefore, because farm workers are not designated by contract or statute as parties for purposes of MMC, the Gerawan employees did not have the right to present evidence on the record at the MMC proceedings between Gerawan Farming and UFW.

Regardless of whether the Gerawan employees’ presence would have improved the functioning of the MMC proceedings, the fact that the ALRA does not designate farm workers as parties for the purpose of MMC proceedings makes it virtually impossible to argue that they have the right to present evidence on the record. Therefore, without a change from the state legislature, the employees are left without a way to present evidence on the record at MMC proceedings.

IV. RECOMMENDATION

A. California Assembly Bill 1389

Jim Patterson (“Patterson”), California State Assemblyman representing the Fresno area, introduced a pragmatic piece of legislation into the pipeline in February 2015. California Assembly Bill 1389 (2015) (“AB 1389”) was poised to be an effective solution to not only the issues discussed in this comment, but also to issues that have been briefed for review by the California Supreme Court. The Assembly Committee on Labor and Employment, however,

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125 See supra notes 108-119 and accompanying text.
126 California Bill Analysis, A.B. 2596 Assem., 8/31/2002. (AB 1389 would not be attempting to change the law to consider farm workers as parties for purposes of MMC if they were already designated as such).
127 See generally Part IV Section B Subsection 1.
128 See supra notes 108-124 and accompanying text.
129 See supra Part III Section A (explaining how there is no constitutional right for employees to attend MMC proceedings), Part III Section B (explaining how there is no contractual basis for employees to attend MMC proceedings, either).
130 See generally A.B. 1389, 2015-16 Leg., Reg. Sess. (Cal. 2015) (showing how the bill was introduced on February 27, 2015).
failed to pass it, and on January 31, 2016, AB 1389 died pursuant to article IV, section 10(c) of the California Constitution.\textsuperscript{132}

AB 1389, introduced by Patterson in 2015, sought to make four changes related to the ALRA.\textsuperscript{133}

First, AB 1389 would have made it an unfair labor practice for a certified labor union to “abandon or fail to represent” employees for a term of three or more years.\textsuperscript{134}

Second, it would have required the ALRB to decertify a labor union that abandons its bargaining unit.\textsuperscript{135}

Third, employees in a bargaining unit would have been considered parties for legal purposes related to MMC and would have had the right to attend all meetings that the mediator schedules.\textsuperscript{136}

Fourth, it would have provided that a CBA issued by a mediator, the ALRB, or the court could only take effect after it was ratified by a simple majority of the employees in the bargaining unit.\textsuperscript{137}

Designating agricultural employees as parties for all purposes of MMC would be significant because it would put employees on equal footing with their employers and unions.\textsuperscript{138} Additionally, AB 1389 would have provided a solution to the problem of farm workers being unable to offer evidence on the record.\textsuperscript{139} Although AB 1389 would not have permitted employees to present evidence on the record, it would have provided a more prudent and equally effective solution: ratification.\textsuperscript{140} With the passage of AB 1389, an initial CBA issued by a mediator, the ALRB, or the court could only have taken effect after it was approved by a majority of the employees in the

\textsuperscript{132} See generally California Assembly Bill 1389 (tracking the bill’s activity from its introduction up until its death pursuant to the California Constitution on January 31, 2016 and its subsequent filing with the chief clerk pursuant to Joint Rule 56 on February 1, 2016).

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id.

\textsuperscript{138} See generally id.

\textsuperscript{139} Id.

\textsuperscript{140} Id.
bargaining unit.\footnote{Id.} The alternative of allowing all employees in attendance to speak on the record would have been practically impossible with a workforce the size of Gerawan’s.\footnote{See Gerawan Farming, 187 Cal.Rptr.3d at 266 (explaining how Gerawan Farming, Inc. employees several thousand employees).} Contrarily, the practicability of a ratification right is easy to understand: if a mediator were to try twice to draft a proposed CBA but both proposed agreements were thrown out for cause, it would then be up to the ALRB to draft a CBA that can get a simple majority vote from the bargaining unit.\footnote{See id.} Without a right of ratification, it is possible for the Board to enact a CBA that is even more disagreeable to the employees than the previous two that the mediator drafted.\footnote{If the Board drafts and subsequently enacts a CBA without soliciting the input of employees - either directly or vicariously through ratification - it is entirely possible for the Board to enact a CBA with terms that are even more adverse to employee interests than the two CBA’s drafted by the mediator that the Board rejected.}

Withholding the right to present evidence on the record and instead providing for the right of ratification is a solution that would be just as effective - if not more effective - as a means of protecting worker interests.\footnote{See supra notes 139-144 and accompanying text.} If the mediator, employer, and labor union all know that any proposed CBA must pass the test of employee ratification, that would create a tremendous incentive for those three entities to work together to come up with terms that are fair and ethical. Indeed, the right of ratification may have been the most important amendment of AB 1389 along with the right to be present during MMC proceedings.

Assuming that the political makeup of the Assembly Committee on Labor and Employment is not going to be changing in the near future, if proponents of AB 1389 want the bill to pass, changes or additions must be made to it in order to gain the necessary votes for passage. There are some modifications to consider in an effort to compromise. For example, perhaps the provision providing for the right of farm workers to attend MMC proceedings can be deleted. Or maybe the
provision requiring the ALRB to decertify a labor union that abandons its bargaining unit after a term of three or more years can be modified. Such modification could be to provide that the respective bargaining unit shall vote for itself whether or not to decertify a labor union that has abandoned its employees. Additionally, in relation to that same provision, perhaps the three-year term for abandonment can be lengthened.

It is not important whether the suggested modifications set forth in the preceding paragraph are heeded or if different ones are preferred. Rather, the focus must be on the fact that if proponents of the bill want AB 1389 to be passed, they must reach out to opponents of the bill in an effort to compromise.

V. CONCLUSION

Currently, the law denies farm workers the right to be present during MMC proceedings.\(^{146}\) A change in the law is at the legislative level is desperately needed. The MMC provision had great intentions in that it sought to protect employees from the dishonest practices of employers who sought to stall the bargaining process.\(^{147}\) However, as evidenced in *Gerawan v. ALRB*, sometimes labor unions prove ineffective when it comes to accurately and ethically representing the interests of the farm workers in their respective bargaining units.\(^{148}\) There seems to be no availing Constitutional or contractual law arguments.\(^{149}\) Therefore, it seems that the only bastion of hope for employees would have to come from the legislature in the form of a change in the law.\(^{150}\)

The MMC process must be amended to provide employees the right to be present during all MMC proceedings and the right to ratify any CBA that is issued.\(^{151}\) AB 1389 is a pragmatic
solution because the checks and protections against employers that were present in the 2002 version of the MMC are retained, and new provisions are also added to allow employees the right to protect themselves against union or Board action that is completely contrary to their interests.\textsuperscript{152}

\textbf{Brandon Hamparzoomian}\textsuperscript{153}

\textsuperscript{152} See supra Part IV and accompanying text.

\textsuperscript{153} J.D. Candidate, San Joaquin College of Law, 2017. I would like to express appreciation to Fresno attorney Paul Bauer and San Joaquin College of Law Professors Gregory Olson and Jeffrey Purvis for their guidance and critiques. Their views and opinions are not necessarily expressed in this work. Special thanks also to my brother, Brent Hamparzoomian, for his proofreading and input - it made a difference.
Decision-Making During Interrogation: Towards a New Approach for Determining the Propensity of Deceptive Police Techniques to Produce False Confessions

Sean Janda

I. Introduction

For police officers investigating crimes, interrogations provide an invaluable opportunity both to develop evidence against a suspect and to help the officer understand exactly how the crime unfolded.¹ In fact, interrogations are so important that at least one study has found that the fruit of a successful interrogation—a confession—is essential to obtaining a conviction in more than 20% of cases.²

Just as successful interrogations are often essential to convictions, many police officers believe that deception is, in at least some cases, essential to a successful interrogation.³ According to these officers, deception can sometimes be the only way to convince suspects that it is in their best interest to confess, particularly in cases where the evidence is against the suspect is not overwhelming.⁴

Unfortunately, while deception can produce much-needed true confessions that lead to convictions, it may also produce false confessions. Although there is no empirically valid way to determine the rate of false confessions in the United States,⁵ research has suggested that they are

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⁴ Id. at 1281, 1284.
the leading source of wrongful convictions. Confessions are nearly always treated by juries as damming; they tend to overwhelm any exculpatory evidence or gaps in the prosecution’s case. In addition, once a suspect gives a confession, it can be extraordinarily hard to check the confession for accuracy. Thus, in many cases, the decision to falsely confess almost singularly results in a wrongful conviction.

In this Essay, I will tackle the problem of police deception producing false confessions (and, ultimately, wrongful convictions). First, in Part II, I will use empirical evidence about the psychology of interrogation and confession to build a decision-making model that explicitly identifies each variable that suspects weigh when determining whether or not to confess. Then, in Part III, I will examine the current law surrounding the permissibility of various interrogative techniques. This will involve looking both at the development of the constitutional standard for

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8 The first safeguard against false confessions should be the post-admission narrative, where individuals who have confessed explain the details of the crime to the interrogator. In a perfect world, this would provide the opportunity to ensure that the confession was true by checking the suspect’s knowledge of the crime. And, in many cases, the post-admission narrative can in fact confirm the validity of the confession by leading the interrogators to additional evidence that supports the confession. Research has shown, however, that many innocent suspects are also able to include details and “inside information” in their post-admission narrative as a result of contamination from the interrogators (where officers give away—either intentionally or accidentally—details about the crime to the suspect that the suspect can then parrot back in the post-confession narrative to give it additional persuasive force). Brandon L. Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1054 (2010). While the careful interrogator—or the careful police department—could implement policies to reduce the risk of contamination (for example, by holding some details back from the interrogator and then using those details as a post-confession check), it is extraordinarily hard to courts to determine whether and how contamination occurred after the fact. Thus, despite its apparent potential to act as a safeguard, the post-admission narrative does not provide the basis of a particularly useful judicial check against false confessions.
the admissibility of confessions under due process and also at various state law approaches that have been developed to supplement the constitutional inquiry and provide additional protection against false confessions. Finally, in Part IV, I will take six separate deceptive interrogation techniques and, using the model developed in Part II, explain how each individual technique operates on guilty and innocent suspects. Using this information, I will propose a variety of per se rules to regulate the different techniques. In addition to providing concrete conclusions about these six techniques, it is my hope that Part IV will clearly demonstrate how to apply the decision-making model in Part II. In so doing, I hope that the model in Part II and the applications in Part IV will provide additional guidance to courts, police officers, and scholars who may wish to extend the research to look at other interrogative techniques.

II. The Psychology of Interrogation and Confession

In this Part, I will examine the existing psychological research to explore how interrogators convince suspects to confess. First, primarily using the work of Richard Ofshe and Richard Leo, who have observed a large number of interrogations, I will walk through what a typical interrogation looks like. Second, using the insights gleaned from the first part of this section, I will build a model to represent the rational decision-making process that any suspect—guilty or innocent—may employ when deciding whether or not to confess. This model will, of course, be critical in later determining how particular deceptive techniques may influence suspects’ decisions. Finally, using this model, I will provide an introduction to false confessions to explain how interrogative techniques may cause an innocent suspect to confess.

A. Inside a Typical Interrogation
The key goal of an American police interrogation can be summed up as trying to “influenc[e] a rational person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess.” To achieve this goal, interrogators generally proceed in two phases: first, they convince the suspect that he is likely to be arrested and convicted; second, they convince him that confessing will lead to a better outcome for him than being convicted will.

Typically, the first part of an accusatory interrogation is to make the suspect realize he will be found guilty. Detectives can achieve this in a variety of ways. One way is to present the suspect with evidence of the suspect’s guilt, such as forensic evidence tying the suspect to the crime scene (for example, linking the suspect to DNA or fingerprints found at the scene) or witness or co-suspect statements implicating the suspect in the crime. According to one study, in 90% of

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9 Interrogations in American police practice are generally accusatory and are only undertaken—particularly in the form discussed in this Essay—when the interrogator believes that he has found the guilty party. Fred E. Inbau et al, CRIMINAL INTERROGATION AND CONFESSIONS 77 (3d ed. 1986). Interrogations are used to obtain confessions and information about how the crime happened, not to get an alibi or other exculpatory evidence. See Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979, 1003 (1997).

10 Ofshe & Leo, supra note 9, at 985. For this article, which walks through a standard interrogation and will form the basis of much of this section, Ofshe and Leo undertook their own study of more than 125 actual transcripts, interviews, recordings, and case materials.

11 Id. at 990. Because these two broad phases actually help structure interrogations—and, hence, the rest of this Section—I will address them separately here. Later on, however, I will demonstrate that there is, of course, an important interaction between the two—put simply, the better an interrogator does at convincing the suspect that he will be found guilty, the less he will need to persuade him about the benefits of confession over conviction.

12 Of course, to even reach the accusatory interrogation stage, interrogators must convince a suspect to waive his right to remain silent. This, however, does not appear to be a huge problem for officers. According to one study, more than 75% of suspects waived their Miranda rights after receiving the proper warnings. Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266, 275 (1996). In addition, according to the same study, in nearly 20% of the cases where suspects chose not to waive their rights, detectives continued questioning them anyway. Id. at 276. Although detectives in those cases tended to tell suspects (broadly correctly) that any information gleaned from such questioning could not be used at trial, they neglected to inform the suspects that the information could be used to impeach them if they chose to testify. Id.

