

BETTER THAN OUR BIASES: USING PSYCHOLOGICAL RESEARCH TO INFORM OUR APPROACH TO INCLUSIVE, EFFECTIVE FEEDBACK

ANNE D. GORDON*

ABSTRACT

As teaching faculty, we are obligated to create an inclusive learning environment for all students. When we fail to be thoughtful about our own bias, our teaching suffers – and students from under-represented backgrounds are left behind. This paper draws on legal, pedagogical, and psychological research to create a practical guide for clinical teaching faculty in understanding, examining, and mitigating our own biases, so that we may better teach and support our students. First, I discuss two kinds of bias that interfere with our decision-making and behavior: cognitive biases (such as confirmation bias, primacy and recency effects, and the halo effect) and implicit biases (stereotype and attitude-based), that arise from living in our culture. Second, I explain how our biases negatively affect our students: both through the stereotype threat that students experience when interacting with biased teachers, and by our own failure to evaluate and give feedback appropriately, which in turn interferes with our students' learning and future opportunities. The final section of this paper details practical steps for reducing our bias, including engaging in long-term debiasing, reducing the conditions that make us prone to bias (such as times of cognitive fatigue), and adopting processes that will keep us from falling back on our biases, (such as the use of rubrics). Acknowledging and mitigating our biases is possible, but we must make a concerted effort to do so in order to live up to our obligations to our students and our profession.

* Clinical Professor of Law and Director of Externships, Duke Law School; J.D. University of Michigan Law School, A.B. Princeton University. Thank you to my partner and my family for their support, including reading drafts, talking through ideas, and helping me raise three anti-racist, social-justice-minded girls. Thank you to my research assistant Jared Shadeed, who helped me collate articles and thoughts. Thanks also to my small group at the Clinical Law Review Workshop for their ideas, critiques, and encouragement: Cecily Banks, Susan Brooks, Gillian Chadwick, Tamar Ezer, Sarah Fishel, Kate Devlin Joyce, Jennifer Lee, Marjorie Silver, Jim Stark, and Kellie Wiltsie. Finally, thank you to my colleagues in the clinical and externship community who graciously offered their time, editing, and feedback, including Crystal Grant, Janet Thompson Jackson, Jerry Kang, Chipu Nyambuya, and the inimitable Sue Schechter.

TABLE OF CONTENTS

Introduction	197	R
I. Cognitive and Implicit Bias: Inter-Related and Interacting	201	R
A. Dual Process Theory and Bias	201	R
B. Cognitive Biases Live in System One, and Interfere With Our Decision-Making	202	R
C. Cognitive Biases Interact With Implicit Bias	206	R
II. Clinicians Have Bias	209	R
A. Lawyers Have Bias	209	R
B. Judges Have Bias	211	R
C. Teachers and Professors Have Bias	214	R
III. Why Does De-Biasing Our Student Interactions Matter? The Example of Feedback	216	R
A. Feedback Is Critical to Teaching	217	R
B. Feedback Conversations Are Hard, Especially Across Racial, Gender, and Cultural Lines	219	R
C. Bias Affects Our Teaching and Our Students' Learning	221	R
D. Biased Faculty Negatively Affect Students' Experiences In Law School	223	R
IV. Tools To De-Bias Ourselves and Our Student Interactions	226	R
A. Change your Elephant: Rid Yourself of Implicit Bias	227	R
1. Training	227	R
2. Exposure to Diversity	229	R
3. Cultivate a Growth Mindset	231	R
B. Strengthen Your Rider: Take Change of Your Brain	233	R
1. Be Mindful	233	R
2. Reduce Your Cognitive Fatigue	235	R
C. Shape The Path: De-Bias Your Process by Using Rubrics	236	R
1. Create A Rubric	237	R
2. Audit Your Rubric	242	R
3. Use The Rubric in Feedback and Assessment ..	244	R
4. Use Good Feedback Practice	246	R
V. Conclusion	248	R

INTRODUCTION

“Whoever teaches learns in the act of teaching, and whoever learns teaches in the act of learning.”¹

“When they approach me they see. . .everything and anything except me. . .[this] invisibility. . .occurs because of a peculiar disposition of the eyes. . . .”²

