Building a More Critical Lens into the Five Habits of Cross-Cultural Lawyering

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**Introduction**

In 1999, clinical professors Sue Bryant and Jean Koh Peters published their seminal article “The Five Habits of Cross-Cultural Lawyering” (hereinafter, the “Five Habits”).

Bryant and Peters introduced their piece with the assertion that “[p]racticing law is often a cross-cultural experience.” This is because “[t]he law as well as the legal system in which it operates, is a culture with strong professional norms that give meaning to and reinforce behaviors.” Thus, lawyering in all contexts requires that attorneys reflect upon this cultured legal environment in which they practice. Good lawyering does not, therefore, demand a “culture-neutral” approach, as critics might suggest.

In 2014, during my second year of law school, my clinic supervisor introduced the class to the Five Habits to consider and improve our cross-cultural competency while we served as student-attorneys within the UC Hastings Social Enterprise & Economic Empowerment (SEEE) Clinic (hereinafter, the “SEEE Clinic”). Although I appreciated the opportunity to interrogate the culture of the legal profession, and to reflect upon my own culture and how it might be similar or different to our clients’ background, ultimately I felt that as a student-attorney of colour, the Five Habits inadequately assisted me in lawyering across difference, because the current exercise lacked an intersectionality analysis. In fact, the very notion of “lawyering across difference” implies that the client of colour will not share the identity of the student-attorney, illustrating that Bryant and Peters wrote the Five Habits through the lens of a White attorney. As such, the Five Habits did not sufficiently allow me to explore

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2. *Id.* at 47.
3. *Id.*
4. *Id.* at 37, 43-50.
the multi-dimensionality within my own identity, and led me to essentialize the identity of my client representative. Failing to recognize the intersectionality within attorneys and clients of colour can lead to their further marginalization within a legal system which already has a tendency to inadequately recognize and essentialize their complex identities.5

This article presents a critique of Bryant and Peters’ Five Habits. Part One provides an overview of the Five Habits and its follow-up article written by the same authors in 2014, noting where there are gaps in critical analysis in both articles. Part Two notes how those analytical gaps created a challenge in applying the Five Habits during my time in the SEEE Clinic by revealing my own thought process in how I applied each habit to my client representative within a transactional legal clinic.6 Part Three provides an overview of Kimberlé Crenshaw’s intersectionality discourse, as a framework through which the Five Habits can be critiqued to reveal that, like the judiciary as a whole, they fail to fully recognize complex, marginalized identities. Part Four revises Habits One and Two with an eye towards intersectionality inclusion. This article does not aim to provide far-reaching solutions to all deficiencies it identifies with the Five Habits, although it does include mitigating measures where possible. As Bryant and Peters also mention at the end of their 2014 update to the Five Habits, the hope is that in raising these issues, other practitioners and scholars will continue to build on this analysis and develop a


6 There is a difference between a client in an individual representation context, and a client in corporate law practice. Throughout this paper, I will be using the term client to refer to the client representative, who was the founder of the business—the actual client that the SEEE Clinic represented. However in Part Four (A)(iii) of the paper, I will further unpack how the characterization of the client within transactional contexts is much more complicated in corporate practice, and makes it difficult to apply the Five Habits therein. See generally, Stephen Ellmann, Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups, 78 VA. L. REV. 1103, 1105 (1992).
comprehensive guide for attorneys seeking to develop better cross-cultural communication with their clients and client representatives.

**Part One: Overview of The Five Habits of Cross Cultural Lawyering.**

Bryant and Peters argue that the cultural differences that exist between lawyers and their clients may cause legal practitioners to stereotype or judge their clients and provide differential representation based on their unconscious biases. Unconsciously stereotyping those belonging to cultures dissimilar from our own, and treating those people differently as a result, is not unique to the legal profession. For example, recently, there have been calls for police officers to recognize and address their unconscious behavior, so that they may begin to reform their instinctual, racist practices towards young Black men. Within the medical field, health care professionals are beginning to implement cultural competency trainings to educate medical students and practitioners on providing medical care across cultural difference in light of America’s diverse population, and dramatic racial and ethnic disparities in health care. Bryant and Peters’ 1999 article provides a detailed exercise for lawyers to become aware of their

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7 Supra n.1, at 51.
8 See, e.g., Tracey G. Gove, Implicit Bias & Law Enforcement, THE POLICE CHIEF MAGAZINE, October 2011 http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011 (discussing studies on implicit bias which indicate that, “[p]olice officers are human and . . . may be affected by implicit biases just as any other individual. In other words, well-intentioned officers who err may do so not as a result of intentional discrimination, but because they have what has been proffered as widespread human biases.” Tracey Gove, Captain of West Hartford Police Department in Connecticut, recommends that these findings be used deliberately by police agencies in their hiring, training and supervision practices, to promote more community policing practices, and to affect policy with regard to reformation of racial profiling statutes.: see also, Ira Glass and Brian Reed, Cops See it Differently, Part One, THIS AMERICAN LIFE, Episode 547, (Feb. 6, 2015), http://www.thisamericanlife.org/radio-archives/episode/547/cops-see-it-differently-part-one; Robyn Semien, Miki Meek, and Sean Cole, Cops See it Differently, Part Two, THIS AMERICAN LIFE, Episode 548, (Feb 13, 2015), http://www.thisamericanlife.org/radio-archives/episode/548/cops-see-it-differently-part-two.
unconscious habits, and to adopt new habits “to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients.”

The Five Habits was written for their clinic students in mind, but was intended to be beneficial exercise for all readers that wish to improve their cross-cultural competency. The Five Habits exercise has certainly been used and referenced extensively by many clinical professors, clinic students, legal academics, and practitioners during the fifteen years since the article was written. Clinical professors have used Bryant and Peter’s exercise to develop cross-cultural competency in students within their own clinics. As the authors intended, clinic students have used the Five Habits to recognize and rectify their own cultural biases towards their clients. In addition, the Five Habits was cited in an amicus brief on behalf of respondents in the Supreme Court affirmative action case, Grutter v. Bolinger. Practitioners have likewise utilized the Five Habits as a framework to develop more culturally-competent practicing attorneys and law students.

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10 Bryant and Peters, supra n.1, at 47.
12 The Five Habits has been cited by two-hundred and fifty-five various scholars and professionals since its publication.
14 Ingrid Loreen, Therapeutic Jurisprudence and the Law School Asylum Clinic, 17 ST. THOMAS L. REV. 835, 842 (2005) (describing her experience as student of the Immigration Unit of the Harvard Immigration and Refugee Clinic and referencing the Five Habits as an effective tool which helped her counsel her client “across a vast cultural and experiential divide.”).
15 BRIEF FOR THE NEW MEXICO HISPANIC BAR ASSOCIATION, THE NEW MEXICO BLACK LAWYERS ASSOCIATION, AND THE NEW MEXICO INDIAN BAR ASSOCIATION AS AMICUS CURIAE, p. 26 n. 89, Grutter v. Bollinger, 539 U.S. 306 (2003) (citing Bryant, supra n. 2) (“Amici acknowledge the importance of cultural competence in the provision of legal services especially where racial differences between lawyer and client can confound the analysis and resolution of legal problems.”).
16 See Serena Patel, Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World, 62 UCLA L. REV. DISCOURSE 140 (2014) (recommending “that a seminar be offered in law schools to develop and practice cross-cultural skills in line with The Five Habits: Building Cross-Cultural Competence in Lawyers, developed by Professors Susan Bryant and Jean Koh Peters.”); Sameera Hafiz and Lillian M. Moy, Implicit Bias and Cultivating Cross-Cultural Competence in Legal Practice, N-LAAN LANGUAGE ACCESS
A. Overview of the Five Habits.

The First Habit requests that the reader to do two things: First, Bryant and Peters ask lawyers to identify a long list of similarities and differences between themselves and their clients.\textsuperscript{17} The categories of similarities and differences may include—but are not limited to—race, ethnicity, gender, socio-economic background, age, role in family, individualistic/collective attitudes, and sexual orientation.\textsuperscript{18} Bryant and Peters note that these similarities and differences may have different orders of importance depending on the client or the case.\textsuperscript{19} For instance, “in interactions involving people of colo[u]r and [W]hites, race will likely play a significant role in the interaction given the discriminatory role that race plays in our society. In some cases, such as rape or domestic violence, gender differences may also play a greater role than in others.”\textsuperscript{20}

Second, the authors encourage lawyers to analyze the effect of these similarities and differences with regard to (1) the professional distance they keep between themselves and their clients, noticing whether any similarities hinder their ability to maintain professional distance, and if any perceived distance causes the lawyer to negatively judge a client;\textsuperscript{21} and (2) their information-gathering practices, identifying where these perceived similarities and differences might result in cultural assumptions that effect how lawyers question their clients.\textsuperscript{22}

Similarly to Habit One, Habit Two also asks lawyers to identify cultural differences and similarities, but this time, between the client and the legal decision makers in either a litigation or

\textsuperscript{17} Bryant and Peters, \textit{supra} n.1, at 51.
\textsuperscript{18} \textit{Id.} at 52.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 52-53.
\textsuperscript{22} \textit{Id.} at 53.
Recognizing that the legal forum is “cultured,” Bryant and Peters suggest that lawyers evaluate how cultural similarities and differences might inform the way that they “explain the client’s choices where they differ from the evaluator’s norms.” Furthermore, practitioners can use Habit Two to understand why judges might be bothered by a particular aspect of a case, even if it is a non-critical aspect, or why a client might resist a lawyer’s advice in certain situations. If the lawyer and legal system share the same culture, which may be different from the client, she may use Habit Two to understand why the client “often sees the lawyer as part of a hostile legal system.” This exercise may further be used to figure out if the law and legal culture can be altered to “legitimate the client, her perspective, and her claim.” The authors ask, should lawyers “push the law,” or “persuade the client to adapt” to the legal culture?