13 Ofshe & Leo, supra note 9, at 1004.
the observed interrogations, the officer confronted the suspect with evidence that he was guilty. Another, though perhaps less persuasive, way to proceed is to begin by pointing out that the suspect has been inconsistent in his statements or that something he has said is contradicted by other evidence. At this point in the interrogation, the officer is “trained, above all else, to express unwavering confidence in the suspect’s guilt.” This results in officers generally refusing to listen to any explanations or alibis and, instead, responding to the suspect by presenting him with a “steadily growing list of inculpatory facts.”

Once an interrogator believes that the suspect is convinced that he will be found guilty, the interrogation moves on to the second phase. Here, the detectives must convince the suspect that there is some benefit to admitting guilt rather than going to trial and being found guilty. Depending on how well the interrogator has managed to convince the suspect that he will be found guilty, this stage could require very little or quite a lot of additional persuasion. Typically, the

14 Leo, supra note 12, at 279.
15 Ofshe & Leo, supra note 9, at 1004. Though this method may be less persuasive on its own than showing the suspect evidence (particularly forensic evidence) of his guilt, it may be necessary in situations where police officers do not have other evidence tying the suspect to the crime. In addition, even in cases where other evidence is available, it seems to provide a good lead-in to the interrogation. Perhaps a suspect will, in attempting to explain away prior inconsistencies in his statements, further inculpate himself. Or, perhaps a suspect will begin to feel overwhelmed or trapped by his own statements, setting him up to be more fully persuaded of the futility of his situation once other outside evidence of his guilt is introduced into the interrogation.
16 Id. at 1043.
17 Id. at 1043-44.
18 Id. at 1052-53. Of course, if a rational suspect believes that there is no such benefit, he will choose to go to trial, no matter how strong the evidence against him. I argue later, however, that this will never be the case, both because there may be a sense that admitting guilt will result in a lighter sentence (even if such a benefit is not explicitly or implicitly conveyed to the suspect by the officers) and because enduring continued interrogation is itself a cost that could tip the calculus, particularly at the margins.
19 This is, of course, partially a function of how strong the evidence against a suspect is (which is itself related to whether the suspect is in fact guilty or not), but it is also influenced at least by the skill of the interrogator and the personal characteristics of the suspect.
interrogator has a continuum of incentives to work with, and those on the low end are relatively easy—and, as we will see later, costless in terms of reliability—to deploy. For example, a detective may tell the suspect about the moral or emotional benefits of telling the truth or emphasize the increase in self-worth that accompanies a (true) admission of guilt.\textsuperscript{20} If these low-end incentives do not work, however, the interrogator may incrementally offer larger incentives, in an attempt to make confessing appear more and more relatively beneficial. This process may terminate in detectives telling suspects—either truthfully or not—that they will be subject to physical harm if they do not confess or that they will be released without charge if they do confess.\textsuperscript{21} Once officers convince the rational suspect that there is some sufficient benefit to confessing to outweigh any possibility that he may not be convicted at trial, the suspect will confess. Because confessions are so likely to overwhelm other evidence and persuade a jury,\textsuperscript{22} at that point, the hard part of the detectives’ jobs is done. The interrogation will, however, generally continue, as investigators attempt to elicit a post-confession narrative to explain the details of the crime.\textsuperscript{23}

\textbf{B. A Model of Decision Making}

Based on the above walkthrough of an interrogation, I will now build a decision-making model that explicitly lays out the different factors that a suspect must weigh in determining whether

\begin{itemize}
  \item \textsuperscript{20} Ofshe \& Leo, supra note 9, at 1056-60.
  \item \textsuperscript{21} See id. at 990; Leo, supra note 12, at 283.
  \item \textsuperscript{22} Leo \& Ofshe, supra note 7, at 434.
  \item \textsuperscript{23} As discussed above, supra note 8, it is important to note that this process provides the careful interrogator a way to verify the truth of the confession. If the post-confession narrative provides additional (verifiable) details that the police did not know or, at the least, confirms or includes facts that the police already know, that is an indication that the confession is true. If, on the other hand, the post-admission narrative only plays back facts that the police already know and that may have been shared during interrogation—or includes an explanation that is irreconcilable with what the police already know—then that is an obvious sign that the confession is false.
\end{itemize}
to confess or not. This model will prove useful later when considering the effects of different interrogative techniques on suspects’ decision-making.

In short, suspects must weigh the costs of confession ($C_c$) with the costs of not confessing and possibly proceeding (eventually) to trial ($C_T$). The costs of confession are simple: whatever the suspect believes his punishment will be. This is the suspect’s self-evaluated probability of being punished ($P_c$) multiplied by his self-evaluated punishment cost ($S_c$). The costs of not confessing involve a few more considerations: they include both the expected costs of punishment at trial ($P_T*S_T$) as well as the marginal costs of trial independent of punishment ($T$), the marginal

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24 It seems likely that $P_c$ will nearly always be 1—or close to it—as few suspects are likely to believe that they can confess but not be punished. In addition, I will treat the particular situation where a suspect believes or is told that he will be free to leave as soon as he confesses as $S_c=0$ rather than $P_c=0$, as I think it makes more conceptual sense to discuss that as the most extreme form of promised leniency, a tactic that generally influences $S_c$ rather than $P_c$. Situations were $P_c$ might not be equal to 1, however, might include situations where a suspect believes that he will confess but that he may still be found not guilty, maybe because he thinks the confession will be inadmissible or because he is confident that other evidence exists that definitively proves his innocence. It bears noting that interrogation tactics could attempt to play on this component—for example, by convincing suspects that anything they say could not be used in court or by lying to suspects about who they are talking to (making them think, for example, that they are talking to a confederate who will not use their statements against them rather than a government agent who will). Tactics of this nature are, however, highly disfavored by courts and relatively rarely employed by police, see Deborah Young, Unnecessary Evil: Police Lying in Interrogations, 28 Conn. L. Rev. 425, 428 (1996) (“When police lie during interrogations, they usually lie about facts, because Miranda affirmatively requires police to accurately inform suspects of their rights.”), and so I will not discuss them in any depth in this Essay.

25 I use “$S$” here to stand for “sentence.” Of course, however, the punishment that a suspect may expect is not limited to a jail sentence—it also includes any non-judicially-imposed costs (for example, a feeling of shame or rejection by his community) as well as non-prison-sentence judicially-imposed costs (for example, fines, probation, special conditions of release, etc.). In addition, given the uncertainty that exists, I use “$S$” here to denote the expected value of some distribution of potential punishments. It is important to note from the beginning that “$S$” does not take into account the probability of being punished at all—that wrinkle is provided by $P$—and is instead the expected punishment, assuming some punishment.

26 These may include monetary costs (for example, attorney’s fees) or intangible costs (such as the reputational cost of publicity stemming from trial).
costs of interrogation (I), and marginal extraneous costs (M). Thus, the rational suspect will confess when:

\[ C_c < C_T = (P_c*S_c) < (P_T*S_T + T + I + M) \]

To convince a suspect to confess, then, a detective has two paths to take: he can try to increase \( C_T \) or he can try to decrease \( C_c \). Increasing \( C_T \) is, of course, what the first interrogation phase, as described above, tries to do: by convincing the suspect that he is likely to be found guilty if he goes to trial, the detective tries to move \( P_T \) as close as possible to 1 (the maximum possible value). The second interrogation phase, convincing the suspect that he has something to gain from confessing, on the other hand, could correspond to increasing \( C_T \) further (for example, by making the interrogation as stressful as possible or by making threats of physical harm or other negative consequences if the suspect does not confess) or to decreasing \( C_c \) (for example, by convincing the suspect that a confession will lead to sentencing leniency and so lowering \( S_c \)).

C. An Introduction to False Confessions

From the analysis in Sections II.A and II.B, it is easy to see how a guilty suspect might confess. Given that he knows his own guilt, his initial \( P_T \) will be relatively high, and any attempt by the interrogators to point out contradictions in his story or present him with evidence—real or manufactured—of his guilt should work to move his \( P_T \) relatively easily. Once his \( P_T \) is close to

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27 These last three costs are all marginal costs, as they represent additional costs from going to trial over confession. For example, interrogation may impose costs under both scenarios, but it may impose additional costs if a suspect chooses not to confess. Rather than attempt to evaluate those costs on both sides of the equation, I use marginal costs from going to trial and only count it on one side. If, in a particular situation, one of these costs is lower if the suspect goes to trial, then the marginal cost will be negative. Finally, extraneous costs include any additional costs not accounted for in \( S_T \), \( T \), or \( I \). For example, if an interrogator tells a suspect that she will lose custody of her children unless she confesses, that would be counted under \( M \). See Lynumn v. Illinois, 372 U.S. 528 (1963).
his \( \mathcal{P}_c \), little additional work is needed to obtain a confession—a slightly stressful interrogation or promises of minor benefits (either tangible or not) could be enough to tip the equation. What is harder to fathom is how an innocent suspect might be led to confess; he knows his own innocence and so, at first blush, the gap between \( \mathcal{P}_c \) and \( \mathcal{P}_T \) seems like it must be large enough that only truly extraordinary circumstances could prompt a false confessions. In this section, I will argue against this initial impression by discussing how normal interrogative tactics can engender a false confession.

The leading study in the field breaks false confessions down into two separate categories: those that are compliant and those that are persuaded. Compliant confessions happen when a suspect knows he is confessing falsely but believes it to be in his best interest to do so. Persuaded confessions are those where a suspect who is actually innocent confesses because he believes that he is guilty.

To focus on compliant confessions, Ofshe and Leo further break these down into stress-compliant and coerced-compliant false confessions. For them, stress-compliant confessions are

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28 Ofshe & Leo, supra note 9. In addition to discussing how a typical interrogation works, Ofshe and Leo also took each confession in their sample and identified whether it was true or false. True confessions were those obtained from individuals who pled guilty or who were convicted at trial. False confessions were those obtained from individuals who were acquitted at trial, proven innocent by additional evidence uncovered before trial, or found guilty but later shown to be innocent. Id. at 981, n.1.

29 Id. at 997.

30 Id.

31 Id.

32 Persuaded confessions are those that happen when a suspect becomes convinced of his own guilt. Id. at 999. They may be induced by, for example, the interrogator suggesting that maybe the suspect does not remember committing the crime because he blacked out or is suffering from amnesia or repressed memories. Id. at 1000. Thus, they do not involve innocent suspects knowingly pleading guilty because they believe that it is in their best interests to do so, id., and so they generally operate outside the framework of rationality that this Essay explores. As such, I will not focus on them here.

33 Id. at 997-98.
those where the confessor chooses to confess in order “to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing.”\textsuperscript{34} Coerced-compliant confessions, on the other hand, are those where suspects confess due to some combination of threats of harm and promises of leniency.\textsuperscript{35} These two identified types of compliant confessions match up well with our model. Stress-compliant confessions can be viewed as those were the primary work done by the detectives is done on I, the costs of continuing the interrogation. Coerced-compliant confessions, on the other hand, can be viewed as those where the interrogative tactics operate on some combination of $P_C$, $S_C$, $S_T$, $T$, and $M$. It is important to note, however, that while this distinction may be useful for categorizing confessions, interrogations generally do not proceed down one or the other path in isolation. Instead, techniques that, for example, cause the interrogation to generally be more stressful may make it easier for interrogators to induce confessions by convincing suspects they are likely to be found guilty (that is to say, the higher $I$ climbs, the larger a gap between $P_T$ and $P_C$ it—in combination with $T$ and $M$ and promises of leniency—can overcome). And, conversely, the more convinced a suspect is that he will be found guilty (or the larger the benefits promised him in exchange for a confessions), the less stressful an interrogation may need to become before it induces a guilty plea.

In addition to generally describing how false confessions happen, Ofshe and Leo also examined what characteristics of suspects and interrogations may make a false confession more likely. They found that certain characteristics of individuals, including intellectual limitations or inherently strong negative reactions to stress, and interrogations, including extreme length or intensity, may operate—together or in isolation—to drive the costs of continuing the interrogation

\textsuperscript{34} Id. at 997.  
\textsuperscript{35} Id. at 998.
high enough for a suspect to falsely confess.\textsuperscript{36} In addition, suspects who are truly innocent may become convinced that they are “either being set up or railroaded” as interrogators present them with “steadily growing list[s] of inculpatory facts.”\textsuperscript{37} Finally, undergirding this entire process is the desire of suspects—even falsely accused ones—to please their interrogators. Empirical evidence suggests that arrest and detention induce shame—and pressure to assuage that shame—in many individuals, even they know that they are innocent of the underlying crime.\textsuperscript{38} To sum up, in police interrogations, innocent suspects who are already feeling shame from being arrested are often placed in extraordinarily stressful situations, presented with evidence of their guilt, told that the stressful interrogation will only end when they confess, and, in many cases, promised various benefits from confessing. It is no wonder, then, that—despite the strong intuitive belief that an

\textsuperscript{36} Id. at 998.