Law schools have a diversity problem.³ Even where schools manage to recruit a diverse population of students, we often fail to provide an enabling and inclusive environment for BIPOC⁴ and other under-represented students, leaving such students excluded from the benefits that law school can bring. Students can feel tokenized, marginalized, and stereotyped – not only by their colleagues, but by their professors.⁵ The stress that accompanies being in a hostile learning environment can lead to reduced well-being, lower performance, and less opportunity for students from under-represented groups, particularly among Black students.⁶ Clinicians are uniquely situated to be able to create either a supportive or hostile environment in our classrooms, given our intensive personal interactions with our students. We may also be uniquely resistant to the idea that we have bias, however, given our politics, our philosophy on the law, or the community-focused nature of our work. If we care about creating an inclusive environment where all students can succeed, we must overcome our

¹ PAULO FREIRE, *PEDAGOGY OF FREEDOM: ETHICS, DEMOCRACY, AND CIVIC COURAGE* 31 (1998).

² RALPH ELLISON, *INVISIBLE MAN* 3 (1995 ed.).

³ Melissa Heelan Stanzione, *Law School Enrollment Up Overall, But Not for Minorities*, BLOOMBERG LAW (December 12, 2019), <https://news.bloomberglaw.com/privacy-and-data-security/law-school-enrollment-up-overall-but-not-for-minorities>. This legal profession as a whole fares little better: in 2020, the profession was 63% male and 86% white. ABA National Lawyer Population Survey, *available at* https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf (last visited January 26, 2021).

⁴ Black, Indigenous, and People of Color.

⁵ Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 BERKELEY LA RAZA L.J. 1 (2015), *available at* <https://ssrn.com/abstract=2599582> or <http://dx.doi.org/10.2139/ssrn.2599582>.

⁶ Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?* 101 NW. U. L. REV. 1759, 1760 (2007). This article capitalizes Black when used in a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community (just as the terms Asian, Hispanic, and Native American are also capitalized). This is consistent with an increasing number of news organizations and style guides. *See, e.g.*, Mike Laws, “Why we capitalize ‘Black’ (and not ‘white’),” COLUM. J. REV., June 16, 2020 *available at* <https://www.cjr.org/analysis/capital-b-black-styleguide.php>; Associated Press, *Explaining AP style on Black and white*, July 20, 2020, <https://apnews.com/article/9105661462>.

resistance to acknowledging our own biases and take affirmative steps to improve our interactions with our students.

While anyone who interacts with students should be concerned about creating inclusive learning environments, clinicians and legal writing faculty must be particularly diligent. This is because the great comparative advantage to our teaching – our ability to give intensive, detailed feedback over a series of months or even semesters – also puts our students at increased risk of biased interactions. Feedback is one of the most critical elements of clinical teaching; it can help students identify their strengths and weaknesses, reinforce what they learn in our classes and office hours, improve our students' interactions with their clients and colleagues, and shape our students' self-perception of their skills as future lawyers. It is therefore critical that clinical professors be aware of the existence and effects of bias – both those that are natural to being a human and those that are shaped by cultural stereotypes – on our feedback. Every clinician must also take positive steps to mitigate our biases. The goal of this paper is to help everyone who teaches in law schools – but particularly clinical, legal writing, and externship program faculty – accept and mitigate our biases. It will do this by examining the many ways we might be biased, showing the negative consequences of our bias on our students (particularly under-represented students), and providing concrete ways to mitigate our bias – all to benefit our students' learning, practice, and future opportunities.

Part I of the paper will introduce the concept of cognitive biases and how they interact with (and confirm) implicit bias. It will also outline the circumstances in which these biases are most likely to present themselves, including times of stress, low blood sugar, and other times when we are cognitively depleted. Cognitive overload and implicit bias (including the cognitive overload *caused by* implicit bias) create a perfect storm, where the more stressed we are, the more likely we are to fall back on our biases, leading to interactions that could have negative outcomes for our students.