Switching gears from identifying similarities and differences between the attorney, the client, and the legal forum, Habit Three asks practitioners to engage in “parallel universe thinking” when lawyers are feeling judgmental about a client, so that any negative inferences about a client’s behavior can be explained, contextualized, and understood. The authors explain that “[t]he point of parallel universe thinking is to get used to challenging oneself to identify the many alternatives” to these assumptions for a client’s behavior . . . [and] to explore

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23 The original 1999 article appeared to be written from a litigation context perspective alone; however the 2014 article updating the original article explicitly mentions that Habit Two is relevant to both litigation and transactional settings. See Susan Bryant and Jean Koh Peters, Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY, 349-72, 351 (Susan Bryant et al. eds., 2014).
24 Supra n.1, at 53-56.
25 Id. at 54.
26 Id. at 56.
27 Id.
28 Id.
29 Id.
30 Id.
further with the client or others the reasons for the behavior,” which may ultimately be useful when trying to explain the client’s behaviors to others.31

Like Habit Three, Habit Four also focuses on cross-cultural communication in normal attorney-client interaction.32 Bryant and Peters remind the reader to remain engaged and to avoid scripts and using default, routine responses when answering questions.33 The authors ask that attorneys pay particular attention to beginnings, thinking about what information should be exchanged before lawyers “get down to business.”34 This habit attempts to reduce anxiety and uncertainty by using techniques which consciously demonstrate that genuine understanding is occurring,35 such as active, and “deep” listening and questioning to expose more areas of cultural disconnect. The attorney is asked to pay special attention any red flags that the method of interaction is ineffective, for example, if the client appears disengaged, and to correct the form of interaction if necessary.36

Finally, Habit Five encourages attorneys to proactively identify and reflect upon the multitude of other factors that may negatively influence the communication between themselves and their clients, with an emphasis on self-analysis as opposed to self-judgment.37 The authors explain that there may be some stressors on this relationship that cannot be controlled, such as the lawyer’s large caseload, pressure from the court, and lack of resources, but there are some

31 Id.
32 Id. at 57.
33 Id; see also Laurie Shanks, Whose Story Is It, Anyway? - Guiding Students to Client-Centered Interviewing Through Storytelling, 14 CLINICAL L. REV. 509, 511-16 (2008) (cautioning attorneys to avoid using the “DMV interview,” wherein they automatically and unconsciously begin client interviews by giving a non-client-specific speech, soliciting a client’s basic demographic information without explaining why, and failing to notice the client’s outward manifestations of discomfort due to the attorney looking down at her legal pad for the duration of the interview).
34 Bryant and Peters, supra n.1, at 57.
35 Id.
36 Id. at 58.
37 Id. at 59.
things that are within the lawyer’s control such as a language barrier (by hiring a competent interpreter), and controlling the lawyer’s own stress (through self-care).38

B. 2014 Update: Reflecting Upon and Updating the Five Habits.

In 2014, Bryant and Peters published “Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference” (hereinafter, the “Update”), as a way to extend the conversation regarding lawyering across cultural difference, to add to their knowledge about teaching the Five Habits, and to incorporate a new tool, ‘Doubting and Believing’ to the practice of cross-cultural lawyering.39 In the first part of the Update, the authors review the original exercise, and illustrate how they apply them in their supervision of students and in the clinic’s case rounds and seminar component.40 In the second part of the Update, the authors examine how ‘Doubting and Believing’41 “can be used to develop insight into a lawyer’s assumptions about a case or matter . . . [and] show how lawyers can use the scale in their practice to employ an intentional process of belief and doubt that helps them think beyond their assumptions,” which they identify as being especially necessary when lawyering across different cultures.42

The following chapter of the Update also discusses how the highly necessary discussions and

38 Id. at 59-60.
40 Id. at 349.
41 Bryant and Peters note in the section, “Moving Ahead: Methodological Belief, Methodological Doubt, and the Doubting/Believing Scale,” that they introduce both (1) Elbow’s concepts of Methodological Doubt and Methodological Belief; and (2) the Doubting/Believing Scale, but refer to the general practice of using either or both concepts as “Doubting and Believing.” See id. at 364.
42 Supra n.39, at 364.
teachings about race are lacking from the Five Habits. The authors examine how these teachings can also be used to update the Five Habits.

i. **Doubting and Believing Scale.**

As Bryant and Peters maintain in the Update, because the law and the legal forum is necessarily “cultured” and, thus, lawyering will consistently involve cross-cultural encounters, a legal practitioner’s privilege and tendency to stereotype clients will have the effect of defining which narratives lawyers find credible or dubious. The authors provide the example of a lawyer immediately doubting, and therefore dismissing, a part of a West African client’s narrative in which she discusses an incident of cannibalism. They write that, “[l]eft unchecked, that doubt would certainly have jeopardized quality representation for the client, poisoned the lawyer-client relationship, and compounded the client’s isolation and trauma.” Therefore, Bryant and Peters suggest that lawyers adopt a “believing” posture. Believing, they assert, should also be coupled with doubt, (collectively, “the “Doubting and Believing Scale”), which looks much like the “default style” of rigorous and aggressive (often negative) scrutinization of ideas that students are taught in law school. As in law school, this aggressive interrogation, they contend, can be very useful to surface fine ideas. Bryant and Peters do not totally discount the doubting posture, but rather posit that when lawyers function solely within this framework, they also “risk[…] skewing their entire approach to balanced legal thinking and thorough legal

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44 *Id.* at 375.
45 *Id.* at 367.
46 *Id.*
47 *Id.*
48 *Id.* at 368.
49 *Id.*
representation.” Adopting a believing state of mind to counter-balance the default doubting posture can have the effect of “broadening [the] universe of imagination to include narratives foreign or troubling to our own.”

The Update additionally explains that the Doubting and Believing Scale may function independently of the original Five Habits, or can be paired well with the Five Habits. The authors very briefly discuss how it updates the Five Habits. With respect to Habit One, Bryant and Peters explain that if the lawyer finds that there is little overlap with the client, the lawyer can treat her own doubts with skepticism, “recognizing that the client’s largely divergent life experience could easily and wrongly look unmeritorious through the lawyer’s unaccustomed eyes.” Or in identifying a similarity, the lawyer should “treat [her] belief in the client with skepticism, aware that [she] may be invested in crediting a story with so many resonances to [her] own.” With regard to Habit Two, understanding a client’s “weak legal claim” from a totally doubting posture can be useful in trying to understand the similarly doubting forum that will ultimately evaluate the client’s claim. This can aid, the authors aver, in strengthening the lawyer’s representation of the client. In Habit Three, or parallel universe thinking, the Doubting and Believing Scale can act to enrich the exercise of finding alternative explanations for a client’s behavior, “in times of minimal information.” Likewise, in Habit Four brainstorming, Bryant and Peters contend that the Doubting and Believing Scale can assist in allowing the lawyer to engage in “balanced strategizing” regarding the overall effectiveness of

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50 Id.
51 Id. at 367-68.
52 Id. at 371.
53 Id.
54 Id. at 372.
55 Id.
56 Id.
57 Id.
the client communication. Doubting and believing are essential in reflecting back in retrospect about client communication, both after the fact and in real time, to assess the successes and pitfalls of the communication strategy. Finally, the new tool can work with Habit Five, in that it allows lawyers to think nonjudgmentally about their actions after a “cross-cultural breakdown.” A believing posture can assist practitioners who are reflecting upon their commitment to cross-cultural respect, by opening themselves up to developing constructive approaches to better their conduct in future, culturally complex situations.

However, as the authors themselves recognize, the Five Habits and the Update are not sufficient “de-biasing” tools for legal practitioners. Thus, in the subsequent chapter of the same book, the authors focus specifically on recognizing and confronting racial bias and prejudice in legal systems, and “describe a disciplined procedure for initiating and continuing planned and unplanned conversations about race, both in the classroom and in [their] advocacy.” Bryant and Peters state that they seek to add this “missing piece” about race to the Habits. The authors maintain that “unless [they] talk about race in the clinic and speak explicitly with [their] students about how to talk about race, [they] will not have prepared them for important work in their future workplaces.” Race and racial injustice, the authors contend, have an important impact on clients’ lives, but “many in society deny its existence and conversations about race are the most difficult to sustain.”

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58 Id.
59 Id.
60 Id.
61 Id. at 375-406.
62 Id. at 375.
63 Id.
64 Id. at 376.
65 Id.
Bryant and Peters write extensively about the ways in which clinical professors can introduce discussions about race to their students, and encourage that teachers begin these discussions as early and as frequently as possible to normalize racial discussions, by regularly asking students, “what role does race play in our work?”66 This article will not provide an overview of everything Bryant and Peters discuss in their chapter on race in the Update, but is intentionally restricted to the summary to how race may interact with, and move the Five Habits further. However, Part Two of this article will examine the authors’ very brief discussion of intersectionality and essentialism theory67 in order to demonstrate that these lenses are integral to any exercise seeking to increase cross-cultural competency and, therefore, should be included very specifically and mindfully into Habit One and Habit Two.

ii. Connecting Race to the Five Habits.

The authors describe the ways in which a professor might connect the Five Habits to seed conversations about race. Bryant and Peters write that Habit One may be an appropriate time to discuss White privilege.68 In their experience as clinical professors, “[W]hite students will often fail to identify their race in the list,” and that some students recognize that they have the privilege of not noticing their race in a society where their clients often do not.69 Habit One, they state, may also serve as a place for “students and faculty to explore how racial mistrust and

66 Id. at 383.
67 On pages 388-90, the authors very briefly highlight the ways in which intersectionality and essentialism are exemplified by the legal structure. This article illustrates in Parts Two and Three that intersectionality is also lacking from the Five Habits, and reifies the legal structure’s own essentialism and lack of intersectionality discourse.
68 Id. at 393.
69 Id. at 393.
microaggression” might influence relationships. Furthermore, in listing all similarities and differences, teachers can also incorporate intersectionality as a way to prevent students from viewing their clients one-dimensionally. In Habit Two, teachers can point out the ways that implicit bias may function within the act of identifying the similarities and differences between the client and the legal forum; teachers may also identify the ways in which students can use that bias explicitly to analyze the strengths and weaknesses of their client’s case. Or, students may instead recognize that the law is also steeped in privilege and should push the law to expand its understanding of meritorious claims. In Habit Three, Bryant and Peters suggest incorporating microaggression awareness to brainstorm alternative explanations for their clients’ behavior, and think through the “seemingly inconsequential acts” that clients may interpret differently.

70 See Peggy C. Davis, Law As Microaggression, 98 YALE L.J. 1559, 1565 (1989) (First proposed by Chester M. Pierce, a Harvard Psychiatrist in 1970, the term ‘microaggression’ refers to “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of blacks by offenders . . . Psychiatrists who have studied black populations view them as ‘incessant and cumulative’ assaults on black self-esteem.”). Bryant and Peters briefly discuss microaggression, privilege and power in this chapter. Microaggressions are defined as “a series of minor but constant indignities, incessant, often gratuitous and subtle offenses based on race, [which] serve to undermine confidence, reduce [a person of color’s] sense of belonging and subordinate [people of color].” Supra n.43, at 384 (internal quotations omitted). For example, when women of colour law students are “demoted” to litigants, and the court asks if they need interpreters. Id. at 385. Or if a White student fears going to a “dangerous neighbourhood,” and a Black student, who lives in that same neighbourhood, perceives the comment as “code” for meaning a “Black neighbourhood.” Id. Over time, being subjected to these “seemingly inconsequential” comments on a regular basis has the effect of “impair[ing] the performance of persons of color by sapping the mental, psychic, and spiritual energy of recipients.” Id. at 384. Bryant and Peters write that it can also explain why clients are distrustful of the legal system, and why they may not immediately view the lawyer as their ally. Id. at 385.

71 Id.

72 Id. at 394.

73 Jeffrey J. Rachlinski et. al., Does Unconscious Racial Bias Affect Trial Judges?, 84 Notre Dame L. Rev. 1195 (2009) (“Race matters in the criminal justice system. Black defendants appear to fare worse than similarly situated white defendants . . . judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment”); Nazgol Ghandnoosh, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies, THE SENTENCING PROJECT, 2014, http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf (“Low-income people of color have disproportionately borne the brunt of [incarceration and sentencing] policies. Nearly 60% of middle aged African American men without a high school degree have served time in prison. And while blacks and Latinos together comprise 30% of the general population, they account for 58% of prisoners.”).