\textsuperscript{37} Id. at 1044. It is also important to note two additional things here. First, when interrogators present suspects with evidence of their guilt, it can, of course, also lead guilty parties to confess. See generally Stephen Moston et al, \textit{The Effects of Case Characteristics on Suspect Behavior During Police Questioning}, 32 Brit. J. Criminology 23 (1992) (examining how different suspects behave during interrogation in light of the strength of the evidence against them). Second, there is significant anecdotal evidence that goes beyond empirical analysis of interrogations or psychology-influenced rational decision-making models to suggest that innocent suspects will admit guilt because they believe it is the rational course of action. See Welsh S. White, \textit{False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions}, 32 Harv. C.R.-C.L. L. Rev. 105, 146 (1997) (citing Albert W. Alschuler, \textit{The Defense Attorney’s Role in Plea Bargaining}, 84 Yale L.J. 1179, 1296 (1975)) (recounting cases where defense attorneys recommended guilty pleas despite client being framed because they felt that police officers would be believed in court over the accused). Because these anecdotes do not answer the key question of what techniques may induce false confessions, I will not examine them further. That being said, it is important to keep in mind that there is significant empirical and anecdotal support for the idea that innocent individuals will knowingly falsely confess (and, in fact, have done so).

innocent suspect would never confess\(^\text{39}\)—empirical and anecdotal evidence suggests that false confessions happen with some regularity.\(^\text{40}\)

### III. Legal Standards Regulating Interrogation Procedures

In this Part, I will analyze the various legal standards that courts employ to regulate the admission of confessions and, by extension, interrogation procedures. I will start by tracing the development of the constitutional due process standard, which only allows for the admission of confessions that are voluntary. I will then examine how courts specifically analyze instances of police deception under this standard. Finally, I will look at how some state courts have developed prophylactic—generally bright line—rules regarding deception to provide better guidance to police and courts.

#### A. The Development of the Voluntariness Standard

Today, the constitutional standard for admitting confessions is that any “involuntarily extracted confession” must be excluded from trial.\(^\text{41}\) Although the test has been stated in different ways by different courts, the basic idea is that, considering the totality of the circumstances, the confession must be “the product of an essentially free and unconstrained choice by its maker.”\(^\text{42}\) This test, which focuses on the conduct around the confession to determine, principally, whether the confession was freely made or coerced is a far cry from the original test for admissibility under common law. At common law, confessions were excluded or admitted purely on the basis of

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\(^{39}\) See, e.g., Leo & Ofshe, *supra* note 7, at 434.

\(^{40}\) See *supra* notes 5-8 and accompanying text.


perceived reliability.\textsuperscript{43} Although the Fifth Amendment introduces a clear procedural element\textsuperscript{44} that courts must at least consider, American courts initially seemed to ground their inquiry in common law reliability concerns.\textsuperscript{45}

In 1897, the Supreme Court explicitly held that the Fifth Amendment compelled the exclusion of involuntary confessions.\textsuperscript{46} Even after that decision, however, the voluntariness inquiry generally turned less on concerns about procedural fairness and more on ultimate concerns about reliability.\textsuperscript{47} Starting in the middle of the twentieth century, the apparent tension between the procedurally-oriented Fifth Amendment and the outcome-oriented approach that courts generally took became evident. Although, at least at first, the substantive approach did not fully change, the Supreme Court began to comment on the procedural concerns with allowing involuntary confessions into evidence.\textsuperscript{48}

\textsuperscript{43} See White, supra note 37, at 111 (citing 3 John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 246 (3d ed. 1940)). That exclusion rules were founded on reliability rather than on procedural fairness is evident from the fact that, in at least some cases, physical evidence found as a result of an unreliable confession was permitted into evidence because the court believed that the physical evidence, unlike the confession, was reliable. See, e.g., The King v. Warickshall (1783) 168 Eng. Rep. 234, 234-35.

\textsuperscript{44} U.S. CONST. amend. V (“[N]or shall [any person] be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .”).

\textsuperscript{45} See White, supra note 37, at 112-13.

\textsuperscript{46} Bram v. United States, 168 U.S. 532, 565 (1897).

\textsuperscript{47} See Yale Kamisar, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 20-21 (1980) (commenting that through the early 1960s, voluntariness would be determined “in 99 cases out of 100” based on whether the “interrogation methods employed . . . create[d] a substantial risk that the person subjected to them [would] falsely confess” rather than on whether the individual defendant was coerced or otherwise had his will overborne).

\textsuperscript{48} See Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (commenting that involuntary confessions may not be admitted “not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system”); Spano v. New York, 360 U.S. 315, 320 (1959) (noting that the problem with involuntary confessions “does not turn alone on their inherent untrustworthiness” but also on a “deep-rooted feeling that the police must obey the law while enforcing the law”); Lisenba v. California, 314 U.S. 219, 236 (1941) (“The aim of the
Over time, this procedural-based inquiry began to supplant the reliability inquiry (even the reliability inquiry couched in voluntariness terms), an evolution that reached its endpoint in the Court’s ruling in *Colorado v. Connelly*. In that case, the defendant, Francis Connelly, approached a police officer in Denver and, without any prompting by the officer, told the officer that he had murdered somebody and wished to confess. The officer properly informed Connelly of his rights and took him to police headquarters, where Connelly offered a full confession. Before trial, Connelly moved to exclude his confession based on evidence that he had been in a psychotic state when he confessed and had been following the command of voices he was hearing inside his head. The defendant was also diagnosed with chronic schizophrenia. According to the Supreme Court, the defendant’s condition should not result in exclusion of his confession under the Constitution, however, because the Due Process Clause is primarily concerned with procedural unfairness and government action. Indeed, according to the Court, “A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment.”

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50 *Id.* at 160.
51 *Id.*
52 *Id.* at 161-62.
53 *Id.* at 161.
54 *Id.* at 167.
55 *Id.* (citation omitted).
Today, then, at least on a constitutional level, courts exclude or admit confessions based solely on whether the confession was voluntary—an inquiry grounded in concerns about fairness—rather than on whether the confession is reliable.56

B. Applying the Voluntariness Test to Cases of Police Deception

The Supreme Court has made it clear that police deception, standing alone, is not sufficient to render a confession involuntary.57 Different courts, however, have implemented this principle in different ways.58 At one end of the spectrum, some courts cite Frazier to say that if a confession is otherwise voluntary, police deception will not change that result.59 On the other end of the spectrum, some courts factor police deception into the totality of the circumstances analysis as one of the relevant circumstances (and, of course, different courts may give different weight to different deceptive tactics).60 Finally, some courts may use “[a] common restatement of the test [that] judges the coerciveness of the tactic solely by the intent of the police. Courts applying this standard evaluate whether the lie was calculated to procure an untrue confession.”61

Although no court applies a general constitutionally-derived prohibition on police deception, some courts may apply per se rules that exclude certain tactics—whether deceptive or not—as impermissible. For example, it is well-settled that that police may not use threats of

56 This reading of the current de facto approach is confirmed by scholars in the field. See White, supra note 37, at 147.
59 Young, supra note24, at 452. According to Young, “These courts are drawing a de facto line that permits police lying.” Id.
60 Id. at 452-53. In addition to the deception itself, other circumstances that courts consider relevant may include the length and intensity of questioning; the age, intelligence, and experience of the suspect; whether the police deprived the suspect of various necessities, such as food, sleep, or use of the bathroom; and whether the suspect was properly advised of (and understood) his Miranda rights. Id.
61 Id. at 454.
physical force to obtain confessions.\textsuperscript{62} This is true whether or not the threat is deceptive (that is, whether or not the officers actually intend to carry out the threat). In addition, promises about conditions of confinement or the nature of the charge are generally unacceptable, as are threats against third parties.\textsuperscript{63} Finally, any police deception that attempts to convince suspects to give up their constitutional right not to speak—for example, by lying about the substance of the right or by having government agents lie about who they actually are—is generally viewed as impermissible.\textsuperscript{64}

Thus, there is no single approach to regulating police deception under the constitutional voluntariness inquiry. While certain particularly coercive tactics will often be found to be per se unacceptable, the role of deception in the general voluntariness inquiry varies. Some courts barely consider deception as a separate factor and instead evaluate all of the other circumstances of the confession; some courts consider the deception as one relevant—though not overriding—consideration; and some courts forsake the balancing test altogether and instead judge coerciveness—including the coerciveness of deceptive tactics—based solely on intent.

\textbf{C. State Court Attempts to Regulate Deceptive Tactics}

While some deceptive tactics may be regarded (at least by some courts) as per se unacceptable, the more typical analysis is a totality of the circumstances balancing test that seeks to weigh all of the relevant factors to determine whether a confession was voluntary or not. Exactly how much weight particular deceptive tactics are given in this analysis will vary from court to court, and given the highly fact bound nature of any particular decision, police officers and lower

\textsuperscript{62} See Roppe, supra note 41, at 750.
\textsuperscript{64} \textit{Id.} at 46.
courts are hard-pressed to derive specific guidance or prophylactic rules from previous cases. To address this problem, some state courts have attempted to find brightline rules that diverge from the totality of the circumstances analysis but that provide clearer rules for police and courts to follow. In this section, I will discuss three such approaches—one that draws a distinction between fabricated evidence and deception about evidence; one that draws a distinction between intrinsic deception and extrinsic deception; and one that attempts to draw lines based on reliability.

To start, some courts have drawn a distinction between cases where police lie about the evidence that they have and cases where police actually manufacture fake evidence. For example, in State v. Cayward, the police prepared fake scientific reports that indicated that semen stains found on the victim’s underwear came from the suspect. After being shown the false reports, the suspect confessed. He then tried to have the confession suppressed on the basis of involuntariness. In ruling for the defendant, the court announced a per se rule that said that fabricating tangible documentation of physical evidence was impermissible. Although, at first glance reliability might appear to be the foundation for the court’s decision, the court’s reasoning was actually completely disconnected from the reliability issue. Instead, the court grounded its decision the fear that fake documents were accidentally introduced into court as real evidence, and fear of shattering the suspect’s and the public’s expectations about the interrogation process. Thus, given these justifications, it seems clear that this rule-while regulating police deception

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65 See White, supra note 38, at 597.
67 Id. at 972.
68 Id.
69 Id. at 973.
70 Id. at 974.
71 As further discussed in this article, it seems clear that manufacturing fake forensic reports that inculpate the suspect could easily lead an innocent suspect to rationally confess.
72 552 So. 2d at 974-75.
seemingly under the guise of voluntariness—is really founded on concerns about the integrity of trial and the public’s view of the police rather than on fears about the tactic producing involuntary confessions.

Conversely, other state courts have attempted to establish a distinction between “intrinsic” and “extrinsic” police deception. According to the leading case in this area, State v. Kelekolio, intrinsic deception is deception about the facts of the alleged offense, such as misrepresentations about the existence of incriminating evidence. Extrinsic deception, on the other hand, is deception that does not relate to the offense. Examples include promises about divine salvation; promises of mental health or hospital treatment in exchange for a confession; and misrepresentations of legal principles. In Kelekolio, the court both drew this distinction and also announced a *per se* rule banning any extrinsic deception. According to the court, extrinsic deception should be excluded because it is more likely “to procure an untrue statement or to influence an accused to make a confession regardless of guilt.” While this reasoning about coercion marks the case as clearly concerned with issues of voluntariness (unlike, for example, the court in Cayward), the end rule is, if not outright baffling, at least no more than tangentially related to any true reliability concerns. As I will discuss later, this court’s rule, when considered in combination with the psychological decision-making model built earlier, both excludes

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73 849 P.2d 58 (Haw. 1993).
74 *Id.* at 73.
75 *Id.* at 73–74.
76 *Id.* at 73. The court decided that intrinsic deception, on the other hand, would just be counted as one of the totality of circumstances surrounding the confession when determining whether the confession was voluntary. *Id.*
77 *Id.*
78 *See infra* Part IV.
79 *See supra* Part II.
techniques that are highly likely to produce reliable confessions and allows techniques likely to procure false confessions.

Finally, some state courts have tried to draw exclusion lines based on whether tactics are likely to produce false confessions.\textsuperscript{80} No state court has, however, laid out a comprehensive method for determining whether a particular tactic runs afoul of this test. Instead, courts generally make conclusory statements about whether a particular tactic is likely to make innocent suspects confess. For example, in \textit{State v. Jackson},\textsuperscript{81} the court encountered a case where the detectives employed a variety of deceptive tactics, including: (1) obtaining a knife identical to the murder weapon, putting blood and a thumb print on the knife, taking photos of it, and telling the defendant that his fingerprint matched the print on the knife;\textsuperscript{82} (2) telling the defendant that a witness had seen him running away from the victim’s apartment;\textsuperscript{83} (3) telling the defendant that his fingerprints had been found on a knife sharpener found at the scene of the crime and on a wooden post on the victim’s front porch;\textsuperscript{84} and (4) telling the defendant that a witness had seen him coming out the victim’s door carrying a knife.\textsuperscript{85} Although the court was highly concerned with the question of whether the resulting confession was reliable, it concluded—with little supporting analysis—that the techniques in question “were not such as were apt to make an innocent person confess.”\textsuperscript{86} As


\textsuperscript{81} 304 S.E.2d 134 (N.C. 1983).

\textsuperscript{82} \textit{Id.} at 137, 147.

\textsuperscript{83} \textit{Id.} at 138-39.

\textsuperscript{84} \textit{Id.} at 139.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 148. In addition, in a similar vein to the court in \textit{Kelekolio}, the court here declared that “[f]alse statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession.” \textit{Id.}
further discussed in this article, while the concern with reliability seems proper, the conclusion about these particular tactics is almost assuredly incorrect. In addition, the court’s conclusory reasoning and lack of substantial analysis makes it nearly impossible for police officers or lower courts to derive any guidance from the decision.

Therefore, state courts have reached outside the bounds of the constitutional voluntariness analysis to regulate deception in their own way. While some of their approaches seem properly motivated to exclude false confessions and some of their approaches provide clear, brightline guidance to police and lower courts, none of the courts have yet provided an approach that does both.

**IV. Applying The Decision-Making Model to Particular Deceptive Techniques**

In this Part, I will take the decision-making model that I developed earlier and apply it to various deceptive interrogation techniques that police officers may employ. I will focus on six such techniques: (1) ploys about what evidence the police will be able to obtain; (2) ploys about what evidence the police already have; (3) promises of leniency in exchange for confessions; (4) promises of other benefits beyond sentencing; (5) threats of harm unrelated to post-conviction imprisonment; and (6) minimization of the crime at issue. In so doing, I will investigate how each technique will affect the decision-making process of innocent and guilty suspects. The goal of this section is to develop clear, brightline, rules that speak to the possibility of different techniques engendering false confessions. Although the constitutional due process inquiry is not currently focused on reliability, given the apparent inclination of many state courts toward developing rules to exclude techniques likely to produce false confessions as well as the clear policy and moral

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87 See infra Sections IV.A-B.
88 See supra Section II.B.
89 See supra Section III.C.
considerations that militate toward avoiding false confessions.\textsuperscript{90} My hope is that there will be an appetite among police officers, courts, and scholars to move towards a reliability rule to supplement the procedurally-oriented application of the constitutional voluntariness standard.\textsuperscript{91}

\textsuperscript{90} Indeed, even the leading police interrogation manual explicitly warns against using techniques that could produce a false confession. See Inbau, supra note 9, at 217. What the manual lacks, however, are clear guidelines to help interrogators determine what may produce a false confession. In addition, the Federal Rules of Evidence may provide an easy, already-existing, way for the federal judiciary to police the reliability of confessions without additional intervention from the legislature or the Supreme Court. Rule 403 provides that courts may exclude evidence “if its probative value is substantially outweighed by a danger of” unfair prejudice (among other things). Fed. R. Evid. 403. Given the highly prejudicial value of confessions, see Leo & Ofshe, supra note 7, at 434, a judge who finds that a particular interrogation technique is likely to produce false confessions could also find that the probative value of confessions produced by that technique is substantially outweighed by the danger of unfair prejudice and so is excluded by Rule 403.

\textsuperscript{91} It is also important to note that \textit{per se} rules, rather than fact-specific balancing inquiries, are important for the judicial system to implement in this case. First, fact-specific balancing inquiries fail to provide useful future guidance because any given decision will be factbound. See supra Section III.C; see also White, supra note 38, at 597. Second, the totality of the circumstances test is difficult for courts to implement because the factfinding tools that courts have may make it nearly impossible to determine exactly the extent or quality of police pressure—or any particular individual’s response to that pressure—in a given case. See White, supra note 38, at 598 (citing Yale Kamisar, \textit{Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record}, 66 Geo. L.J. 209, 234-35 (1977)). In addition, even if a confession seems reliable in a particular case, developing brightline rules will deter misconduct against all suspects—including those who are innocent—in a way that \textit{post hoc}, individualized, inquiries may not. Cf. William J. Stuntz, \textit{Waiving Rights in Criminal Procedure}, 75 Va. L. Rev. 761, 766 (1989) (citing \textit{United States v. Leon}, 468 U.S. 897, 906 (1984)) (explaining that the good-faith exception to the exclusionary rule demonstrates that Fourth Amendment protections are meant to deter misconduct against innocent third parties). Finally, some commentators have, in recognition of the need for brightline rules, proposed banning police deception in interrogations outright. See, e.g., Miriam S. Gohara, \textit{A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques}, 33 Fordham Urb. L.J. 791, 835 (2006). Other commentators have proposed allowing all such deception (at least beyond deception about \textit{Miranda} rights or up to the point of the traditional, constitutional, inquiry) based on a perceived lack of false confessions. See, e.g., Miller, supra note 63, at 70; Slobogin, supra note 3, at 1287. As was discussed earlier, see \textit{supra} Part I, however, there is substantial evidence that false confessions do happen regularly—even if it is exceedingly difficult to quantify them in any precise way. At the same time, police deception may be important in obtaining confessions in at least some cases, see \textit{supra} Part I, and, as will be discussed infra Sections IV.A-F, there are deceptive techniques that may not pose an unacceptably high risk of false confessions. Given these competing considerations, a less strident rule that attempts to separate permissible from impermissible deception is prudent. Some commentators have recognized exactly this and have proposed rules based on reliability. See, e.g.,
A. The “We Will Have Evidence” Ploy

One ploy that detectives may use involves telling suspects in an interrogation that they have recovered physical evidence from the scene of the crime that will implicate the true perpetrator. For example, the detectives may say that they have found fingerprints or DNA evidence. The lies may become more and more elaborate, perhaps particularly in cases where the detectives have reason to believe that the true guilty party would know or suspect that he had not left traditionally-recoverable forensic evidence. Whatever the exact nature of the evidence described, however, the key feature of this ploy is that the evidence is not presented in a way that

Irina Khasin, Note, *Honesty in the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 Vand. J. Transnat’l L. 1029, 1055 (2009); George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 Tex. Tech. L. Rev. 1293, 1300 (2007). No commentator has, however, developed a clear analytical method to guide courts in determining whether specific practices tend to produce reliable or unreliable confessions. In addition, perhaps due to the lack of an explicit decision-making model to direct their approach, both Khasin and Thomas run into problems in their analysis. Khasin generally recognizes the dangers of the presentation of false evidence when compared with deception about future possible evidence, compare infra Section IV.A, with infra Section IV.B, but she argues that misrepresentations about culpability or false sympathy from officers will have no effect on innocent suspects. Khasin, supra, at 1038-43. This conclusion, while probably true in most cases, ignores the effect that diminishing $S_T$ and $S_C$ (even when diminishing them together) can have in the face of large potential interrogation and trial costs ($I$ and $T$). See infra Part IV.F. Thomas argues that deception about evidence is only problematic when it is combined with threats or promises of leniency. Thomas, supra, at 1299-1300. This, however, fails to account for the inherent stress of the interrogation or costs of trial ($I$ and $T$, in my model) as well as for any unstated (though not unreasonable) beliefs that a suspect has about leniency in return for a confession (that is to say, even if interrogators do not promise that $S_C$ will be lower than $S_T$, suspects may still believe that they will receive some leniency in return for a confession).

92 See, e.g., People v. Lee, 471 N.E.2d 567, 572 (Ill. App. Ct. 1984) (discussing the tactic of falsely telling suspects that fingerprints had been found at the scene of the crime).

93 There are stories, for example, of police telling suspects that they have recently started using new technologies to recover evidence that was unavailable before or, in at least one case, telling a suspect that the last image that the murder victim saw before dying would be imprinted on his retinas (and would be recoverable by police). Lawrence C. Marshall, Professor, Stanford Law Sch., Wrongful Convictions: Causes, Preventions, and Remedies Seminar (Apr. 9, 2015) (notes on file with author).
incriminates the suspect. Instead, the detectives tell the suspect that they have evidence that will reliably identify the guilty party.

This ploy is, by far, the most acceptable police deception from a reliability standpoint. Assuming that the suspect believes the detectives, his reaction will be based entirely on whether he is in fact guilty. A guilty suspect will have his $P_T$ increase nearly to 1, perhaps with some discounting if he believes, for example, that there is some possibility that the police are lying or that the forensic evidence will be contaminated before it can be tested. An innocent suspect, on the other hand, will have his $P_T$ decrease nearly to 0. Any fears that he may have had about being wrongfully convicted will almost entirely evaporate, as he knows that the forensic evidence will almost certainly exculpate him. In this way, the “we will have evidence” ploy is perfectly crafted to both make it more likely that guilty suspects will confess and also less likely that innocent suspects will. As such, under a reliability metric, this tactic should be permissible.\textsuperscript{94}

B. The “We Have Evidence” Ploy

Another common tactic, but one that produces substantially greater concerns, is the “we have evidence” ploy, where suspects are told that the police have evidence incriminating the particular suspect. For example, suspects may be told that eyewitnesses have identified them,\textsuperscript{95}

\textsuperscript{94} This tactic may also be combined with some promise of a slight benefit if the suspect confesses immediately. For example, the suspect may be told that this will be his last opportunity to tell his side of the story. Ofshe & Leo, \textit{supra} note 9, at 1061. While I will address promises of leniency and intangible benefits more below, see \textit{infra} Sections IV.C-D, promises of minor benefits combined with this particular ploy do not strike me as problematic. Because the “we will have evidence” ploy produces such a large gap between $P_C (= -1)$ and $P_T (= 0)$ for innocent suspects, minor potential benefits, even when combined with the stresses of interrogation or potential costs of trial, seem quite unlikely to tip the equation and convince an innocent suspect to confess. This appears particularly true when the benefits are intangible (like getting the chance to tell your side of the story) rather than explicit promises of sentencing leniency.

\textsuperscript{95} \textit{See, e.g.}, State v. Jackson, 304 S.E.2d 134, 138-39 (N.C. 1983).
that a co-suspect has confessed and incriminated the suspect,\textsuperscript{96} or that the police have found forensic evidence that links the suspect to the crime scene.\textsuperscript{97} In some cases, the police may engage in more elaborate ruses, such as subjecting the defendant to a fake lie detector test.\textsuperscript{98} In addition, it is common for officers-at least when using fake scientific tests or test results-to impress on the suspect how the test is highly reliable, if not infallible.\textsuperscript{99}

This ploy should be banned, as it may produce highly unreliable confessions. Like the “we will have evidence” ploy, it will raise a guilty suspect’s $P_T$ close to 1. Unlike that technique, however, it will also raise an innocent suspect’s $P_T$ (rather than lowering it to close to 0). The magnitude of the effect on an innocent suspect’s $P_T$ may vary depending on the exact nature of the deception that the officers employ, but it will inevitably increase it.\textsuperscript{100} Some commentators have argued that this type of deception is acceptable because it will not cause an innocent person to confess. Their reasoning is that, even if an innocent suspect thinks it is likely he will be found

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{96} See Ofshe & Leo, \textit{supra} note 9, at 1018-22 (describing this tactic as very common in cases where there are co-suspects).
\item \textsuperscript{97} See \textit{id}. at 1029; see also State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989) (describing police officers fabricating scientific reports indicating that semen stains found on victim’s underwear came from defendant); \textit{Jackson}, 304 S.E.2d at 139 (describing police officers telling defendant that they found his fingerprints on various items at the scene of the crime).
\item \textsuperscript{98} See Ofshe & Leo, \textit{supra} note 9, at 1037-38.
\item \textsuperscript{99} See \textit{id}.
\item \textsuperscript{100} How close $P_T$ gets to 1 for the innocent suspect will depend on how reliable he believes the test to be (or, to be more precise, on how reliable he thinks a jury will find the test to be). Thus, scientific ploys, such as telling the suspect that his fingerprints or DNA have been found at the crime scene, have a greater potential for inducing false confessions than ploys that provide, for example, fake eyewitness identifications. This effect, which we would expect based on the model, is borne out empirically, as observers have recognized that scientific ploys are much more likely than eyewitness ploys to produce confessions. \textit{Compare} Ofshe & Leo, \textit{supra} note 9, at 1017 (“Regardless of the validity of the alleged eyewitness evidence, a suspect can blunt its impact by insisting that the eyewitnesses are mistaken or lying.”), \textit{with id}. at 1023 (“Both the guilty and the innocent have a harder time explaining away evidence that is allegedly derived from scientific technologies.”)
\end{enumerate}
\end{footnotesize}
guilty, he will always prefer to take his chances at trial rather than confessing.\(^{101}\) Thus, these commentators argue, for false evidence ploys to cross the line and potentially produce unreliable confessions, they must be combined with some promise of leniency to tip the scales.\(^{102}\) This argument, however, is flawed, because it does not take into account two things. First, there may be significant costs to a suspect of going to trial or continuing an interrogation.\(^{103}\) Thus, if a suspect thinks it is almost certain that he will be found guilty anyway, he may wish to spare himself, for example, the continued stress of interrogation, the financial cost of a trial, or the shame (to himself or his family or friends) of a public trial. Second, suspects are weighing not just the probability that they will be found guilty but also the sentence that they will receive. Even if interrogators do not explicitly offer leniency in exchange for a confession, suspects may believe that they will receive some credit for cooperation. Because the key variable is the suspect’s perception of the likely sentence, this belief that the baseline value of \(S_C\) is lower than the baseline value of \(S_T\) may be enough to tip the scales when \(P_C\) and \(P_T\) are similar. Thus, false evidence ploys may, on their own, be enough to convince innocent suspects to confess. Given that reality, as well as the existence of a nearly-as-persuasive alternative (the “we will have evidence” ploy) that has a significantly lower chance of producing false confessions, false evidence ploys should be impermissible.

\(^{101}\) Though, of course, other commentators do not explicitly use the variables from the decision-making model employed here, this argument is equivalent to saying that, no matter how close \(P_T\) comes to 1, because \(P_C=1\), \(P_C>P_T\) and innocent suspects will not confess.

\(^{102}\) See, e.g., Thomas, supra note 91, at 1299. This background logic may also be motivating the intrinsic/extrinsic distinction found in some cases. See, e.g. State v. Kelekolio, 849 P.2d 58, 73 (Haw. 1993). If the court accepts the premise that false evidence ploys (intrinsic deception) will not produce false confessions without some benefit of leniency (extrinsic deception), then the decision to render extrinsic deception impermissible without banning intrinsic deception makes sense.