74 Id.

75 Id; see, e.g. University of California Hastings’ Center for Gender and Refugee Studies, which under the direction of Professor Karen Musalo, has pioneered the effort to obtain legal recognition of domestic violence as a potential basis for asylum; On August 26, 2014, the federal Board of Immigration Appeals issued a groundbreaking decision recognizing domestic violence as a basis for asylum. … versus chapter wherein they discuss women of colour fleeing domestic violence is not favoured by legal forum which lacks intersectionality and reinforces essentialism.
Students can also be encouraged to “factor race and culture” into their parallel universe brainstorming as part of Habit Three. Professors can use Habit Four’s “Habit of not creating habits when communicating with clients” to demonstrate to students how their behavior may be resulting in microaggressions against the client, thus leading to racial mistrust. In Habit Four, students may examine their communication style as it relates to lawyering across racial difference. Finally, in Habit Five, wherein students examine what factors led to a “cross-cultural blunder,” teachers can encourage their students to recognize that they are more likely to act on implicit biases or stereotypes when they are under stress. Also, if the student understands that implicit bias is not an individual failing, but occurs in society at large, they will be more likely to view their own actions nonjudgmentally. The authors conclude that “[t]he true failing occurs when lawyers fail to function more intentionally to strive to eliminate bias.” Because cultural norms “influence how we speak, who speaks to whom, when we speak, and what we talk about,” it is important that student-attorneys and practicing attorneys alike interrogate these default practices so that they do not become unconscious habits.

While the Update might mitigate some of the issues I observed when applying the Five Habits to my client representative, as demonstrated in Part Two, there are still ways in which both the original Five Habits and the Update do not adequately assist attorneys of all cultural backgrounds in applying the Five Habits to build cross-cultural communication.

Part Two: My Introduction to and Problematic Experience With Applying the Five Habits.

76 Id. at 394.
77 Id.
78 Id.
79 Id.
80 Id.
81 Id.
As previously mentioned, in 2014, I had an opportunity to work within the SEEE Clinic. Under the supervision of Professor Alina Ball, the SEEE Clinic offers the opportunity for students to serve—in teams of two—as outside counsel for nonprofit and for-profit social enterprises on a variety of corporate and transactional matters. The first task at our SEEE Clinic orientation was to define for ourselves the meaning of “social enterprise,” which was surprisingly difficult. The definition my partner and I agreed upon is that a social enterprise is a for-profit business or nonprofit organization whose primary mission is to have a positive impact on society or the environment. A social enterprise may accomplish its social mission through its products and services, or by creating employment opportunities for vulnerable populations. Social enterprises impact a variety of social issues including, but not limited to education, health, poverty alleviation, diversification of the workforce, economic development, technology for change, and environmental protection. In the SEEE Clinic, we discussed how we, as lawyers, could best participate in this rapidly growing social enterprise sector and we were encouraged to be aware of how, through our practice, we may either be advancing or hindering issues of economic and social justice.

In my student team, I primarily worked to assist a nonprofit with gaining retroactive tax exemption. In so doing, I also began to understand the myriad ways that the nonprofit sector—through the many hoops and hurdles associated with trying to incorporate businesses as nonprofits—itsel...
I provided strategic business planning counseling to a different entrepreneur looking to incorporate his for-profit business. In addition to gaining invaluable lawyering skills including independently managing and planning cases, and interviewing and counseling, another goal of the SEEE Clinic was to build our cross-cultural competency. To that end, Professor Ball assigned articles critically analyzing the social enterprise movement, in which race and class became the natural focal point of seminar discussions. Professor Ball also required us to complete reflective writing exercises. I chose to respond to the prompt wherein we were asked to apply the Five Habits to our experience thus far in the SEEE Clinic.

While I found the exercise to be extremely beneficial insofar as it was the first time in law school that I had been asked by a professor to think explicitly and analytically about the law as being “cultured,” rather than culture-neutral, I found that I could not apply the Five Habits uncritically. Just like the multitude of other readers of Bryant and Peters’ article, I valued the objective that the Five Habits exercise aims to achieve—that is, to bring our awareness to our implicit biases and stereotyping of our clients that often occurs when we lawyer across difference so that we do not unconsciously provide our clients differential treatment.

However, I also found the exercise itself to be problematic, because I found myself reducing my client\textsuperscript{84} to his most negatively judged identity, thus ignoring the intersectionality which may exist in him and further essentializing and marginalizing him. I also found myself having to choose a singular identity within myself to best work through the Five Habits. The next section demonstrates how I applied the Five Habits to my client, discussing both where the

\textsuperscript{84} The SEEE Clinic is a transactional practice wherein students “clients” are actually the companies that social entrepreneurs have started, not the individuals themselves. Nonetheless, to preserve the anonymity of the founder of this particular social enterprise, and to better apply the Five Habits and maintain consistency throughout this article, I will refer to the founder to whom I applied the Five Habits as my “client.”
exercise was helpful, and also illuminating the areas where the Five Habits were problematic in
that they were devoid of critical theory.85

A. Working With The Five Habits In The SEEE Clinic.

It is important to note that, at the time I wrote the reflection piece, I applied only the Five
Habits, not the Update article. In my analysis here, however, I will incorporate both the
Doubting and Believing Scale and the chapter on race from the Update, continuing to identify
where I believe holes in critical analysis remain within the Five Habits.

Before I could even jump into the applying Habit One, I felt compelled to explain myself,
which I did in my original reflection piece for nearly two pages. I wanted to tell my clinical
professor exactly how I was “cultured,” because I felt that immediately in Habit One, the
categories of sameness and difference forced me to think about myself in overly-rigid binaries,
which I felt did not accurately illustrate my upbringing. I thought that explaining my
background would also help to illuminate some of the less “obvious” similarities, and illustrate
why some potentially distancing “differences” someone might expect me to possess, I did not
perceive to be differences between me and my client. Although, I had enough critical self-
awareness to unpack my own identity, I failed to use this same critical lens for my client. If the
Five Habits do not explicitly adopt a critical lens through which to view identity, it is likely that
many practitioners will fall into the same deleterious trap of essentializing their clients, thus,
contributing to the kind of hostile attorney-client relationship Bryant and Peters seek to prevent.
It will also likely be a source of Habit Five’s cultural communication breakdown that the authors
explain happens to the most well-intentioned attorneys. The reader’s intent in applying the Five

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Habits must explicitly include intersectionality theory to describe herself, her client, and the legal forum in order to prevent against further marginalization of all parties involved in lawyering across difference.

In my reflection piece, I explained that English was not my first language, Punjabi was; I shared my home with my grandparents for three years before my parents earned enough to move out. One of my parents was a first-generation college student and the other had a father who attended college. Both of my parents did extremely well academically, and my sister and I were both expected to go to college. I grew up in a racially diverse area of West London—the students in my primary school were Indian (Sikh, Hindu, and Muslim), Bangladeshi, Sri Lankan, West Indian, Jamaican and African. My elementary school in England was made up primarily of first-generation immigrants, asylum seekers, refugees, and working to middle-class White students. As result, I had an extremely eclectic group of friends who were both racially and socio-economically diverse. Of my three closest friends, one was Jamaican, one was White, and the other was half-White and Indian. Thus, my ability to connect, on a human level, across many of the categories of either sameness or difference that Bryant and Peters identify in Habit One was instilled in me from a very young age.

When my family moved to Virginia, I attended a middle school where the student demographics were 50% White, 30% Black, and 18% Filipino; South Asians were included in the 2% “other” category, and I was one of two Indians in the entire middle school. I realized that in order to have the same ethnically diverse group of friends, I would need to acquire different “languages” to speak to my White, Black and Filipino classmates who all supposedly spoke the same English. They each came from families which had different styles of “culturalization” (all of them foreign to me), and I was eager to learn them all.
I was also foreign to them—my Black and Filipino classmates were poorer, and they assumed I was “privileged” because of my British accent, which actually increased the distance between us. I had to explain to them that not all people with English accents lived like the Queen. At the same time, my experience socializing and singing in school choirs with Jamaican friends; being from a more traditionally “conservative” Indian culture; and the collectivist attitude towards socializing and interacting with others, with which I personally identify because of my Indian ethnicity, connected me to those groups on a deeper level. My White friends found me to be more relatable to them because of my accent—I was perceived by them to be ethnically “Whiter” because of how I spoke. Additionally, because my parents were college-educated, there were certain similarities in upbringing that brought about a feeling of closeness to White students. For example, my White friends were able to discuss the books that their parents recommended they read instead, because the syllabus was not challenging enough. Educational privilege was something to which I could also relate. At the same time, there were differences with regard to our respective cultural values that made them seem distant. For instance, while my White friends’ parents’ let them date in middle school, my parents were vehemently opposed to me dating anyone (they said, until I was married!). In this regard, I was more able to relate to my Filipino friends, who shared that same cultural upbringing.

My move to Irvine, California made me realize something else: A lot of these cultural differences seemed less important when everyone is socio-economically on par. While my high school was ethnically diverse, I felt that students could much more easily communicate and relate to one another because much of the student body came from economically-privileged, college-educated, and family-focused households, irrespective of their race. Still, I felt more connected to students of colour, sometimes but not always from families with lower incomes, because of my own roots growing up in England, despite the reality that my family was certainly financially stable. My experiences in college and graduate school have reinforced the feeling that differences in socio-economic class can create the greatest distance between groups, and can bring about the greatest closeness if shared amongst people in American society; race can also create such distance, although perhaps to a lesser degree than class does. Nonetheless, as Bryant and Peters maintain in the Update on race, 87 a person’s whole way of perceiving and receiving the world, his or her mannerisms, and style of communication is influenced by class and race.

I explained that, while I understand that familiarity is not identical to similarity, my over-exposure to low-income, minority populations either in my formative years, through the friends with whom I have chosen to associate, or through employment experiences, has overtime decreased the distance I feel to those whom I may not obviously, or at first glance appear connected. And, from there, I felt comfortable jumping into my application of the Five Habits.

The fact that I had to go through this analysis before applying the Habits to communicate with my clinical professor (and even to myself) the multi-dimensional aspects of my identity indicated to me that the original Five Habits were lacking with regard to interrogating

87 See Bryant and Peters, supra n.43, at 383.
assumptions about identity. In fact, it appears as though Bryant and Peters wrote the Five Habits envisioning that White readers would be applying the Five Habits. For instance, the authors liken the idea of cross-cultural lawyering to the experience of entering a courtroom for the first time and feeling overwhelmed by the same “anxiety.”\textsuperscript{88} I, however, was not confronted with fear before meeting my client belonging to a racially different group, because I myself am a person of colour. Thinking about meeting with clients of colour for the first time as producing anxiety in the attorney creates a rigid framework for understanding the identity of the student-lawyer.