\(^{103}\) See supra Section II.B.
C. Promises of Leniency

Another ploy that interrogators may use is one of false promises of leniency. These promises may run from general assurances that the suspect’s cooperation will be considered in handling his case\(^{104}\) to explicit assertions “that the suspect will be charged with the most serious offense possible if he does not confess, but if he admits guilt, he will receive a lesser punishment.”\(^{105}\) The attempted effect of these promises on suspects’ decision-making process is clear: the interrogators wish to increase the difference between \(S_C\) and \(S_T\) in order to overcome the difference between \(P_C\) and \(P_T\).\(^{106}\) As a general matter, the effect of potential leniency is not entirely agnostic as to the suspect’s guilt. Because an innocent suspect will, as a general rule, have a much larger gap between \(P_C\) and \(P_T\) than a guilty suspect will at the start of the interrogation, minor promises of leniency will be much more likely to work on guilty suspects than on innocent suspects. On the other hand, because \(P_T\) is probably never quite 0 and because of the I and T (and potentially M, depending on the interrogation) costs, a large enough promise of leniency may well convince even innocent suspects to confess.\(^{107}\)

Unfortunately, there does not appear to be a reliable way to adequately separate promises of leniency that are likely to induce false confessions from those that are unlikely to do so, as much of the analysis would have to focus on each individual suspect’s expected costs of not confessing. These numbers are, of course, extraordinarily difficult—if not impossible—for an outside observer.

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\(^{104}\) See, e.g., United States v. Leon Guerrero, 847 F.2d 1363, 1365 (9th Cir. 1988).

\(^{105}\) Ofshe & Leo, supra note 9, at 1077.

\(^{106}\) This, of course, is why promises of leniency often work in combination with false evidence ploys. See supra Section IV.B. By narrowing the gap between \(P_T\) and \(P_C\), the false evidence ploy makes it easier for the leniency to tip the equation in favor of confessing.

\(^{107}\) As \(S_C\) goes to 0, so too does \(P_C*S_C\) (=the costs of confession). As long as the costs of not confessing (=\(P_T*S_T + I + T + M\)) are non-negligible, we would expect all suspects to confess once \(S_C\) gets close enough to 0.
to analyze in any given case. At the same time, promises of leniency may be very important tools for getting suspects to confess. Without them, it is highly unlikely that a suspect who has low costs of trial or interrogation\textsuperscript{108} will choose to confess.

In order to appreciate both the importance of leniency in getting suspects to confess and also the potential for leniency to induce false confessions, courts should adopt a rule prohibiting \textit{false} promises of leniency but allowing \textit{true} promises of leniency. Rather than attempting to impose an exact stopping point at which promises of leniency become impermissible, this rule would allow police officers and prosecutors to make determinations in each case about what they are willing to offer suspects in exchange for a confession. In addition, by forcing them to honor their promises, courts will, without having to review the specifics of each case, encourage interrogators to keep their promises relatively small (and so less likely to induce false confessions). Moreover, if we assume that the innocent suspect is rational, this rule would allow him to always choose the best course of action. Only he is able to accurately gauge his expected costs, particularly related to interrogation and trial,\textsuperscript{109} and forcing officers to keep their promises ensures that the suspect is acting on the best possible information in choosing a course of action.\textsuperscript{110}

\textsuperscript{108} Although no empirical evidence is presented to support this point, it appears quite intuitive that the individuals who will have the lowest costs of interrogation and trial—particularly when it comes to the stress and shame aspects of these costs—are precisely those individuals with extensive experience in the criminal justice system. Thus, promises of leniency may be especially necessary for convincing suspects with long criminal records to confess.

\textsuperscript{109} In addition, absent from this entire discussion has been an analysis of the risk aversion of individuals. Because they are comparing, on each side of the equation, a range of outcomes distributed according to some individualized probability function, each suspect’s level of risk aversion may become relevant as he decides whether to take the offered leniency or to take his chances at trial. This again militates in favor of a rule merely requiring officers to keep their promises, as the suspect is in the best position to determine his ideal course of action given his individual level of risk aversion.

\textsuperscript{110} There may be an additional discussion about whether we, as a judicial system or a society, are comfortable with a rule that recognizes (even if only implicitly) that it may be the best course of action for some innocent individuals to confess. However, it seems, however, as if the proper way
D. Promises of Benefits Beyond Sentencing

Another technique that interrogators may use is to promise some benefits beyond sentencing to individuals if they choose to confess. These promises may include intangible benefits such as assurances of divine salvation or of the personal benefits of a clean conscience, or they may include more tangible benefits like promises of hospital treatment or more favorable prison conditions in exchange for a confession.111 As with evidence ploys, these promises can be separated into two categories: those that work differently on innocent and guilty suspects (like “we will have evidence”) and those that do not (like “we have evidence”). The former group includes promises about divine salvation or the clearing of the suspect’s conscience. For an innocent suspect, they should have no effect.112 For a guilty suspect, however, they may reduce the costs of confession (of M, in particular) by reminding the suspect of some external benefit that he will receive if he confesses. The latter group includes promises of better conditions of incarceration or hospital treatment. For both guilty and innocent suspects, they should reduce the costs of confession.113

112 If anything, they may increase the costs of confession, if indirectly, by reminding suspects about the harms—either to themselves or to their prospects of salvation—of lying. This could be seen as decreasing the M for innocent suspects and making confession less likely.
113 Where exactly the reduction in costs comes into the model depends on the exact promise. A promise for better conditions of incarceration works into SC and ST by promising suspects that their prison sentence will be better—if not shorter—if they confess. Promises about, for example, hospital treatment, may work into M for both groups. It may be important to note that any changes in SC and ST are scaled by PC and PT. As such, for a guilty suspect, promises (for example) of better conditions of confinement may have a greater impact, as he is more likely to suffer the worse
While courts have often taken a stance against all such promises, a better approach would attempt to separate out the promises into the two groups mentioned above. Those promises in the first group, then, would be allowed (just like the “we will have evidence” ploy) while those promises in the second group would be prohibited (just like the “we have evidence” ploy). While this article cannot cover every potential promise and separate them into the two groups, the analysis above should serve as a good guide to approaching each new promise. Thus, courts should allow those promises of benefits that operate more like the “we will have evidence” ploy but should not allow promises that operate more like the “we have evidence” ploy.

E. Threats of External Harm

Another technique that officers may engage in is threatening some sort of external (that is, outside of the sentencing or imprisonment process) harm to suspects if they do not confess. While this harm could, of course, take a nearly infinite number of forms, two examples drawn from real cases are (1) telling a suspect that he will lose custody of his children or welfare benefits if he does not confess and (2) threatening a larger sentence. The general operation of the promise, however, is the same, even if the magnitude may differ.

114 See, e.g., Kelekolio, 849 P.2d at 73-74.
115 The reason I group these promises with the “we have evidence” ploy and prohibit them rather than grouping them with promises of leniency and allowing them (but forcing officers to abide by them) is that these promises strike me as having the potential to combine promise and impermissible threat in a way that the leniency promises do not (of course, the flip-side of leniency promises is a threat of a larger sentence, but threatening a statutorily permissible sentence does not seem to be particularly impermissible). For example, promising suspects that they will receive the hospital treatment they need—if—and only if—they confess impermissibly threatens the withholding of necessary hospital treatment if a suspect does not confess. In addition to being impermissible to threaten the withholding of it, the treatment would also be impermissible because it was withheld. As a result, the suspect is not being given proper information to make his cost/benefit analysis like he is in the promises-of-leniency context. If a court wished to be even more nuanced, however, and separate these promises of additional benefits into three groups—those that resemble “we will have evidence,” those that resemble “we have evidence,” and those that resemble promises of leniency—and treat them accordingly, I would not object to that approach.
not confess;\textsuperscript{116} and (2) having a suspect’s police-officer friend tell the suspect that he might be fired from the department if the suspect does not confess.\textsuperscript{117} Conceptually, it also makes sense to include threats of physical harm to the suspect (or any third party) if he does not confess in this Section.\textsuperscript{118}

These techniques could all credibly induce false confessions. Because they are not about considerations of guilt—or of post-conviction treatment—they operate entirely outside of $P_T$, $P_C$, $S_T$, and $S_C$; instead, they operate on M. Not only is their effect independent of a suspect’s knowledge of his own guilty or innocence, the effect is not even scaled based on such knowledge (as for example, the effect of promises of leniency at sentencing is). With the acknowledgement that, like promises of leniency, minor threats of external harm may be more likely to work on guilty suspects (because the $P_T/P_C$ gap that must be overcome is smaller), there seems to be almost no justification for allowing this type of deception.\textsuperscript{119} Thus, courts should prohibit all threats of external harm.

\textbf{F. Minimization Technique}

Finally, some interrogators may engage in a “minimization technique,” where they provide explanations for the crime that reduce the moral or legal culpability of the suspect. For example, they may suggest that the suspect acted in self-defense\textsuperscript{120} or was otherwise provoked.\textsuperscript{121} They may also misinform the suspect about the result of the crime—for example, by falsely telling him that

\begin{itemize}
  \item \textsuperscript{116} See Lynumn v. Illinois, 372 U.S. 528, 531 (1963).
  \item \textsuperscript{117} See Spano v. New York, 360 U.S. 315, 323 (1959).
  \item \textsuperscript{119} Of course, true physical harm or other coercive threats are already clearly covered by the constitutional voluntariness inquiry. See, e.g., Brown v. Mississippi, 297 U.S. 278, 286 (1936).
  \item \textsuperscript{120} See Young, supra note 24, at 430-31.
  \item \textsuperscript{121} See Frazier v. Cupp, 394 U.S. 731, 737 (1969) (holding that an interrogation where the officers suggested that the victim had made homosexual advances to the suspect was not coercive).
\end{itemize}
the victim is still alive.\textsuperscript{122} On an instrumental level, this technique operates much like promises of leniency—by reducing the seriousness of the offense, the officers make the suspect believe that $S_C$ and $S_T$ are lower than they actually are.\textsuperscript{123} Like the leniency technique, the minimization technique may induce false confessions—by driving $S_C$ and $S_T$ low enough, the technique may convince the innocent suspect that taking the (quite low) punishment associated with confessing will be preferable to enduring interrogation and trial, even if they are ultimately acquitted.\textsuperscript{124} Unlike leniency, however, minimization is a bit harder to regulate in a split-the-difference way, as it may not involve interrogators explicitly offering promises that they can then be forced to keep. Thus, given the potential for false confessions along with the practical inability to provide more nuanced regulations, courts should prohibit the minimization technique.

\textbf{V. Conclusion}

This article used psychological information that comes from observation of police interrogations to build a decision-making model to approximate the approach of suspects—both guilty and innocent—to determining whether or not to confess during an interrogation. Using this model, this article analyzed a variety of deceptive interrogation tactics to determine what effect they may have on both innocent and guilty suspects in an attempt to develop \textit{per se} rules for

\textsuperscript{122} See Young, \textit{supra} note 24, at 430-31.

\textsuperscript{123} The instrumental difference between this technique and the leniency technique is that leniency seeks to produce a gap between $S_T$ and $S_C$ to overcome the reverse gap in $P_T$ and $P_C$. This technique, on the other hand, reduces both $S_T$ and $S_C$. The effect, however, is to reduce the gap between $P_T*S_T$ and $P_C*S_C$, potentially allowing the other costs involved—I, T, and M—to overcome the gap.

\textsuperscript{124} In fact, in some cases, the technique may be used to convince suspects that they will be allowed to go home as soon as they confess. This is particularly true if the officer is suggesting a version of the crime that the suspect believes will result in no—as opposed to merely diminished—legal culpability (for example, self-defense). If $S_C$ and $S_T=0$, then the confession/no-confession equation reduces to the suspect confessing when $0<(0 + I + T + M)$. Assuming that continued interrogation and trial will come with \textit{some} additional costs, it is always going to be rational for an innocent suspect to confess when he believes that the confession will come with no punishment.
interrogations that are focused on the ability of tactics to produce reliable confessions. While these rules do not fit neatly under the constitutional voluntariness inquiry that the Supreme Court has developed to regulate the admissibility of confessions under due process, they do fit in with the approaches taken by a variety of state courts, police officers, and scholars.

While this article was, naturally, unable to analyze every potential deceptive interrogation technique, the approach outlined and employed here can be applied to a wide variety of techniques as courts or officers encounter them. Indeed, while this article is focused on police deception, the decision-making model is one that could apply just as well to evaluate expected responses to any interrogation technique. As such, it is my hope that along with the specific conclusions drawn about particular practices, this article will also serve as a guide for additional research into the potential consequences of interrogative techniques.
BULLYING – IT’S NOT JUST ABOUT THE CHILDREN:
AN OVERVIEW TO WHY CURRENT POLICIES ARE
INEFFECTIVE AND SUGGESTIONS TO EVOLVE BEYOND
SCHOOLYARD SOLUTIONS

Grainne M. Callan 1

Part I. INTRODUCTION

Google the word “bully” on the Internet, approximately 117,000,000 results show
in less than 1 second. Adding a search qualifier for college campuses, the results drop to
less than six million. Change the qualifier to “graduate schools,” that number decreases
further to 526,000, while the phrase workplace bullying increases to 2.63 million.

Contrast this with a search for the word “bully” in California statutes to find only
38 laws. A significant majority of those laws apply to K-12 schools with only one
touching higher education. Further, none of these laws address workplace bullying,
despite 93% of adult Americans supporting such a law. 2

Since the majority of resources on bullying focus on situations involving minor
children, this article will discuss how to expand those narrow uses to include adults
where applicable in an attempt to address the holes where bullies are protected and
fostered more so than their victims. When society recognizes that bullying is a collective
problem to be taken seriously regardless of the ages of the bullies or their victims and

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1 J.D., Lincoln Law School of San Jose, 2016; M.S. University of Wisconsin –
Milwaukee; B.A. American University. Grainne Callan thanks the editors of Lincoln Law
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2 THE HEALTHY WORKPLACE BILL (JUL. 14, 2014, 3:00 AM),
http://healthyworkplacebill.org/workplace-bullying-support-for-u-s-laws/
stops addressing bullying solely as child’s play, only then bullying will be effectively eradicated.