Also, given that most clinic clients will belong to marginalized communities, since they cannot afford representation—it is also highly likely that they are people of colour—a sad reality of our society. Therefore, the Five Habits, through their very existence, indicate that they ultimately cater to a population of readers who are assumed \textit{not} to belong to marginalized communities themselves.\textsuperscript{89} This is despite the reality that today, certainly more so than fifteen years ago, many law students have complex identities with regard to race, class, gender, sexuality, \textit{etc}. There are still other indicators that Bryant and Peters wrote their original Five Habits and even their Update with White readers in mind, and these will be revealed throughout the remainder of this article. While I cannot fault Bryant and Peters from writing from this perspective, given that many practitioners \textit{do} come from privileged, oftentimes White backgrounds,\textsuperscript{90} I personally found that the exercise forced me to think about myself from the

\textsuperscript{88} Bryant, \textit{supra} n.11, at 99. 
\textsuperscript{89} For example, their discussion of Victor Lazlo, \textit{see supra} n.43, at 389, as being very different from the clients in their clinic, and of women of colour being mistaken for clients indicates that their clients are people of colour. In our clinic, our clients were men and women of colour. 
\textsuperscript{90} The \textit{total} minority enrollment in law schools across the country, including both full and part-time, first-year JD students was only 26.9\%. \textit{See First-Year and Total Minority Statistics}, AMERICAN BAR ASSOCIATION, available http://www.americanbar.org/groups/legal_education/resources/statistics.html.
very beginning in extremely binary terms, which revealed to me a deficiency in the Five Habits exercise.

Fifteen years later, in writing the Update, Bryant and Peters appear to envisage a more complex student-attorney, for instance, where they discuss the microaggressions exhibited by courts against the female student-attorneys of colour, whereby legal actors mistake the students for clients.91 These microaggressions are a vestige and example of an outdated, racist legal system that cannot perceive people of colour to occupy professional positions of power. However, this is less the case today and it must be explicitly acknowledged in any guide to cross-cultural communication. The Five Habits need revising such that they recognize an intersectional identity structure for the attorney applying them to avoid the creation of the default, over-simplified, singular-identity “hatch”, as famously described by Kimberle Crenshaw,92 which the judiciary oftentimes utilizes to perceive the claims of litigants belonging to multiple marginalized identities at once. While the Update states that teachers can incorporate intersectionality as a way to prevent students from viewing their clients one-dimensionally,93 it does not mention that student-attorneys should incorporate intersectionality when viewing themselves, and thus remains a problematic feature of the Five Habits.

i. Habit One.

91 See Bryant and Peters, supra n.56, 387
93 See Bryant and Peters, supra n.43, at 388.
Below is the list of similarities and differences between my client representative and I, that I originally developed as part of my reflection piece applying the Five Habits during the SEEE Clinic.

<table>
<thead>
<tr>
<th>Differences</th>
<th>Similarities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethnicity</td>
<td>Socialization</td>
</tr>
<tr>
<td>Gender</td>
<td>Collective view of society</td>
</tr>
<tr>
<td>Social Status</td>
<td>Potentially a similar lack of religious beliefs</td>
</tr>
<tr>
<td>Marital status</td>
<td>“Language”/ sense of humour</td>
</tr>
<tr>
<td>Physical characteristics (in terms of dress/style, while I am playing the</td>
<td>Person of colour</td>
</tr>
<tr>
<td>“role of lawyer”)</td>
<td>Potentially same age bracket (25-35)</td>
</tr>
<tr>
<td>Education level (unknown/no assumption of what his education level is,</td>
<td>Aesthetic preferences including:</td>
</tr>
<tr>
<td>could be high school level, associate’s degree, undergraduate, probably</td>
<td>Music</td>
</tr>
<tr>
<td>not graduate level, based on client transfer memo)</td>
<td>Style/Appearance (when I’m not playing the</td>
</tr>
<tr>
<td>More likely family educational expectations/encouragement: Asians</td>
<td>“role of lawyer”</td>
</tr>
<tr>
<td>perceived as “model minorities” and pitted against African American/</td>
<td>Artistic</td>
</tr>
<tr>
<td>Latino academic “culture.”</td>
<td></td>
</tr>
</tbody>
</table>
Possibly family life: single-parent household (client) vs. parents still married (me)

Again, I found Habit One useful in that I was forced to actively think about lawyering across difference, and at the same time, I found the exercise problematic, given how I also felt forced to essentialize my client by reducing him to a singular, over-simplified identity before knowing him completely. Whereas a White student might be able to identify race as a difference (assuming the White student recognizes her race at all), I found it difficult to identify race as a similarity or a difference. I ultimately identified race as a similarity because I felt I was more connected to my client being a person of colour myself, but it forced me to think about what it meant to be a person of colour. I was unsure if there was a collective person of colour identity that transcends class, and allows for some kind of similarity between attorney and client in the event that we are both non-White. Or, alternatively, if socio-economic differences work to create distance, as was the case between my client and me, regardless of some socially-constructed people of colour identity. These are questions that are difficult to answer within the framework of Habit One.

With respect to second part of Habit One, asking readers to analyze the effect of similarities and differences on professional distance and judgment does not provide guidance in situations as those that I have just identified. Even with the proviso in the 1999 article that identity characteristics may have different orders of importance depending on the client, a reader

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94 The feeling of needing to pinpoint a singular identity for my client became especially troublesome when I began to engage in Habit Two, for reasons which I will explain more fully in the next part.
95 See Bryant and Peters, supra n.55, at 393.
96 Bryant and Peters, supra n.1, at 52.
may still be unsure if a category like race is a similarity or difference. Or, for a transgendered reader, if gender would act as a similarity or a difference. Additionally, the disclaimer regarding orders of importance does not assist readers occupying multiple identities at the same time. For example, I was unsure how to “rank” perceived racial similarity, when gender will continue to be huge difference—especially in professional contexts where women still experience sexism. As I mentioned in my reflection piece for the SEEE Clinic, I felt the need to dress more professionally to exhibit a sense of seriousness, whereas a male—perhaps of any racial background—may not feel the need to do so. Thus, the guidance with regard to the intersection between race and gender was lacking from Habit One.

Additionally although the Update discusses how microaggression and mistrust may impact the relationship between lawyer and client, it does not include an implicit bias\(^\text{97}\) examination as another way of interrogating Habit One. For example, in creating a list of similarities and differences, students may be incognizant of the stereotypes they harbour, and may be relying on implicit biases in identifying these categories. For example, I was not sure whether my client was educated, but I did not want to assume that he was not, simply because of his race or class. I ended up asking my partner to clarify, who informed me that our client had told her that he had gone to college. A less self-aware, less race-conscious practitioner may fall into the trap of essentializing her client.

Moreover, although the Update states that students should use intersectionality to avoid reducing our clients to a singular identity,\(^\text{98}\) the exercise still promotes reductionism to the extent that we are still expected to operate within the Five Habits framework. As a result, despite my

\(^{97}\text{See supra n.73.}\)

\(^{98}\text{See Bryant and Peters, supra n.43, at 388.}\)
undergraduate and graduate studies on critical race theory and the law, I still made glaring errors in “categorizing” my client’s identity. For example, my client is both Black and Japanese. On its face, The Five Habits do not ask students to choose one over the other, however, in practice—especially when confronting Habit Two—students may, as I did, reduce the client to their least-favoured identity within the legal system to effectively anticipate biases and to provide better counsel. Thus, I categorized my client as Black, but as Professor Ball pointed out, I had completely ignored the other half of his identity. Therefore, without more critical analysis, Habit One may result in further essentialism and marginalization of the client.

ii. Habit Two.

In thinking about how cultural differences and similarities influence the interactions between my client and the legal forum in Habit Two, I altered the legal forum to reflect my transactional clinic. As mentioned previously, Bryant and Peters do mention in their Update that the Five Habits exercise is intended for lawyers operating within both litigation and transactional settings. Nonetheless, the steps are not directly applicable to corporate or group clients. For example, the identified legal actors include decision-makers and opposing counsel, which does not apply to the context of entity formation. Thus, I had to think creatively. As my client was an entrepreneur, I substituted potential investors and investors’ legal counsel for “opposing counsel” and employees of the company and potential customers of his product for “legal decision-makers.”

As Bryant and Peters contend, Habit Two was useful for thinking about how to provide effective counsel to my client, given the potential biases these various parties may have towards

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99 See supra n.18.
him. It is important to note that investors are not a homogenous group, and should not all be assumed to have the same opinions. Still, because investors and investors’ legal counsel may be looking for certain traits in my client, which he may not outwardly portray—his appearance may lead to negative stereotyping.100 One source states that investors want to see “big opportunities led by credible entrepreneurs.”101 What credible means to a potential investor in the company may not be an eclectic, artistic, funky, “Black” man with dreadlocks.102 My client himself mentioned that he feels compelled to “suit up” when he needs to look “professional.” Investors and their counsel may also make certain ethnocentric judgments about my client, as a result of how he dresses, or based on his manner of speaking.103 This stereotyping may influence their decision about my client’s education-level, habits, or work-style, and may negatively affect their decision to invest in both him as a person, and in his company.

The focus of Habit Two is on the overlap between the client’s universe and the universe of the law,104 with an eye towards “refocusing,” “refining,” and ultimately “strengthening” the client’s legal claims.105 Even with the suggestion in the Five Habits that readers examine the circumstances in which they should “push the law”106 to expand its understanding of the client, it is less likely that readers would do this given the stated intent of this habit.107 The Update’s

103 See supra n. 79.
104 Bryant and Peters, supra n. 34, at 351.
105 Id.
106 See Bryant and Peters, supra n.2 at 56.
107 See supra n.105.
addition of a race and privilege framework\textsuperscript{108} does create more critical awareness within Habit Two, but it does not go far enough to explain when to push the law, or why the practice of understanding when to push the law, is important in the first place; that is, to prevent further ostracizing a client who is already marginalized by the legal system.

Still, readers might ask, to what extent does Habit Two become a mere exercise in acculturating their clients to a biased legal system so as to ensure that they present strong claims to the legal forum? Should readers of the Five Habits be advocating more by pushing the boundaries of the legal forum’s own stereotypes and presumptions about clients? Or is it a matter of choosing battles? The fact that these questions are not answered by Bryant and Peters is especially problematic for social justice attorneys working through the Five Habits who occupy complex identities of their own. For example, when a female client of colour desires to push the boundaries of the legal system in a case where the legal forum did not understand her claims to the extent that they were directly connected to her own identity, it is highly likely that I, as a woman of colour reader of the Five Habits will be more likely to empathize with the client’s sentiment. Perhaps I would also be more likely to raise the issue of needing to push the legal system myself, given my own experience with a White legal culture, and of microaggressions within legal practice. I will also likely be more frustrated if I am encouraged not to push the law, in order to strengthen the client’s claims so that they appease a privileged, unjust legal forum. Asking readers to evaluate claims against a biased system without knowing exactly when to push back on that system, may result in law students passionate about social

\textsuperscript{108} \textit{See} Bryant and Peters, \textit{supra} n.43, at 394.
justice feeling as though they must compromise their inherent values in favour of acculturating the client and presenting him or her in the most appeasing manner to the legal forum.

iii. Habit Three.

In practicing parallel universe thinking as part of Habit Three, I wrote about an instance wherein my partner and I had very different reactions to the same event during a client interview. It is worth mentioning here that my SEEE Clinic partner was a White female. At first, I was skeptical that her reaction to this event was overly-judgmental, stemming from her different culture, from both myself and our client. I was concerned about bringing it up to the supervisor and turning it into a legal issue, because I felt that it would lead to the type of communication blockage that the Five Habits are trying to prevent against; I did not want my client to view us as part of a hostile legal system that could not fully comprehend his claims. However, as I noted in my reflection piece, this marked an occasion where she was probably correct to doubt our client, because ignoring the issue would have resulted in inadequate business counseling. Hence, it made sense to acculturate him to the legal forum’s norms. I found, in this instance, that my shared cultural similarity with him did not create enough professional distance between myself, our client, and this issue.

Nonetheless, this does present an interesting question for team lawyering. Lawyers often work in teams, where between the group of student-attorneys, they altogether occupy unique identities. Thus, lawyers need to also engage their colleagues in these practices of working through and understanding cross-cultural differences amongst themselves to prevent other members of the team from negatively affecting other members’ judgments of the client. A failure to interrogate group of attorney’s identities in relation to one another, and in relation to
the client’s identity, might result in co-counsel being hindered from explaining, contextualizing and understanding the client’s behavior. Bryant and Peters highlight in the Update that utilizing racial and intersectional lenses to discuss power, privilege and anti-subordination can be useful frameworks to discuss not only attorney-client relations, but also relations among co-counsel, for instance, when one member of the student team is a White man, and the other student is a woman of colour.\textsuperscript{109} It is worth unpacking this concept relating to race and power dynamics further with respect to how it interacts with to client judgment in Habit Three.

I find that Habit Three is, for the most part, sufficient—especially with the addition of the Doubting and Believing Scale. Still, it is worth pointing out that the Update could have the potential to be problematic without further critical analysis with regard to racial identity. For instance, while it is certainly useful to consider how a client may be interpreting and negatively reacting to microaggressions either from the lawyers, or from the legal forum, the authors also write that students can also be encouraged to “factor race and culture” into their parallel universe brainstorming, which could cause issues if left unchecked.\textsuperscript{110} Making students aware of their implicit biases, for example, may be necessary before factoring a client’s race and culture into a brainstorm of why she may be acting a certain way. A student could feel the urge to attribute the client’s behavior to something which is the result of a negative stereotype, and if this is communicated to the client, this could also be perceived as a microaggression. Thus, an incorporation of critical awareness of implicit biases, even within Habit Three, could prevent further marginalization or essentialism of the client.

\textbf{iv. Habits Four and Five.}

\textsuperscript{109} Id. at 386.
\textsuperscript{110} Id.
In examining how we communicated with our client, as part of Habit Four, to ensure that we were effectively lawyering across difference, I noticed in my reflection discussion at that time that I did not see any red flags, such as our client appearing disengaged, uncomfortable, angry, or distracted. He appeared enthusiastic and eager to communicate with us. Likewise then, in Habit Five, I noted at the time that I saw no urgent need to reform our practices, since our client seemed pleased with our representation.

Unfortunately, this changed drastically over time, and was directly related to the fact that we were lawyering across difference. Towards the end of our representation, our client was non-communicative—he missing meetings without following up with reasons as to why he did not show up. If he suggested an idea with which we disagreed during business planning meetings, he retorted that we just “didn’t understand” him, his culture, or the world in which he lived—both at a local level within the local San Francisco neighbourhood where his business was located, and in general, because he was an artist of colour. In our minds, our team reacted unfavourably to those ideas because of their potential illegality and because we wanted to preserve the company’s image as a social enterprise that works to empower youth. Our client felt distanced from what he perceived as a legal culture that was hostile to his own culture. However, without a guide on how to articulate these issues, it resulted in precisely the kind of cross-cultural communication breakdown the authors explain might occur throughout client representation.

Bryant and Peters suggest that we identify and reflect on ways that we can reform our behavior—thinking both about areas that we can control (such as our own stress-level induced by a lack of self-case), and areas outside of our control (such as our workload). But, the Five Habits provide little guidance when the element that we cannot control is the cultural difference itself.
Students also need structure for how to effectively bridge gaps when the client is convinced that legal forum is so steeped in privilege that the lawyer could not possibly understand his position.

The Update, including the Doubting and Believing Scale, is useful in that it re-suggests that we think non judgmentally about our actions after a “cross-cultural breakdown” such that we can develop constructive approaches to better our conduct in future, culturally complex situations. However, with regard to the Update, Habit Five should also include an analysis and suggestion of how, exactly, to rectify a client’s racial mistrust of the student-attorney to adequately address what is likely a common theme in lawyering across racial and cultural difference. Although Bryant and Peters by no means suggest that we dismiss our clients’ interpretation of seemingly inconsequential acts of microaggression, and in fact suggest the exact opposite in the Update to Habit Three, if readers in any way disregard this very real issue of racial mistrust as something that can be resolved by simply “striving to eliminating bias,” the student may further marginalize the client. Perhaps again, Habit Five can suggest that lawyers consider if it is an area that requires pushing back on their own privileges or the legal forum’s privileges to ensure that, at the very least, we are constantly recognizing our clients’ position as worthy of consideration.

**Part Three: Overview of Intersectionality and a Suggestion to Build a Critical Lens into the Habits.**

In the Update, Bryant and Peters highlight the fact that, within their clinic, they are students and teachers of different racial identities, interacting with legal actors and clients of different identified races, among other traits. As a result, the authors posit that in any

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111 *Id.*
112 *Id.* at 388.
interaction, race will play a role, but note that “using any one category of thinking . . . to fully define a person or a social issue can result in the very bias or stereotype [they] seek to avoid. . . .”¹¹³ As such, “[t]o counteract these impulses,” they also teach the interrelated concepts of essentialism and intersectionality.¹¹⁴ The next section of the article will first very briefly discuss Kimberlé Crenshaw’s definition of intersectionality, as Crenshaw first coined the term, and will second examine how the Five Habits inadvertently reinforces essentialism of clients and of practitioners through their exclusion of intersectionality theory.

i. Intersectionality: Crenshaw.

In her seminal article “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,”¹¹⁵ Crenshaw illustrates how dominant conceptions of discrimination encourage the viewing of “subordination as disadvantage” along a “single-axis framework,” which has the effect of erasing Black women from feminist and antiracist analyses altogether.¹¹⁶ For instance, Crenshaw writes that racism and sexism are not mutually exclusive and, in fact, often intersect in the lives of many people. As such, it is important to explore the intersection of race and gender to conceptualize identity as multi-dimensional and, thus, provide a more accurate recognition of the differences among people and give a stronger voice to all marginalized groups.

Crenshaw, focusing specifically on the Black female experience, writes that the general categories that discrimination discourse provide are limiting because they “continu[ally] insist that Black women’s demands and needs be filtered through categorical analysis that completely
obscure their experiences [and] guarantees that their needs will seldom be addressed.” In illustrating the problematic way in which the judiciary treats intersectionality, Crenshaw offers three Title VII cases as exemplars. The article will discuss the first two case studies, as they provide useful teaching points that can be applied to this article’s critique of the Five Habits.

Crenshaw first describes *Degraffenreid v. General Motors*,118 wherein the district court reasoned that the Black women plaintiffs bringing suit against GM for past race discrimination had to frame their legal issue in such a way that it “state[d] a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.”119 Also, because GM did hire White women, in the court’s view, there was no way that GM could have perpetuated sex discrimination.120 The court then dismissed the race claim, and recommended that the plaintiffs consolidate their claims with another case that alleged purely race discrimination. As Crenshaw maintains, this “solution” did not adequately account for the fact that Black women experience a combination of race and sex discrimination.121 Thus, Crenshaw posited that in the legal system, the “boundaries of sex and race discrimination doctrine are defined respectively by [W]hite women’s and Black men’s experiences.”122 As a result, the Crenshaw asserts that the court “refused to recognize the possibility of compound discrimination against Black women and analyzed [the plaintiffs’] claim using the employment

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117 Id. at 149-50.
119 Supra n.92, at 141 (citing *Degraffenreid*, 413 F.Supp at 143).
120 Id. at 142.
121 Id. at 142-43.
122 Id.
of [W]hite women as the historical base, [and thus] the employment experiences of [W]hite women obscured the distinct discrimination that Black women experienced.”

In Crenshaw’s second case study, Moore v. Hughes Helicopter, Inc., she demonstrates another way that the courts failed to understand the intersectionality of Black women’s claims. In Moore, the plaintiff employee, a Black woman, alleged that her employer practiced race and sex discrimination in promoting its employees. The plaintiff introduced evidence that there was a large disparity between men and women in supervisory roles, and less of a disparity among Black men and White men in those same roles. The Ninth Circuit affirmed the district court’s refusal to identify the plaintiff as the class representative in the sex discrimination complaint, noting that she had “never claimed . . . that she was discriminated against as a female, but only as a Black female. . . [thus] rais[ing] doubts as to [her] ability to adequately represent [W]hite female employees.” As Crenshaw articulates, the Ninth Circuit through its decision in Moore, “reveal[ed] not only the narrow scope of antidiscrimination doctrine and its failure to embrace intersectionality, but also the centrality of [W]hite female experiences in the conceptualization of gender discrimination.”

In analyzing the experience of Black female plaintiffs, Crenshaw notes that judicially-created frameworks for analyzing sex discrimination considers the perspective of White females, and paradigms for considering race discrimination from the perspective of the most privileged Blacks. What results is the court recognizing a narrowly-tailored view of discrimination, which

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123 Id. at 148 (emphasis added).
124 Moore v. Hughes Helicoptors, a Div. of Summa Corp., 708 F.2d 475, 480 (9th Cir. 1983).
125 Supra n.92, at 143.
126 Id. at 144 (citing Moore, 708 F.2d at 480).
127 Id. (emphasis added).
128 Id. at 141.
embraces only an incomplete and flawed conception of peoples’ complex identities.\textsuperscript{129}  
Crenshaw additionally provides a vivid metaphor illustrating how potential litigants who are “disadvantaged” on multiple identity bases are marginalized further when the legal system does not fully recognize the intersectionality of multiple forms of discrimination.\textsuperscript{130}  
Crenshaw asks readers to:

Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual [orientation], age and/or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the hands of those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who can say that “but for” the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. Those who are multiply-burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.\textsuperscript{131}  

In many ways, Crenshaw’s metaphor of the legal system as a basement in which many different marginalized identities can reside, but built with a crawl-hatch through which only those with a singular marginalized identity can pull themselves through and be recognized by the system, can be directly applied to the Five Habits. That is, although the Update names

\begin{flushleft}
\textsuperscript{129} Id. at 151.
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\textsuperscript{130} Id. at 151.
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\textsuperscript{131} Id. at 151-52.
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intersectionality as a way that “clinics can help students see a client as an individual with a particularized package of experience unique to that individual and as a member of multiple groups, “¹³² the Five Habits do not on their face incorporate such intersectionality in its analysis. As such, the Five Habits, in a certain respect, represent a kind of cross-cultural lawyering basement; although various marginalized identities can exist, because of Bryant and Peters’ narrowly-construed, non-intersectional view of the lawyer, the client, and the legal forum, what results is, at best, a somewhat flawed guide to cross-cultural lawyering, and at worst, further marginalization of the attorney and her clients. Just as Bryant and Peters note that “the legal structure tends to reinforce essentialism and discourage intersectional thinking[,]”¹³³ this article demonstrates that the Five Habits, in part, tend to do the same.