Bullying behavior is a power-struggle. The US Government defines bullying as “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance.”\(^3\) (emphasis added) Although a bullying incident may happen only once, this paper is focusing on the repeated bullying behavior that occurs over time. In order to be considered bullying, the aggressive behavior includes using the bully’s power source such as physical strength, access to embarrassing information, or popularity—to control or harm others.\(^4\) Even though power imbalances can change over time they can still involve the same people and the same bullying dynamics and kids who are bullied may have serious lasting problems.\(^5\)

There is no need for the federal government to limit their definition to school-aged children as adult bullies also engage in many forms of power struggle. Other crimes involving power struggles include rape, sexual assault, domestic abuse, child abuse, elder abuse, and animal abuse. One definition for abuse from Black’s Law Dictionary is “physical or mental maltreatment.”\(^6\) Although the mental component is a separate and distinct element, it is not pursued with the same enthusiasm by prosecutors as physical elements. The sad truth is most of these other crimes also include physical acts which makes confirmation of the assault easier to see and subsequently convictions easier to obtain.

\(^3\)What Is Bullying - Definition, STOPBULLYING.GOV, \url{http://www.stopbullying.gov/what-is-bullying/definition/} (last visited Apr. 28, 2016)
\(^4\)\textit{Id.}
\(^5\)\textit{Id.}
\(^6\) Black’s Law Dictionary 10 (5th ed. 1979)
California Education Code § 48900 specifically defines and addresses bullying behavior as “any severe or pervasive physical or verbal act or conduct that has or can be reasonably predicted to have the effect of one or more of the following:

(A) placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property;

(B) causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health;

(C) causing a reasonable pupil to experience substantial interference with his or her academic performance;

(D) causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

California states that the consequence of such behavior for K-12 students can include suspension or expulsion. The same definition for bullying in the statute can be applied towards college students and graduate school students. This definition can easily be modified for the workplace as well, simply replacing the term pupil with co-worker.

Damages inflicted by bullying can include both physical and psychological symptoms that stay with the victim even long after the bullying terminates. The torment inflicted by a bully can manifest itself with complaints to include headaches, digestive problems, depression, anxiety, sleep disturbances and poor performance at school. Again, the school qualifier in describing damages can be modified to include the workplace without losing the core understanding.

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7 Cal. Educ. Code §48900
Even though bullying should not be considered a normal right of passage, too often bullying antics are dismissed by adults with colloquialisms like “boys will be boys” or romanticized by “the indiscretions of youth.” As a population grows up and survives abusive acts, those who previously failed to protect victims of bullying tend to rewrite the abrasiveness of others in a softer light, which is one of the reasons bullying has lasted as long as it has as a fringe form of acceptable behavior. Bullies do not stop being bullies simply because they graduate high school as if they can simply drop off their offensive conduct as they pick up their diploma.

Part II. ADDRESSING THE ISSUE

A. Federal law

Currently there are no federal laws that directly tackle bullying, either in schools or the workplace. Schools that receive federal funding however are required by federal law to address discrimination on a number of different personal characteristics. The general consensus is that the public is protected via laws covering harassment, discrimination, and other laws that extend to any physical injuries. Nonetheless, the federal government has made funds available to schools in an attempt to combat bullying provided school districts list an anti-bullying policy and include it on their web sites. But there appears to be no requirement as to how effective a policy must be or what specific actions must be taken to receive the funds. For example, there is no incentive for reducing bullying victims or increasing bullying reports so the behavior can properly be

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addressed. Further, as federal funds decrease due to budgeting woes, the limited programs addressing bullying are likely to be cut.\(^{10}\)

**B. Lack of reporting**

With these half-hearted efforts, bullying incidents continue to grow in occurrence while reporting declines. One study reveals that one out of every four students report being bullied during the school year\(^{11}\) with more than 65% not reporting it.\(^{12}\) The number of victims increases significantly if cyber-bullying is included.\(^{13}\) Another study claims that bullying affects nearly one in three American school children in grades six through ten.\(^{14}\) While these teens were bullied in K-12, another study reveals 42% of college students reported seeing someone bullied by another student.\(^{15}\) Almost 15% of students reported seeing a professor bully a student.\(^{16}\) In a 2014 Survey by the Workplace Bullying Institute, 27% of adults are being bullied in the workplace.\(^{17}\) The college and workplace surveys will be discussed later in this paper.


\(^{12}\) *Study Finds Most Bullying Not Reported*, EDUCATION DEVELOPMENT CENTER, INC. (Aug. 31, 2010), <https://www.edc.org/newsroom/press_releases/study_finds_most_bullying_not_reported_reporting_more_likely_when_physical>.


\(^{16}\) Id.

\(^{17}\) NOBULLYING.COM, *supra* note 13.
The Education Development Center, a nonprofit research and development organization, draws the conclusion that schools cannot address problems they do not know about to explain the lack of decline in bullying instances. Since nearly 70% of students think schools respond poorly to bullying, an alternative reasoning is the more experienced a victim becomes, the less consequences he sees applied to a bully, the less likely the victim is to report the offending behavior so as to not draw any further ire from the bully.

And as the bullies grow older, they grow bolder in their behavior. Bullies often go on to perpetrate violence later in life with 40% of boys identified as bullies in grades 6 through 9 having had three or more arrests by age 30. The stakes get even higher for the victims. Victims of bullying on college campuses result in dropping out of school or even suicides. With workplace bullies the stakes are as high and are further compounded as victims lose their jobs, their homes and their families. In addition, to suffering at the hands of the bully, adult victims are further ostracized in society with wails of “why can’t you just get along?” or “you must have done something to provoke it.”

While bullying is loathsome in all circumstances, there is something empowering when a victim is stands up to the attackers and receives support from the community. It is almost endearing to see a child who is being bullied suddenly protected by a motorcycle gang going or coming from elementary or middle school. A story like that gets hundreds

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18 **EDUCATION DEVELOPMENT CENTER, INC.**, *supra* note 11
19 **NOBULLYING.COM**, *supra* note 13
20 *Id.*
of thousands of likes on Facebook. But try that at a college campus, law school or workplace – and suddenly the victim is viewed as a crazy person and unable to solve his own problems.

C. Public response to bullying

The public resonates with an anti-bully sentiment. In 2012 a K-12 bullying incident took place in Greece, NY where four teen-age boys bullied a 63-year old grandmother, Karen Klein, and videotaped it. It evokes one response when reading the slurs these kids said to her: “fat ass”, “bitch”, “ugly”, “no wonder your kid killed himself” and another when hearing these tormentors hurling these unwarranted insults at her over and over, which resulted in her breaking down in tears. These ruffians posted the video on-line probably expecting praise from their peers but instead the backlash was almost instantaneous as the video struck a nerve with the public that wants to see bullying stopped.

One viewer started an Indiegogo fund to give Mrs. Klein a vacation and within days more than $700,000 was raised. Mrs. Klein was interviewed by CNN’s Anderson Cooper where she was read the apologies of two of her tormentors. She said she did not believe a word that was written.

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21 Kimberly Yam, After 5-Year-Old with Disability Was Bullied, These Bikers Had Her Back, HUFFINGTON POST (June 1, 2015, 6:09 PM), http://www.huffingtonpost.com/2015/06/01/the-punishers-bully-victim_n_7485382.html
22 Making the Bus Monitor Cry, YOUTUBE (Jun. 19, 2012) https://www.youtube.com/watch?v=i93wAqnPQwk
24 Karen Klein Anderson 360 Interview, YOUTUBE (Jun. 21, 2012) https://www.youtube.com/watch?v=xv0iLG6Z7UE&nohtml5=False
Fast forward to less than three years later when allegedly one of these same tormentors was involved in another bullying incident forcing a special needs student to hold his crotch and drink urine.25 The persecutor did learn an important lesson after the Klein incident however and this time uploaded the video to a platform that automatically deletes the video after viewing.

Greece Central School District has a policy on bullying and this is what is posted on its web page:

The Greece Central School district is committed to providing students a safe learning environment that respects the dignity of all. Greece schools are continuing the multi-year implementation of a K-12 Positive Behavioral Interventions and Supports (PBIS) approach. PBIS enables school staff to utilize data to monitor and intervene to reduce challenging behavior. The approach also helps staff to recognize and acknowledge students' positive behavior. 26

Yet, there is nothing about punishment or consequences offenders will face. It would appear that having a policy did nothing to prevent the disabled student from being victimized and nothing to stop an alleged bully from being a repeat offender.

The public as a whole is fed up with bullies but in many ways is ill-equipped to effectively address bullying behavior.

D. Bullying bullies as a way of dealing with the issue

There is a difference between conflict and bullying. Conflict occurs when there is a disagreement or difference of opinion and is usually an inevitable part of a group

Bullying occurs when one has to put down another in order to gain his or her strength. Appropriate conflict resolution or mediation is a skill set that can be learned in order to address difficult situations – including bullying. This is not always easily done.

Along the lines of monkey-see-monkey-do, unfortunately many ironically resort to bullying behavior to address bullying situations. Oftentimes when a bullying incident is reported, peoples’ comments are along the sentiment of “Just give me five minutes with the offender, I’d’ve taught him a lesson.” Right there is a bullying statement with the speaker potentially unaware of his own bullying offense or how easy it is to resort to that lowest form of behavior. The danger of this is that the bullying behavior seeps into our psyche and feeds on itself where bullying behavior is and then becomes justifiable in certain situations or attempted dismissals with a “I didn’t mean it that way” rationale.

A recent video that went viral shows a mother calling her child out for a bullying incident at her child’s school.28 The video starts by the mother asking the child “where is the letter at?” and the child walks to the front of the room with her backpack and you hear the mother say “and do it right or you’re going to get embarrassed in front of your whole class.”29 Meanwhile, the video is focused on the child and not the mother. It becomes clear that this young girl is already embarrassed in front of her classmates and as a result of the posting, a much larger audience as this video has been viewed almost 500,000 times.30 The mother simultaneously empowers and demeans her daughter. The mom

29 Id.
30 Id.
acknowledges that her daughter is her own person and knows how to say no. At the same time the mom is clearly using her position of power as an authority figure to force her daughter to do something she does not want to do. This girl had allegedly bullied a classmate due to peer pressure. The mother demands her daughter apologize and “mean it sincerely” while not grasping that anyone who is forced to apologize never means it sincerely. Instead of helping her daughter to understand why she should apologize and how to come from a place of sincerity to correct any harm caused, the mother used bullying tactics to diminish her daughter ironically for bullying. The fact that this mother addressed the behavior straight on and did not permit her daughter to get away with destructive behavior is respectable, however the damage she may have caused her daughter may include the daughter becoming a shrewder bully.

One commenter, Linda Walton, revealed this retrospect:

There was an instant in my youth when I hurled a very hurtful and mean thing at a classmate in front of a crowd about the poor condition of her house. No blows were exchanged but it was, as it turned out, a most vulnerable and painful matter for her. I know this because when we returned to school that afternoon, her mother furiously overwhelmed me and proceeded to dress me down in front of everybody. I could not respond, one out of fear and number two, this was an adult who I feared was about to slap the sxxt out (sic) me. Lesson learned at the tender age of 9, my words had the power to hurt and wound deeply. That said an (sic) in retrospect and as a parent, I think it was wrong for a grown person to step to a child in manner. This parent, having the power, became the bully.

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31 Id.
32 Id.
Linda points out how bullying can be very confusing when one uses bullying to stop bullying instead of truly empowering those involved to learn better so that they can do better.

A brilliant example of how to effectively address an unintended bullying experience occurred in October 2015 when a four-year old girl in Ohio was brought to the hospital to get stitches on her face after a male classmate accidentally struck her with a metal object. As this young girl was being checked into the hospital and in tears, the young male at the registration desk made the comment, “I bet he likes you” not realizing the danger in his words. Although the incident did not initially stem from a bullying experience as it was truly an accident, the response of the “professional” at the hospital dismissing the seriousness of the injury demonstrates how seemingly innocuous comments trivialize assaults and up-play the power of the bully. Ironically, when checking in, the mom was given a pamphlet on domestic violence without realizing the disconnect in providing assistance to a victim while simultaneously complimenting harmful behavior. The mom’s response in educating the hospital and clerk on why the behavior was inappropriate directly addressed the offending message that “Love Hurts” as an unacceptable message without demeaning the clerk, the hospital, or even the

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35 *Id.*
classmate in the process. She did not gloss over the valuable life lesson she wants her
daughter to know about acceptable demonstrations of affection.\textsuperscript{36}

\textbf{E. Stop the bully or stop the victim?}

One issue for many victims of bullying is they are often advised to adjust their
behavior so as to not further antagonize the bully. One problem with this advice is that
the victim’s behavior most likely has nothing to do with what provokes the bully since it
stems from the bully’s internal struggle. Further, this advice may not play out well when
other dynamics are involved such as group bullying. Instead of focusing on teaching
victims to modify their behavior, the root cause is what needs to be addressed. The root
cause is the bully.

Bullies can be very smart and strategic in their attacks. Bullies can push far
enough to where their behavior causes minimal damage each time but over time the
cumulative effect creates a pressure cooker where the victim finally explodes in
retaliation.