**Part Four: Revising the First Two Habits to Include Intersectionality.**

Rather than revising all Five Habits, this article will focus on incorporating an intersectional analysis into Habit One and Habit Two alone, as they, in particular, concern defining and exploring the identities of the client, the student-attorney and the legal system. Hence, if these first two habits are reimagined to view all relevant actors as being multi-dimensional, practitioners applying the remaining three habits will be better positioned to engage in parallel universe thinking to identify alternatives to their client’s behavior with a more critical lens (Habit Three); or to think more complexly about areas of cultural disconnect whilst

¹³² See Bryant and Peters, supra n.38, 388.
¹³³ See Bryant and Peters, supra n.38, 389.
engaging in “deep” listening and questioning with clients (Habit Four); and, to add more depth to what factors are creating bad communication patterns between the attorney and client (Habit Five). Cross-cultural communication breakdown between the attorney and client may quite possibly stem from the client’s feeling of being marginalized or essentialized as a result of the attorney or legal system’s failure to fully recognize her intersectionality. The breakdown may also result from the attorney feeling frustrated by the legal system’s inability to recognize both the client’s and her own intersectionality, and her simultaneous feeling of connectedness to the client’s struggle and confusion of how to properly counsel with these feelings given her professional position.

A. Revised Habit One.

i. Re-examining Yourself and Your Client with a Critical Lens.

Reforming Habit One first requires an examination of the reader Bryant and Peters envisions are applying the Five Habits. Through the rhetoric the authors use to describe the process of approaching cross-cultural lawyering, it is quite clear that they envision a White reader will be applying the Five Habits. For example, Bryant analogizes the experience of lawyering across different cultures to the “stressful” experience of entering a court room for the first time. The authors also describe the experience as provoking “anxiety” in attorneys; they posit that “[i]f [they] lessen the anxiety of interacting with others whom [they] perceive as different, [they] promote an openness to learning more about [their] clients and [them]selves.”

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134 See Susan Bryant, supra, n.11 at 85 (“We ask students to think about the stress they feel upon entering a courtroom to represent clients and to connect this experience to the stress of entering a culture in which the cultural rules are hidden and one does not know how to predict the responses of others.”).

135 Id. at 99.
In order to gather culture-general information about these clients who have different backgrounds, Bryant references another article, which asserts that within the process of gathering information about people’s experiences that engage the emotions, there is “anxiety about appropriate behavior, disconfirmed expectations, outsider status, tolerance of ambiguity, and confrontation of one’s own prejudices.”\textsuperscript{136} However, for students of colour applying the Five Habits, interacting with people of different races and backgrounds is likely far from being a stressful or anxiety-ridden activity. From my experience with conducting our team’s first client interviews as part of the SEEE Clinic, there was some stress, but it was associated with never having conducted a client interview before as a new student-attorney, not because my client was a person of colour who belonged to some foreign culture, which I perceived as radically different from my own. Bryant and Peters’ word choice and rhetoric, therefore, have the effect of ostracizing student attorneys of colour who cannot relate to these described feelings of panic and fear, and that word choice almost reifies the othering of their clients by validating the lawyer’s belief that her client is immensely different from her.

There are yet other indications that the authors are speaking to a White audience of readers. They state in the Update that Habit One may be an appropriate time to discuss White privilege, because “[W]hite students will often fail to identify their race in the [Similarities and Differences] list,” whereas their clients do not have the privilege of not seeing their race.\textsuperscript{137} Other, subtler indications that their reader applying the Five Habits is White is evident from Bryant and Peters’ observation that there may be a high degree of overlap between the lawyer and the legal system, but only a small degree of overlap between the client and the legal system,

\textsuperscript{136} Id. at 107 (citing Kenneth Cushner & Dan Landis, Improving Intercultural Interactions: Modules for Cross-Cultural Training Programs (Kenneth Cush & Richard W. Brislin eds., 1997), at 189.
\textsuperscript{137} Id. at 393.
which might contribute to the client’s feeling that the lawyer is a part of the hostile legal forum.\textsuperscript{138} If the legal system has a defined culture, which is steeped in privilege as Bryant and Peters contend, then we can infer that the lawyer they envision also shares in that culture of privilege. As such, Bryant and Peters assert that clients “often see the lawyer as part of a hostile legal system.”\textsuperscript{139}

Moreover, even in introducing the new Doubting and Believing Scale, the authors appear to envision a White attorney. They state that the “legal practitioner’s privilege and tendency to stereotype clients as a result has the effect of defining which narratives lawyers find credible or dubious,” and the legal practitioner’s largely divergent life experience could easily and wrongly look unmeritorious through the lawyer’s unaccustomed eyes.\textsuperscript{140} However, attorneys belong to a diverse group of different races and socio-economic classes, and they may not share in the privileged culture of the legal forum,\textsuperscript{141} making it less likely that clients will associate them with the hostile system, at least at first glance. Of course, there may be other “privileges,” such as class, heteronormative, or educational privilege that the reimagined legal practitioner possesses, despite a shared marginalized identity with the client, which ultimately manifests itself through the client’s feeling of hostility towards the attorney. Nonetheless, assuming generally that clients will oftentimes associate the attorney with the privileged legal system presupposes that the lawyer is one-dimensional.

In sum, while Bryant and Peters were cautious to “exorcize[…] the ghosts of diversity trainings past, which despite their good intentions, often inadvertently establishing a norm of

\textsuperscript{138}\textit{See} Bryant and Peters, supra n.18, 385.
\textsuperscript{139}\textit{Id}.
\textsuperscript{140}\textit{See supra} ns. 44, 52 (emphasis added).
\textsuperscript{141}Certainly, attorneys will have education privilege, and social capital, but this should be distinguished from racial privilege, which not every attorney will possess.
[W]hite maleness[,]” in that those trainings “focused on teaching about non-[W]hite culture to [W]hite students[,]”142 the Five Habits appear to fall into the same trap. Their rhetoric ultimately illustrates that they are catering to a White population of students who are anxious about lawyering across difference. It appears that the authors, at times, envision a more diverse population of student attorneys,143 and a more complex client. For instance, when they concede that the student-attorney might actually share the culture of the client in “situations where the lawyers and clients have circles that overlap.”144 Or, when in the Update, they discuss how a student-attorney of colour may be “demoted” to litigant-status when the court fails to comprehend that she could occupy a position of power.145 However, these examples read more as exceptions to the White attorney norm. This article notes that the authors also did not put the word ‘demoted’ in quotations, which might be perceived by the attorney of colour as an indication that being identified as a litigant is necessarily bad, and is a valid belief that other practitioners hold. Therefore, although the authors are not intentionally teaching cross-cultural lawyering “towards unspoken [W]hite, male, heterosexual norms,”146 by failing to envision the intersectionality in the lawyer, the client and the legal forum, they are teaching from those norms, which ultimately orients their teaching in such a way that marginalizes non-White students, clients, and legal actors.

To mitigate this, Bryant and Peters should be more explicit that the Five Habits are designed to help attorneys lawyers of all races, genders, and sexualities interrogate and address differences between themselves and their clients. Rather than focusing solely on White

142 Id. at 350.
143 See Bryant and Peters, supra n.43, 386 (introducing power, privilege, anti-subordination frameworks to discuss the dynamic between a White male attorney and Latina female attorney).
144 See Bryant and Peters, supra n.1, 52.
145 See Bryant and Peters, supra n.43, 385.
146 Supra n.23, at 351 (emphasis added).
privilege, the authors could focus on how class privilege or education privilege, or heteronormative privilege generates distance between attorneys and their clients. The authors should also withhold the naming of privileges that those applying the Five Habits may possess until students have a fuller understanding of their clients. This reservation may perform a number of important functions: First, it prevents attorneys from presupposing that their clients are necessarily inherently different from themselves, which may halt any immediate essentialization and marginalization of the client. Second, it allows attorneys to reimagine their clients as being multi-dimensional, which will result in the lawyer being more open to discovering less obvious similarities between herself and her clients. Rather than viewing categories like race or ethnicity one-dimensionally, attorneys should always try and view the client’s identity as being multi-faceted, so as to prevent any tendency to essentialize and over-simplify identity.

As mentioned in Part Two of this article, in applying the Five Habits to my client, I named his race as Black, even though he is also half Japanese. One reason that this may have occurred, is because the two stated goals within the Habits are in tension with one another. For example, the goal of Habit One is to identify and analyze the distance between the attorney and client by making lists “honestly and nonjudgmentally, thinking about what similarities and differences [the lawyer] perceive[s] and suspect[s] might affect [her] ability to hear and understand [her] client’s story and [her] client’s ability to tell it.” However, in the second part of Habit One, the authors suggest that the similarities, differences, or assumptions of similarity will significantly influence questioning and case theory. The narrower goal of the Five Habits is to examine points of difference or similarity to better understand a client’s perspective. On the

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147 Bryant and Peters, supra n.1, 53.
148 Id. at 52.
149 Id. at 52-53.
other hand, the broader goal of the Five Habits is to analyze cultural difference to provide better representation for the client. Managing these competing goals is, of course, what lawyers are tasked with doing all the time, and it is summed up in Habit Two, wherein the authors state:

Lawyers interview clients to gain an understanding of the client’s problem from the client’s perspective and to gather information that will help the lawyer identify potential solutions particularly those that are available within the legal system or those that are available within the legal system that those opponents will assent to. What information is considered relevant and important is a mixture of the client’s, opponent’s, lawyer’s, and legal system’s perspectives.150

Understanding the client to create better communication during representation is an extremely important goal, but is somewhat at odds with the larger goal of understanding the client to provide effective counsel. Put differently, although the authors in their Update encourage the incorporation of intersectionality analysis in making lists to prevent students from essentializing their clients,151 students may be more likely to focus in on the singular identity of their client to which the legal system is likely to react and perceive, as I did, in order to counsel their clients. Oftentimes, as mentioned in Part Two of this article, this may result in the type of unconscious stereotyping, essentialization, and implicit bias that the authors are trying to avoid in employing the Five Habits. For example, because the legal forum, including potential investors and business partners were more likely to view my SEEE Clinic client as Black, because of its own bias towards this racial group,152 I also viewed him as belonging to a singular

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150 Id. at 52 (emphasis added).
151 See Bryant and Peters, supra n.38, 394
racial group. Going through the Habits’ thought-process also encouraged my own implicit biases and stereotyping of Asian-Americans. The myth that Asians are a “model minority” in American society, which receives universal and unparalleled academic and occupational success among American minority groups, caused me to erase this part of the client’s identity, because it seemed unlikely that the legal forum would focus on the fact that he is Asian.\textsuperscript{153} Hence, by failing to distinguish and separate out the goal of client communication from the objective of providing effective counsel, the Five Habits encourage students to emphasize the client’s least-favoured identity, so as to best anticipate the legal system’s biases, and to deliver effective representation. Finally, focusing in on one identity also prevents practitioners from making “conscious and less obvious lists” in Habit One,\textsuperscript{154} and discourages the consideration of the client’s intersectionality. Therefore, one way attorneys might avoid this form of essentialization might be to clearly demarcate these separate goals, in other words, to first brainstorm similarities disproportionately factored into that crucial ‘human capital’ valuation equation, leaving minorities and women at a distinct disadvantage when seeking early investments. . . [e]arning the lowest share of investments for all minority groups were companies led by African Americans. Only one such company acquired capital funding in the time period during which [CB insights] data was collected, totaled at $1.9 million, which factors to less than 1 percent of the total share.”); Jeffrey J. Rachlinski et. al., \textit{Does Unconscious Racial Bias Affect Trial Judges?}, 84 Notre Dame L. Rev. 1195 (2009)(“Race matters in the criminal justice system. Black defendants appear to fare worse than similarly situated white defendants . . . judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment”); Nazgol Ghandnoosh, \textit{Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies}, THE SENTENCING PROJECT, 2014, http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf (“Low-income people of color have disproportionately borne the brunt of [incarceration and sentencing] policies. Nearly 60% of middle aged African American men without a high school degree have served time in prison. And while blacks and Latinos together comprise 30% of the general population, they account for 58% of prisoners.”); \textsuperscript{153} See generally Samuel D. Museus, Peter N. Kiang (2009), \textit{The model minority myth and how it contributes to the invisible minority reality in higher education research}. S. D. Museus (Ed.), CONDUCTING RESEARCH ON ASIAN AMERICANS IN HIGHER EDUCATION: NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH (no. 142, pp. 5-15). San Francisco: Jossey-Bass; see also Stacey J. Lee, \textit{Unraveling the Model Minority Stereotype: Listening to Asian American Youth}, TEACHERS COLLEGE RECORD, Vol. 99 No. 4, 1998, pp. 120-142 (“As a hegemonic construct, the model minority stereotype serve[s] as a wedge between Asian Americans and other groups of people of color, and shape[s] the way all Asian American students view[…] themselves.”).\textsuperscript{154} Bryant and Peters, \textit{supra} n.1, 52 (emphasis added).
and differences with an eye only towards fully seeing the client as a multi-dimensional being, not to anticipate legal forum prejudgment.

ii. Envision Identity Three-Dimensionally as Opposed to Linearly.

The second revision to Habit One is somewhat related to the first revision, but works to re-emphasize Crenshaw’s insistence that legal actors consider clients’ intersectionality such that different marginalized identities are considered at the same time rather than as separate and distinct from one another. In Degraffenreid and Moore the courts failed to perceive the Black female litigants’ race and sex as joint and separate sources of discrimination, and, as a result, were unable to perceive the full extent of their identities and to provide adequate solutions. Likewise, although Bryant and Peters encourage the attorney to look at the client as a complex character—and this article encourages that they apply that same critical lens to attorneys—their language nonetheless suggests a more linear viewing of clients.

For instance, Bryant and Peters note that these similarities and differences may have different orders of importance depending on the client or the case.\textsuperscript{155} As an example, they state that “in interactions involving people of color and [W]hites, race will likely play a significant role in the interaction given the discriminatory role that race plays in our society.”\textsuperscript{156} Instead of thinking about similarities and differences in “orders of importance,” this article posits that all traits, and particularly marginalized identities, should be considered simultaneously to completely conceptualize the type of discrimination or bias the attorney or the legal system may

\textsuperscript{155} Id.
\textsuperscript{156} Id.
have towards the client, that the client may have towards the attorney, and that the legal system may have towards the attorney.

Rather than making lists, attorneys might find it useful to think about identity as filling a bowl, in which all characteristics can coexist and intersect with one another more fluidly. The Five Habits could focus on filling the bowl with every possible ingredient of identity, such that the top becomes well-rounded and whole. Note, of course, that each ingredient has the potential to change the final product; like a chemical formula, the addition of a new compound may generate a reaction that transforms the identity of the solution. By thinking of identity as a well-rounded bowl of various ingredients, attorneys are not left trying to rank identities, because they may all be equally important to the person’s being and significant in trying to understand an attorney or client’s personality or behavior. For example, in meetings with male and female clients of colour in the SEEE Clinic, I still felt compelled to look “lawyerly” because I am doubly discriminated against because of my race and gender, despite the fact that my partner did not feel the same urge to appear professional as a White female.

Additionally, the bowl could include other, less obvious categories to encourage looking at the attorney and client more holistically. Because accent, dialect, and dress/appearance are ways that people immediately judge personality, and serve as coded forms of discrimination, it is important that these do not go unmentioned. For instance, I was first aware that my own dialect and accent gave off the impression of a false sense of privilege in middle school. My client was self-aware that on top of his status as a minority, his loud, non-traditional style of dressing additionally made him more prone to discrimination from potential investors, and these differences between him and the legal system can serve as rich areas for discussion in any guide to cross-cultural lawyering.
iii. Applying a Critical Lens to a Corporate Entity Client in Transactional Settings.

Stephen Ellmann writes that, “a tremendous amount of what lawyers do they do for groups of people. The vast bulk of corporate representation is in a sense the representation of the many individual owners of the corporation’s stock.” Wherein in direct representation, the needs of the individual client are more visible, in representing the corporate entity or other “group clients,” individual voices are likely to be diluted. “Client-centeredness” is, therefore, at once multiplied by each member of the entity. Given the ease in which an attorney or the legal forum can overlook a client’s intersectionality when the client is represented in her individual capacity, the risk of losing “client-centeredness” and seeing client intersectionality is much higher in group-client lawyering. As previously mentioned in Parts One and Two, the Five Habits are written from a litigation perspective alone. Although the Update explicitly mentions that Habit Two is relevant to both litigation and transactional settings, without explicitly tailoring the Five Habits to a transactional context in a very deliberate way, transactional lawyers may be especially prone to generalizing their corporate client, and failing to recognize the intersectionality of identities that exist within the larger entity.

In the previous section, Part 4(A)(ii), I suggested imagining identity as filling a bowl, in order to allow for intersectionality to exist. However, doing this exercise thoughtfully and

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159 Ellmann, *supra* n.157, 1122-27.

completely simply might not be feasible with a larger entity. At the time that I applied the Five Habits to my client, he had not yet incorporated his business, and it made sense to think about him as the incorporator and the entity interchangeably for the purposes of going through Bryant and Peters’ exercise. But, had he incorporated his business, established a Board of Directors potentially with a multitude of complex identities, and incorporated the entity with a purpose of serving a particular, marginalized demographic of people, it would be extremely difficult to apply Five Habits with a critical lens. The client for the purposes of the exercise would be multiplied by all of the different identities that make up the corporate entity, including the people who would be served by the business. Thus, thinking about filling the bowl with every possible ingredient of identity for every person in the entity in order to avoid over-simplifying and, therefore, marginalizing the client, would be a near impossible task. Of course, the attorney could always clarify that she would be applying the Five Habits solely to the one person that she represented who belonged to the larger company. Nonetheless, the exercise may then provide only a limited picture of the corporate client’s identity, although it could potentially still remain a useful practice for thinking about lawyering across difference.

Therefore, the Five Habits may only be useful to certain extent in representing a corporate client within a transactional context. Lawyering in this setting requires that practitioners think even more deliberately about their client’s intersectionality, given the tendency to lose client-centeredness in group-lawyering because of the multitude of identities that make up the client. It can be challenging enough to add the requisite amount of nuance to analyzing a client’s identity when applying the Five Habit’s only to one individual, as I discovered for myself within the SEEE Clinic. An attorney applying the Five Habits within transactional settings should merely be aware of the exercise’s limitations.
B. Revised Habit Two: Re-examining The Legal System with Intersectionality.

i. Reimagine the Legal Forum.

Despite the fact that the legal forum can most certainly be critiqued for being steeped in privilege, the entire legal forum is also not a homogenous group. Bryant and Peters assume in writing the Habits that the legal forum will likely consist of White actors who will be judging a client belonging to a marginalized background.\(^{161}\) However, just as the attorney and the client are not monolithic categories, neither is the legal forum. Although judges undeniably have educational privilege, class privilege, and great deal of social capital as a result, again, this does not equate to racial, or heteronormative, or gender privilege. In the Northern District of California, at the Federal Courthouse in Oakland, for example, of the seven judges on the bench, eight are women, and of those eight, half are women of colour; two are African American; one is Latina; and the other is Asian.\(^{162}\) The courthouse in Oakland is certainly not typical throughout the country with regard to diversity on the bench, however, and the legal forum generally is privileged and favors White cultural norms. Nonetheless, in applying the Five Habits, Bryant and Peters should encourage student-attorneys to consider exactly who the actors in the legal forum might be; while the law itself may be steeped in privilege, the legal actors applying the law cannot presumptively share in all of its privileges as well—those actors may be more diverse than the Five Habits anticipate.

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\(^{161}\) See supra ns.20-24; see also supra n.56, 385 (highlighting that the legal forum presumably does not share in the marginalized person’s culture, which is further exemplified by the fact that judicial actors are guilty of perpetrating microaggressions such as mistaking the law student of colour for a litigant.)

Within the transactional SEEE Clinic, potential investors in social enterprise clients may belong to more traditional investor groups that may not be diverse with respect to race or gender, however, impact investors, who specifically seek out businesses which have a social mission may well come from more diverse backgrounds.\textsuperscript{163} Thus, the legal forum may not possess a singular culture that is hostile and different to the client’s claims.\textsuperscript{164}

Of course, that is not to say that just because a judicial decision-maker or potential impact investor has a complex identity, she will immediately have a different, more favourable perspective of the marginalized client. On the one hand, separating identity from decision-making is practically impossible, and members of the legal forum recognize this reality. Justice Sonia Sotomayor, for example, asserted that the ethnicity and sex of a judge, herself included, “may and will make a difference in our judging.”\textsuperscript{165} While Sotomayor was still a judge on Second Circuit, she maintained in a speech that, “[s]he would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a [W]hite male who hasn’t lived that life.”\textsuperscript{166} On the other hand, a jurist having a non-traditional identity in a traditionally White space, such as the legal forum, may also drive a legal forum actor to go above and beyond to ensure that she gains the respect of the forum that likely otherizes her by conforming her decisions with those White norms.\textsuperscript{167}

\begin{footnotesize}
\begin{enumerate}
\item[164] \textit{See} Bryant and Peters, supra n.1, 54.
\item[166] \textit{Id}.
\item[167] \textit{See}, \textsc{e.g.}, Devon W. Carbado; Mitu Gulati, \textit{Working Identity}, 85 Cornell L. Rev. 1259, 1260-62 (2000) (“Working within an organization necessarily entails negotiating and performing identity. . . . [O]nce’s identity shape[s] the workplace behavior and experiences of outsider groups, such as women and minorities. . . . [B]ecause members of these groups are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of ‘extra’ identity work to counter those stereotypes.”); \textit{see also}
\end{enumerate}
\end{footnotesize}
Still, applying a critical lens in Habit Two is necessary for two reasons: First, it ensures that attorneys and clients do not fall into the trap of believing that positions of power are reserved for White men, or that both men and women of colour cannot occupy those positions. Second, at times, it may also change the attorney’s valuation of whether to push the legal system to consider supposedly non-meritorious claims if the legal forum is assumed not to be as hostile as a result of its perceived privilege.

ii. Pushing the Law Should Not Equate To Covering.