In schools, victims are retaliating against their attackers in violent ways, similar to
the burning bed syndrome for domestic abuse victims. Although it appears that the
government may be minimizing the seriousness of this possibility saying “A very small
number of bullied children might retaliate through extremely violent measures. In 12 of
15 school shooting cases in the 1990s, the shooters had a history of being bullied.”\textsuperscript{37}

\textsuperscript{36} Merritt Smith, \textit{Official Statement Regarding Facebook Post}, FACEBOOK, (Oct. 14, 2015, 5:03 AM),
\textsuperscript{37} \textit{Effects of Bullying}, STOPBULLYING.GOV, http://www.stopbullying.gov/at-risk/effects/ (last visited Apr. 28, 2016)
In other words, in the 90’s 80% of school-shooting cases were committed by victims of bullying.

One of the more infamous situations involving possible victims fighting back occurred in the Columbine shootings, where Eric Harris and Dylan Klebold allegedly decided enough was enough and launched a deadly rampage killing 13 and injuring 24 others. Although there is now debate whether Harris and Klebold were (and if so to what extent) actually bullied. Regardless their actions were literally overkill.

Ironically, when a victim strikes back the victim is the one usually charged with a crime despite the original offender getting away with often repeated tortious-like behavior. The difference can be that each incident of bullying behavior by itself does not reach a level protected by law and a victim’s response may. But if the law had an aggregate component, then victims would be more effective in fighting back – legally.

If the policies focused more on addressing or eliminating the bullying behaviors rather than victim minimization, maybe bullying would decline. When dealing with incidents involving adults, society tends to focus too much on how the victim invited the altercation, rather than hold the bullies accountable for their actions, almost as a way to make sense of the senseless violence. One area this is repeatedly demonstrated is rape cases where the defense will assert that the victim asked for it by the clothes she was wearing or if she was consuming alcohol. Not one rape statute will list a victim’s clothing or alcohol consumption as an element to committing the crime. Further, clothing and consumption are not affirmative defenses either.

Part III. VIDEOTAPING BACKFIRES

With the ease and plethora of recording devices today, more and more bullying incidents are being recorded and society is beginning to demand change. It is no longer a “he said she said” scenario – but rather being scene as true assaults. When one is physically injured, outsiders can sympathize because they can “see” where it hurts. But with bullying acts, the harm can be more subtle. It is a mind-game and the damage, while there, can be illusive. When the bullying incidents are recorded in a manner where an uninvolved third party can experience first-hand the humiliation and abuse, it no longer becomes a “words will never hurt me” understanding. When the assault is witnessed in this manner, empathy evolves to the pain felt. Further damages stem from adults committing suicide and communities being ripped apart as reactions to bullying.

Bullies post their “triumphs” on the Internet as status symbols of their prowess. Many of these students do not realize that it also reveals crimes they have committed. The repercussions can be significant and most likely are not exactly what the bullies expect. Much to a bully’s surprise, society does not view the bullies as people to be admired but rather aggressors who should be punished. One recent example occurred January 27, 2016, where four female students in Philadelphia attacked Mia Chanel DeJesus. The bullies posted their trophy video to the Internet showing them pulling Mia by her hair, punching and kicking her. Mia went to the school with the video and the

39 PAMELA LUTKEN-SANDVIK, ADULT BULLYING-A NASTY PIECE OF WORK: TRANSLATING A DECADE OF RESEARCH ON NON-SEXUAL HARASSMENT, PSYCHOLOGICAL TERROR, MOBBING, AND EMOTIONAL ABUSE ON THE JOB; 4919 (ORCM ACADEMIC PRESS, 2013)
32 Alfred Ng, Philadelphia Teen Turns Tormenting Clip of Beatdown Against the Four Bullies That Attacked Her, Uses it to Spread Positive Message, NY DAILY NEWS, (Feb.
school refused to take action, calling it a “neighborhood dispute” and said they could not pursue the attackers despite having clear evidence of the physical assault. Mia then reposted her aggressors’ video with a voice-over explaining how she was attacked and asking “why isn’t bullying a criminal act?” Eventually the assailants were expelled.

Meanwhile, the Philadelphia School District has an anti-bullying policy in place with several methods to report bullying in a variety of languages, but it appears that the school authorities do not know how to recognize bullying when it occurs. Although the school district does list consequences of bullying deep in the pages of its web site, they make it cumbersome to discover. Further, the school took action only after it was pressured through the victim’s viral video. With a victim having to get a video to go viral in order to hold her abusers accountable, it is no wonder that more incidents of bullying is not reported.

Resorting to this trial by public opinion results in the loss of control by the administration and thereby reduces the effectiveness of any bullying policy which in turn results in fewer reports. Merely having a policy and not identifying the behavior or pursuing the offenders continues to have an impact in the continuation of bullying and confusion for its victims.

Part IV. COLLEGE/GRAD-SCHOOL BULLYING


Ng, supra note 32.

The one law in California addressing postsecondary education is *Cal. Educ. Code* § 66302.

The Trustees of the California State University, the Regents of the University of California, and the governing board of each community college district are requested to adopt and publish policies on harassment, intimidation, and bullying to be included within the rules and regulations governing student behavior within their respective segments of public postsecondary education. It is the intent of the Legislature that rules and regulations governing student conduct be published, at a minimum, on the Internet Web site of each public postsecondary educational campus and as part of any printed material covering those rules and regulations within the respective public postsecondary education systems.

Congratulations. California can now collect its federal funds. But how effective is simply having a policy? It is not as if bullying does not occur within institutions of higher learning.

In 2011, Indiana University Professors Bridget Roberts-Pittman and Christine MacDonald noticed that there were several studies on elementary, junior high, high school and the work place bullies but nothing on colleges.\(^\text{44}\) Asking if there was any difference in maturity between an 18-year-old high school senior and an 18-year-old college freshman to show that bullying and cyberbullying do not end with high school. Four years later while doing the research for this paper, there is still a dearth of college studies and even less on graduate schools. This is not to say that bullying does not exist beyond high school.

College bullying is often erroneously redefined as hazing.\(^\text{45}\) Hazing, while closely related to bullying is more about those trying to be included in something and earning

\(^{44}\) INDENIA STATE.EDU, *supra* note 14.
their place and seek out their tormentors. Hazing, while also an unacceptable behavior and a power struggle, is not the focus of this paper. Bullying is more about singling someone out and excluding them. The bully wants to keep someone down and out.

## College Bullying Cases

Tyler Clementi, an 18-year-old freshman at Rutgers University in New Jersey, leapt to his death from atop the George Washington Bridge in New York on September 22, 2010.46 Clementi’s roommate, Dharun Ravi and fellow student Molly Wei, used a web-cam to spy on Clementi kissing another male and then shared the images with others. Ravi assumed the next time his roommate asked for alone time in the room that Clementi was going to engage in sexual activities with this man and Ravi planned to stream it live. Clementi found out and asked for a room transfer which never materialized before his death.

Ravi’s lawyers tried to portray Ravi’s malicious behavior as acceptable because he was “just a kid” who did not intend to hurt his roommate and that prosecutors were trying to criminalize “simple boorish behavior.”47 Ravi’s attorneys unwittingly demonstrate why laws with more teeth are needed for bullying crimes. The dismissiveness towards the impact of their client’s hateful behavior adds insult to the injuries. The bullies should not be permitted bully their victims and then decide how their behavior should be viewed. Ravi was ultimately convicted, not for bullying or for the

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47 *Id.*
death of his roommate but for invasion of privacy, bias intimidation, witness tampering and more.\textsuperscript{48}

Another incident resulting in the self-inflicted death of a bullied college student occurred in November 2015. Jacob Marberger was a Washington College student active in the Student Government Association (SGA) and his fraternity.\textsuperscript{49} He reported fellow SGA members for texting inappropriate sexual comments about a woman in SGA.\textsuperscript{50} Those students were disciplined by the school’s administration. One of the disciplined students played on the same sports team as and were friends with some of Jacob’s fraternity brothers.\textsuperscript{51} Those brothers were upset that Jacob had chosen not to resolve the situation via the fraternity instead following the school’s policy on bullying. The brothers then embarked on a new bullying campaign targeting Jacob.\textsuperscript{52} People that Jacob thought were friends, his fraternity brothers, quickly morphed into hateful instigators. Hi-jinx such as putting a trashcan full of water against Jacob’s door so it spilled into his room and trash-talking about him on a web-site which allows anonymous postings contributed to a downward spiral which ultimately resulted in Jacob’s suicide.\textsuperscript{53} As for the students

\textsuperscript{48} NEW YORK TIMES (last updated Mar. 16, 2012), http://www.nytimes.com/topic/person/tyler-clementi
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Laura McCrystal, \textit{Bullying on Social Media Targeted After Pennsylvania College Student’s Suicide}, \textbf{READING EAGLE}, (Nov. 28, 2015, 1:47 PM) http://www.readingeagle.com/ap/article/bullying-on-social-media-targeted-after-pennsylvania-college-students-suicide#sthash.Z6kG4d5O.dpuf
who participated in Jacob’s torment, they get to continue living their lives without any repercussions.

**Part V. WORKPLACE BULLYING**

Sad as it is when bullying occurs in the school yard, the victim is usually a sympathetic child with frailties, and adults are hardwired to protect those that are smaller. Society has feelings of empathy towards those being harassed and will come together to prevent its reoccurrence. But when bullying occurs in the workplace, as the victim is typically another adult, those feelings of empathy tend to disappear and are replaced with feelings of annoyance, gratitude to not be the target, or schadenfreude. Often the victims are blamed for their own abuse.\(^{54}\)

With workplace bullying harming nearly 40% of US working adults in any given six-month period, it is not a rare or occasional occurrence. Adult bullies are far more astutely strategic than children, more likely to use indirect aggression because indirect is easy to deny and are excellent at managing up – appearing completely innocent to upper-managers or other organizational authorities.\(^{55}\)

Without appropriate legal repercussions to address it, workplace bullying has been increasing at an alarming rate. A 2014 survey commissioned by the Workplace Bullying Institute (WBI) reveals the following statistics:\(^{56}\)

- At their work, 27% of employees have directly experienced abusive conduct with 21% who witnessed it.
- 69% of workplace bullies are men with 60% bullying victims being women. What makes it worse is that women bullies pick on other women 68% of the time.

\(^{54}\)LUTKEN-SANDBVIK, supra.
\(^{55}\)Id.
\(^{56}\)NOBULLYING.COM, supra note 13.
• Workplace bullying statistics ranked the highest with Hispanic employees (56.9%) followed by African Americans (54.1%) and lastly Asians (52.8%).
• 56% of bullies are bosses.
• Less than 20% of American employers take action to stop workplace bullying.

Currently federal law only protects individuals who are bullied if they are within a Title VII of the Civil Rights Act of 1964 protected class.\(^{57}\) Despite bullying reaching epidemic numbers, unless you are a victim fortunate enough to be tormented regarding a Title VII protected class (sex, race, color, national origin or religion), you are unlikely to receive protection in the Federal Courts, as bullying is not illegal. Although the California Fair Employment and Housing Act extends the protections to include gender identity and expression, disability, age (over 40) and marital status,\(^{58}\) this is still not enough. If a person harms another through bullying the victim needs a forum where he can hold that person accountable so as to not resort to self-help methods which can cause more harm.

**A. Other countries addressing bullying**

Other countries have enacted status-blind bullying laws.\(^{59}\) According to the WBI, all other western democracies have laws prohibiting bullying conduct in the workplace with several EU nations requiring employers to prevent or correct bullying.\(^{60}\) Sweden was the first country to pass anti-bullying laws in 1994.\(^{61}\) In 1997 Great Britain passed

\(^{57}\) Civil Rights Act of 1964 §7, 42 U.S.C. § 2000e et sew (1964)
\(^{58}\) CAL. GOV’T CODE § 12940
\(^{59}\) THE HEALTHY WORKPLACE BILL, supra note 1.
\(^{60}\) Id.
\(^{61}\) Id.
the Protection from Harassment Act which gave rise to general harassment claims.\textsuperscript{62}

Australia criminalized workplace bullying in 2011 after a victim committed suicide.\textsuperscript{63}

A 2006, United Kingdom case, \textit{Green v DB Group Services} \textsuperscript{64} exemplifies how the childish behavior of bullying accumulates over time and what starts as “\textit{slow systematic mental abuse … becomes far more serious when it is repeated day in day out.”}\textsuperscript{65} Helen Green, the plaintiff was a secretary for Deutsche-Bank for several years. She received positive evaluations, discretionary bonuses, and salary increases. And she was terrorized.\textsuperscript{66} The boorish behavior included:

\begin{enumerate}
\item Ignoring me or staring silently at me, often with their arms crossed. This was done in a way that was plainly intended to intimidate and unnerve me;
\item Greeting and acknowledging other members of the Secretariat department in a very overt manner, in order to highlight the fact that they were not speaking to me;
\item Excluding me from conversations with other member of the Secretariat department by either talking over me or pretending they could not hear anything I said;
\item Excluding me from group activities to which every other member of the Secretariat department would be invited, typically when booking restaurants for departmental lunches;
\item Waiting for me to walk past the area of the office in which they sat before bursting out laughing;
\item Making crude and lewd comments that made me feel uncomfortable …
\item Interfering with office administration by removing my name from circulation lists, hiding my post from me and removing papers from my desk.
\end{enumerate}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{64} \textit{Green v DB Group Services} (UK) Ltd, 2006 WL 2248794
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\end{itemize}
\end{footnotesize}
Standing inches away from my chair and chatting very loudly out loud, making it difficult for me to make or receive telephone calls. There was no need for Danni to stand this close to me other than as a means of harassing me;

Making raspberry noises with each step I took, if I was walking from one part of the office to another;

Shouting to the other women “err what's that stink in here?” and then saying “its coming from over there” (referring to me)”.  

The court found that many of the incidents described when viewed individually would amount to no more than minor slights. But it is their cumulative effect that has to be considered. In addition, the terrorizing coworkers interfered with company administration, withholding mail, disappearing paper work, removing Ms. Green’s name from internal circulation lists and employee files. What made this worse was Ms. Green was not the first person to be subjected to this treatment by this gang. Other employees had been bullied, where the aggressors found other employees’ weak spots and tormented them.

In the end, Ms. Green was awarded $1.6 million in damages. As a result the bully employees cost Deutsche-Bank not only the $1.6 million award in damages but also the cost of lost productivity, lost profits, and good will. Many companies choose to look the other way regarding bullying because they are mistaken that the bully is good for the company’s bottom line. Deutsche-Bank learned a very costly lesson similar to what other companies have found when they finally choose to address a workplace bully – in

\footnotesize
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
addition to improving employee morale, the overall productivity rate increases significantly. Further other costs associated with protecting a bully such as employee turnover, absenteeism, presenteeism, litigation, settlements, workers comp and disability insurance claims and lost customers or clients add up.\footnote{Estimating the Costs of Workplace Bullying, WORKPLACE BULLYING INSTITUTE (Apr. 24, 2014), http://www.workplacebullying.org/costs/}

B. The United States in addressing bullying

i. California

California was the first state in the United States to introduce the Healthy Workplace Bill, however it died in committee in 2003.\footnote{THE HEALTHY WORKPLACE BILL, supra note 1.} In 2014, California passed \textit{AB 2053}, a watered-down version of a Healthy Workplace Bill related to workplace abusive conduct. \textit{AB 2053} adds an abusive conduct biannual two-hour training in sexual harassment for supervisors of all employers in CA with more than 50 employees. Similar to the federal policy that requires school districts to have a policy to get funding, having a two-hour training, however does not address the core problem.

While the California law is a step in the right direction, the journey still remains long. First, the law is still attached to a Title VII protected class for sexual harassment. It remains to be seen if it will open the grounds for additional lawsuits. Second, there are no remedies provided or penalties listed for failure to follow this law.\footnote{Id.} Third, while training may shed some light to unintentional infractions, it does not address those who abuse their power and get away with it.
California employees are starting to turn to the courts to address abusive behavior. In *Higgins-Williams v. Sutter Medical Foundation*, an employee who was targeted by her bully boss sought a leave of absence and accommodation not to work under her supervisor. The employee’s supervisor was deliberately giving the employee a hard time at work while being nice to others, similar to the bullies in the *Deutsche-Bank* case. Attempts to address the boorish behavior resulted in further retaliation towards the employee. The employee was diagnosed with depression as a result of the boss’ antics and went on medical leave. The employee refused to return as long as she had to report to this supervisor. As a result, the employer terminated the employee and she sued for wrongful termination. The court held that normal anxiety and stress caused by the supervisor’s criticism is not a disability under FEHA and no accommodation was required. The employer is not obligated to have infinite leave and does not have to take an employee back if she cannot do the work.

Although this did not turn out favorably for the plaintiff, this case is a warning shot. While currently there is a distinction between statutory harassment and boorish bad management, there is also a movement towards the former becoming broader based. Though current laws related to bullying have about as much empowerment as a bullying victim has without resources, there are positive efforts being made to change this. As more and more victims choose to address the bullying via the legal system, eventually one will win and then another and another. Just like what occurred with Tobacco and

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76 *Id.*
77 *Id.*
Sexual Harassment cases, eventually the obstacles to justice protecting the bullies will fall.

**ii. Tennessee**

Tennessee is the first and only state to affirmatively stand up to workplace bullying with the passage of *HB 1981* and *SB 2226*. Specifically, Tennessee Code Annotated §50-1-503 directed the Tennessee Advisory Commission on Intergovernmental Relations to create a model policy prohibiting abusive conduct and allowing for the safe reporting of such conduct. Under the law “abusive conduct” is defined as repeated verbal abuse, threats, intimidation, humiliation, or work sabotage. Public-sector agencies (all branches of state, county, metropolitan, and municipal governments) may adopt the model policy or, alternatively, create their own policy so long as the policy (1) assists employers in recognizing and responding to abusive conduct and (2) prevents retaliation against any employee who reports abusive conduct. Employers that adopt a compliant antibullying policy will be “immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of emotional distress.” These new laws still have many shortcomings however as they merely incentivize public employers to adopt anti-bullying policies rather than permit a cause of action based on bullying in the workplace.

It is worth recognizing that the Tennessee law takes several steps to directly address bullying and abusive behavior. This law encourages public-sector agencies to

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79 29 No. 6 Tenn. Emp. L. Letter 3
80 *Id.*
81 *Id.*
82 *Id.*
implement policies to address bullying conduct. It is not limited to a Title VII protected
class. It provides protection to those who report abusive conduct. It makes the public-
sector world a little bit safer for everyone. There is still a long way to go, however as it
appears that this first law on bullying is following the recommended path/program of the
federal method of recommendation for schools – which has not effectively worked.
Further, there does not appear to be any disincentive for failure to comply because
consequences are not listed. The parameters surrounding potential immunity are unclear.
Although, there is hope as there was another version of the bill that covered all employers
– public and private – which would have created a private cause of action for workplace
bullying\textsuperscript{83}. While it did not pass this time, since 2003, twenty-nine states and two
territories have made efforts to introduce workplace bullying legislation that would allow
workers to sue for harassment without requiring a show of discrimination.\textsuperscript{84}

\textbf{Part VI. OPPOSITION ARGUMENTS}

Those who oppose anti-bullying laws hide behind the sentiment that “you can’t
legislate morality” or that bullying encompasses only words and behind the saying “sticks
and stones may break my bones, but names will never hurt me”.

Words have power. Applying the logic that words are irrelevant undermines the
very spirit this country was founded on. At the heart of US Democracy and what has
guided the United States for 240 years has been the words written in the US Constitution.
These very words have been at the core of legal disagreements for centuries – whether

\textsuperscript{83} THE HEALTHY WORKPLACE BILL, supra note 1.  
\textsuperscript{84} THE HEALTHY WORKPLACE BILL, supra note 1; See Also Roy Maurer, Workplace-
Bullying Laws on the Horizon?, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (Jul. 16,
2013), https://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/workplace-
bullying-laws.aspx
one is a strict or broad constructionist. Words matter in Constitutional Acts and Amendments. Words matter in the Constitutional Rights granted to the US citizens as well as the Fundamental Rights determined by the Supreme Court. Words matter in both statutory and case law. Words used are already scrutinized in a variety of legal situations such as intentional infliction of emotional distress. Words do matter – and words can inspire or hurt. As the aggressor, the bully makes the choice to engage. Instead of telling the person targeted by a bully to ignore the words being spewed at her, hold the bully accountable for his actions and his choices.

A teacher trying to demonstrate how bullying impacts others brought two apples to school. They were similar in size and color. The teacher asked her students to describe the differences and other than one being slightly smaller there were none. The teacher then picked up the smaller apple and said “Gross! This apple is disgusting!” And dropped it on the ground. The kids initially reacted like she had lost her mind but with her encouragement they were all saying negative things to the apple and dropping it on the ground. When the apple made its way back to the teacher, there were still very few physical differences between the two apples. The teacher asked who wanted a piece of apple and the kids raised their hands. When she had cut both apples open, the kids were finally able to see the damage done to the one apple with the insults and dropping the apple on the ground as the apple was bruised and mushy. The teacher pointed out that they each contributed to the apple’s demise, much like what happens when engaging in
bullying. And suddenly her students seemed to truly understand the damage that is caused by harmful words and behavior.\textsuperscript{85}

The First Amendment protection of Freedom of Speech is not absolute. There is a hierarchy of speech. Some speech is well protected while other speech is not. Speech such as fighting words and incitement tend to fall in a lower protected category. As an example, one cannot falsely shout “fire” in a crowded theater and cause a panic.\textsuperscript{86} Therefore carefully drafted laws that are not overbroad or vague can address repeated injurious statements made by a bully to his victims and prohibit the bully from protection for the harm caused when making these statements.

The very recent case \textit{Doe v. Rectors & Visitors of George Mason University} (2016) struck down a GMU Speech Code that was not a bullying statute per se but did address methods of communication that could be used in bullying. \textit{GMU Speech Code} 2013.9.B provides, in relevant part:

\begin{quote}
Acts of misconduct include ... [a]ll hostile, threatening, or intimidating behavior that by its very nature would be interpreted by a reasonable person to threaten or endanger the health, safety or well-being of another. Examples for such behavior may include...b) Communicating ... either directly or indirectly...by...electronic or written communication in a manner likely to cause causes [sic] injury, distress, or emotional or physical discomfort is also prohibited [sic].\textsuperscript{87}
\end{quote}

Doe concerned two romantically involved consenting college students (Doe and Roe). The students engaged in bondage, dominance, submission, sadism and masochism.

\textsuperscript{86} Schenck v. United States, 249 U.S. 47, 52, (1919).
Eventually, the relationship terminated and the male was expelled for violating two of GMU conduct regulations. At one point Doe sent Roe one text saying if she did not respond, he would shoot himself. This text was at the heart of the discussion regarding the free speech challenge.

The court did not have an issue with the first part of Code 2013.9B. It bans “true threats” which is an exception to First Amendment jurisprudence. Rather the court found the second sentence overbroad. The court pointed out that the role of universities is not to coddle students and sometimes students will be exposed to controversial and offensive viewpoints.

This ruling supports the idea that a properly phrased law can still encourage individual growth and freedom of expression while providing a safety net for those targeted by threatening or harassing bullying speech. The text sent in Doe did not threaten Roe, did not involve potentially harming Roe and was not repeated, all of which fall short as a potential bullying incident.

Further, proponents who want to keep bullying legal say that it is too difficult to define bullying – because of course, words matter. Yet, if school-aged children can define bullying, adults should be able to as well. As most of the school anti-bullying laws in California have clear definitions in place, the same definitions can be transferred to the adult world.

Regarding the morality justification for permitting bullying to go unaddressed, morality is already the linchpin of many laws. The saying “when you know better you do
“better” demonstrates how societies can nudge its members to adopt acceptable behavior while shunning the more deplorable acts. As youngsters learn the skillset how to handle and address bullying, the less tolerant society will become of bullying. This can be demonstrated by society’s evolving attitude against sexual harassment. Initially when women entered the workforce in the 60’s and 70’s sexual harassment was not only tolerated, it was expected and encouraged. Just view one episode from the AMC television series Mad Men\(^\text{90}\) and there are a multitude of infractions to choose from. Any time a woman raised a claim or issue about mistreatment, the sentiment was “Honey, why can’t you just get along with everyone else?” And the struggle was real: the victimization impactful. Imagine the woman being harassed in the workplace, heading home, putting supper on the table for her darling children, and talking with her husband about how horribly she had been treated. The children grew up seeing bosses as mean men and that they hurt mommy. Eventually over time, those children who knew better than to mistreat their employees replaced those bosses. Those employers who continued harassing their female employees began losing lawsuits and eventually behaviors began to change.

**VII. RECOMMENDATIONS**

That the United States is able to ensure a safe educational environment or workspace for people regardless of their gender, religion, or national origin is commendable. Having shown that civility based on these specific attributes can be legislated, it is time to take it to the next level as companies have been provided with ample time to make the changes on their own and yet have not done so. Perhaps corporate America needs assistance in ousting their bullies. Similarly with colleges and

\(^{90}\) *Mad Men* (AMC television series 2007-2015)
graduate schools, it is time to stand up to bullies and tell them their intolerable behavior will not be endured any longer. And should the bullies choose to continue their destructive roles, then at least the consequences will be clear and they along with their employers or protectors will pay the price for causing injuries instead of their victims absorbing all costs. Imagine, if every bullying incident came with a $1.6 million verdict like in Green how much more involved employers would be in eradicating bullying.

Officials need to stop tiptoeing around this issue. Anti-bullying laws that address the behavior of the perpetrators need to be passed. These laws need to be more than “have a policy in place.” These laws need to focus on preventing the offensive conduct rather than concentrating on the victims’ demeanor. And yes, victims need to understand the difference between directives from a superior and bullying, while employers need to know that demeaning behavior in issuing directives will no longer be tolerated – despite absence of discrimination. Companies and schools can institute forums/training on conflict resolution, how to talk with superiors/subordinates, and truly empower a company’s and this country’s greatest assets – its people.

Legislators need to update the current laws to include higher learning environments and have clear consequences defined. Make the laws status blind and remove the classifications of Title VII or FEHA in order to proceed with a lawsuit. Permit general harassment claims. If a person is found to have committed bullying in the higher education arenas, the consequence should be a suspension or expulsion. Similarly, if a person in the workplace commits bullying, the consequence should also be suspension or termination. Further, policy requirements encouraging implementing a program can require the inclusion of metrics for program effectiveness in targeting true
reduction of bullying incidents and the confidence in bullying reporting. Empower individuals and provide a forum to seek redress if applicable while eliminating the loopholes that currently aid and abet the atrocious behavior. By taking these steps, the bullies and their enablers will grasp that their outdated ways will no longer be permitted.

Bullies grow up. It is time the laws did too.