As previously discussed, Habit Two is primarily focused on “refocusing,” “refining,” and ultimately “strengthening” the client’s legal claims. As part of this practice, the authors ask that attorneys identify the differences between the client and the legal system to assess whether the law and legal culture can be altered to “legitimate the client, her perspective, and her claim,” and to also consider whether attorneys should “push the law,” or “persuade the client to adapt” to the legal culture.

Habit Two’s goal of strengthening the claim will often result in persuading the client to adapt to the legal culture to legitimate his claims, which could potentially result in acculturating

As A Latina, Sonia Sotomayor Says, ‘You Have To Work Harder,’ NPR, January 13, 2014, http://www.npr.org/2014/01/13/262067546/as-a-latina-sonia-sotomayor-says-you-have-to-work-harder (“I would be doing a disservice to the Latino community if I ruled on the basis of a preference for any group. ... I have to rule as I do on the basis of the law ... but I do feel that I have a special responsibility to work harder to prove myself because I am the first of a group that has been perceived as being incapable of doing whatever it is that I’ve had the benefit of becoming a part of.”).

168 Bryant and Peters, supra n. 34, at 351.
169 Id.
170 Id.
the client to the legal system and covering his identity by making it less visible to a “cultured” legal system, thereby resulting in the client’s further marginalization. Covering involves modulating one’s stigmatized identity in order to allow others to ignore that identity.171 These are not decisions that the lawyer should be making without client input. Moreover, an attorney of colour may be especially sensitive to the idea of covering a client’s identity given that she may already cover in her own life to adapt to the legal community’s culture. Thus, asking that an attorney of colour especially to cover a client’s identity may be a source of discomfort to the attorney, and may create a communication blockage between the attorney and the client. This may be a situation where social justice attorneys, in particular, might work to push the boundaries of the law to accommodate the client’s needs.

However, there may be times where it is entirely reasonable to ask the client to adapt to the legal culture. Nonetheless, without unpacking and interrogating this concept—with the client’s input—precisely when those times are appropriate as part of Habit Two, the attorney runs the risk of acculturating and covering the client’s identity. In revising Habit Two, it would be helpful to explore a specific example from the SEEE Clinic to illustrate when pushing the law versus adapting to legal culture may be suitable to prevent marginalizing the client.

As mentioned in Part Two, during my time in the SEEE Clinic, I worked with a client who needed assistance with long-term strategic planning for his business that was already up and running, but was still very much in the idea stage. He retained the SEEE Clinic to eventually

171 Kenji Yoshino, Covering, 111 Yale L.J. 769, 772 (2002) (quoting Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 102-04 (1963)) (“Goffman observed that even persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large. Thus a lesbian might be comfortable being gay and saying she is gay, but might nonetheless modulate her identity to permit others to ignore her orientation. She might, for example, (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism.”).
incorporate that business. I have already stated that our client, who was half-Black and half-Japanese, had an extremely eccentric, loud, and non-conformist style and appearance, which went with his very artistic personality. However, potential investors, coming from a distinct culture, may not have been inclined to invest in someone who did not appear professional. Because the client felt comfortable downplaying his dress style, and “suit up” to appease potential business partners, it was less necessary for us to have an in-depth conversation about whether this form of identity-shifting was discriminatory. This, however, should be differentiated from coded forms of discrimination. For example, if client felt pressure from us as the student-attorney team to, for example, cut off his dreadlocks then that would be an example of coded discrimination. If attorneys asked clients to change aspects of their appearance that are directly connected to their racial, religious or sexual identity, in their pursuit to make them more ‘professional’ to a cultured legal forum, it may actually be a form of coded discrimination because it requests that marginalized clients cover their identity. For instance, asking clients belonging to the Black community to conform to White-standards of professionalism by changing their hair-styles has long-been discussed as a form of coded discrimination in the legal sphere. Asking a Sikh male or female client to remove his or her turban in order to quell any prejudice a member of legal forum might have, would also be a form of religious prejudice that would marginalize the client. Suggesting that a queer client dress or act differently to


173See Neha Singh Gohil & Dawinder S. Sidhu, The Sikh Turban: Post-911 Challenges to This Article of Faith, 9 RUTGERS J. L. & RELIGION 10 (2008) (“[T]he turban has transformed from an article of religious devotion to a cue for violence and object of marginalization. Indeed, in various contexts and settings, Sikh-Americans have been subject to an unfortunate backlash in which their distinct appearance has been used as a proxy for the identity of a terrorist or terrorist-sympathizer.”).
downplay his “queerness” and conform to a heteronormative legal culture would likewise be a form of covering.\textsuperscript{174} These are undoubtedly exemplars of where attorneys should consider pushing the law to expose any Eurocentric, gender, or heteronormative biases. Even when the law may not readily view these as forms of discrimination,\textsuperscript{175} an attorney interested in social justice should be encouraged to identify these potential forms of coded discrimination as part of Habit Two, and make a conscious effort not to further marginalize the client by inadvertently asking the client to cover in their pursuit to strengthen legal claims.

There were also times during the SEEE Clinic, however, when pushing our client to adapt to the legal system’s culture was not marginalizing the client on the basis of his identity, but was objectively-speaking, sound legal advice that worked to strengthen his position as an entrepreneur. In our discussions of how to promote the company, the client suggested that it tag, or graffitti, street walls without permission to generate interest from the urban public. When we advised him that this marketing approach would have serious consequences, and that as his legal counsel, we could not support an unorthodox practice that would potentially damage the business’s reputation, he responded by saying that we simply “did not understand urban culture.”

\textsuperscript{174} See Yoshino, supra n.171. 
\textsuperscript{175} A New York District Court in Rogers v. American Airlines declined to hold that a workplace policy of forbidding braided hairstyles was discriminatory towards Blacks. In Rogers, an American Airlines employee challenged a rule under Title VII of the Civil Rights Act, \textit{inter alia}, which prohibited employees from wearing “corn rows,” or an all-braided hairstyle common in the Black community, which was “adopted in order to help American project a conservative and business-like image, a consideration recognized as a bona fide business purpose.” 527 F. Supp. 229, 231-33 (S.D.N.Y. 1981). The district court dismissed the complaint, reasoning that the grooming policy did not discriminate against women or Blacks, because it applied equally to members of all races, “and plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by [B]lack people.” \textit{Id.} at 232. The court found that while the plaintiff employee “may be correct that an employer’s policy prohibiting the ‘Afro/bush’ style might offend Title VII . . . [b]ut if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.” \textit{Id.} Braided hairstyles, the court reasoned is an “easily changed characteristic,” and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.” \textit{Id.} (citations omitted).
This situation actually created the type of client communication blockage Bryant and Peters ask attorneys to explore and correct as part of Habit Five. I was especially perturbed and frustrated, because outside of my role as a student-attorney, I appreciate graffiti as a form of artistic expression and its roots in hip-hop culture. However, the lawyer as counselor will often be tasked with advising the client against his own interest, or floating ideas that will be unpopular, or viewed as “risk-averse.” In these instances, it is prudent legal advice to counsel the client into adapting to the legal culture. Still, in hindsight, we could have done more problem-solving with the client to ensure that we were not being dismissive. For instance, we could have started by assuring him that we understood the benefits of tagging, but then counseled him as to the potential downsides, and subsequently engaged in a dialogue to discuss the issue in more depth. Nevertheless, Habit Two should be revised to consider when adaptation is appropriate, given Bryant and Peters’ suggestion that the legal system is rooted in an oftentimes privileged, one-dimensional culture, which oftentimes lacks a critical framework.

Hence, as part of Habit Two, student attorneys should first recognize explicitly that the decision of whether to “push the legal system” or whether to the client to adapt to the legal system’s culture is borne out of, and informed by, a judiciary that is steeped in privilege and a distinct culture that generally excludes marginalized voices. Attorneys should then examine

176 See Plerhoples, Alicia E., Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur (2015). GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS. ARTICLE 1471 (“[A] lawyer—and particularly the student attorney without practice experience—may be prone to risk aversion. Lawyers are often described by themselves and by others as “conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies.’ On one hand, risk aversion can inhibit a lawyer’s ability to “think outside the box” and take the innovative approaches that their social enterprise clients need. On the other hand, a lawyer’s risk aversion may add value to a social enterprise to the extent that the lawyer can be a “sounding board to help clients balance risk-prone ideas.”); see also David A. Binder, et al., LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH, Chapter 20, Counseling ‘Deal’ Clients, (1977), 465-496.
177 See generally Crenshaw, supra n.92, at 149-50.
the extent to which asking a client to acculturate would result in his or her further marginalization.

For instance, if the attorney is asking the client to cover a part of his racial identity, by pushing him to cut off his dreadlocks or to remove a turban, as just some exemplars, it would be a form of coded discrimination that—if left unexamined—would marginalize the client. In contrast, dressing the client differently, when suggested by the client, and when that dressing is non-essential to the client’s identity, may not be covering. Finally, suggesting that the client consider another option, unrelated to his essential identity—tagging versus not tagging as a business strategy, for example—is not covering, but could still result in further marginalization if not done delicately and thoughtfully. Even short of covering, the lawyer can be dismissive of the client’s perspectives by not seeking to understand the assets that the client brings to the table. Encouraging this conversation in the early stages of the Five Habits ensures that, in bridging distance to improve lawyering across cultural difference, attorneys are not working to unintentionally marginalize their clients further.

Conclusion

The Five Habits are an incredibly rich tool for attorneys to examine the ways in which the legal forum is cultured, as opposed to culture-neutral, and is undoubtedly a useful exercise for attorneys to think about how to better understand, and work with their clients when lawyering across cultural difference. However, the Five Habits are also lacking a critical lens when considering the identities of the attorney applying the Five Habits, the client, and the legal forum. Lawyering across cultural difference is necessarily conditioned upon the presupposition that the attorney and the client come from different cultural backgrounds. But, this should not assume
that the attorney is a White male—the stereotypical identity of the lawyer class; educational privilege should not be conflated with racial or gender privilege. Likewise, attorneys should not assume that the client, who likely belongs to a marginalized background, does not also have a complex identity that is worthy of deep interrogation. As demonstrated, the Five Habits all too often presume that a White attorney will be performing the exercise with respect to a client comprised of multiple marginalized identities. Therefore, as written, the Five Habits do not adequately allow for nuance within each individual’s identity, which can result in essentialism and further marginalization of both the attorney and the client.

This article has presented a number of ways to reimagine Habit One and Habit Two, which focus specifically on naming and examining the similarities and differences in identity between all of these individuals in the Five Habits exercise, in order to more deliberately consider each person’s intersectionality. It has also illuminated the ways in which the Five Habits exercise may only have a limited relevance to attorneys operating within transactional context, given that identity is multiplied in these settings. Nonetheless, for individual client-representation, thinking about identity as a bowl of combined unique ingredients, rather than as discrete, separable characteristics that can be ranked and ordered, the exercise may sufficiently allow readers to consider all the nuances of identity so as better attorney-client communication.

In so doing, the Five Habits become less likely to essentialize the attorney, client, and the legal actors within the forum, and it becomes increasingly likely that the exercise will not result in further marginalization of the client, or of the attorney applying the Five Habits. The hope of this article, as stated earlier, is that other readers use this article as a jumping point for considering how to craft a guide to cross-cultural communication, which considers the diversity of the legal profession and the diversity of client base it seeks to serve.