Part II is intended to prove that clinical professors are biased, just as members of the general population are. Clinicians do not exist in a vacuum; we are lawyers, judges, teachers, and academics. Each of these groups has been studied extensively and found to exhibit bias that interferes with decision-making – both cognitive biases and implicit biases (and often an interaction between the two). This section is intended to snap us out of our own Blind Spot Bias (the tendency to think we are less prone to bias than others).⁷ Clinicians are likely to

⁷ Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERS. & SOC. PSYCHOL. BULL. 369 (March 2002), available at <https://>

believe that we do not harbor stereotypes or negative attitudes about minoritized groups; after all, most of us work every day in spaces designed to promote justice and equality; we may teach implicit bias in our classes, work in social justice, or have our students take the IAT.⁸ Ironically, however, this “expertise” may make us *more* likely to be biased.⁹

Part III will examine the importance of giving bias-free feedback to our students, both in how we act during the one-on-one conversations we have with our students and in the substance of our feedback. This section will describe the effect of biased feedback on our students, both on an interpersonal level and for their future academic and professional opportunities. The stakes truly could not be higher.

Part IV will discuss tools that clinicians can use to mitigate bias in our feedback and evaluation. Here I will use a frame first described by NYU psychologist Jonathan Haidt to explain how to change behavior when change is difficult: the Elephant, the Rider, and the Path.¹⁰ This section will highlight some of the ways you can start making change: taming your Elephant by changing your implicit bias, strengthening your rational Rider by preventing you from falling back on your biases, and shaping your path to encourage bias-free teaching and evaluation by using rubrics.

A note on the terms used in this paper. First, “clinician” or “teacher.” These terms are meant to encompass clinical and externship teachers (including site supervisors), legal writing teachers, and podium faculty, whether or not they are officially designated as faculty; as such, I may also use the words “faculty” or “professor” even though many readers will fall outside these formal categories. The relevant audience is those of us who cultivate personal and feedback relationships with students; this can also include doctrinal faculty. Second, clinicians and supervisors can show bias toward any group, based on race, gender, nationality, ability, sexual orientation,

doi.org/10.1177/0146167202286008.

⁸ The IAT measures the strength of associations between concepts and evaluations or stereotypes. The main idea is that making a response is easier when closely related items share the same response key. See PROJECT IMPLICIT, ABOUT THE IAT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Feb. 6, 2021).

⁹ Mark W. Bennett, *The Implicit Racial Bias In Sentencing*, 126 YALE L.J.F. 391, 393 (2016-2017) (citing L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 865, 888 (2017) (reviewing NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016) (stating that egalitarian individuals are less likely to be aware of these implicit biases, because they lack explicit biases)).

¹⁰ JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 4 (2006); CHIP HEATH & DAN HEATH, *SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD* (2010).

gender identity, accent, weight, skin color, English language skills, family status, or other factors that make a student fall outside of a given professor's view of the norm.¹¹ The problem of bias in feedback, and the tools this paper suggests to mitigate that bias, can be used in working with any group that a teacher may harbor bias against – implicit or not. Because race and gender have been most extensively studied in the psychology literature, this paper will primarily discuss race and gender bias – not just from white male professors, but also from BIPOC professors and women of any race.

Another important note: while this paper discusses the effects of bias on our students and how to mitigate bias in our teaching and feedback, any thorough exploration of bias within our institutions should also consider how our institutions created the current inequities faced by our under-represented and minoritized students, how these inequities are held in place, and what our role is as teachers in perpetuating inequities, despite our good intentions. While this paper does not discuss admissions practices, faculty hiring, career and clerkship services, diversity and equity initiatives, or financial aid policies, they are not divorced from the situation we currently find ourselves in. If law schools are to succeed in creating institutions where everyone has access to the opportunities they need to learn and thrive, they must be willing to confront the history and effects of structural racism, learn how both implicit and explicit biases serve to entrench hierarchies, and take action to interrupt inequitable practices at the interpersonal and institutional level.

Cultivating personal interactions with professors is risky; as is taking a clinic, externship, or intensive writing course. Students who may have become comfortable with anonymous large lecture-classes may take a clinic and find themselves thrown into unfamiliar or uncomfortable situations with clients and collaborators; they rely on clinicians and supervisors to help them navigate these new spaces. Yet under-represented students seeking individual attention and mentorship from professors may view the benefits of the relationship as outweighed by the risk of biased interactions with those professors. If we want to recruit a diverse group of students to our clinics, we must do the work to create an inclusive space. This means acknowledging our biases and taking affirmative steps to mitigate them; doing so will pro-

¹¹ William Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Educational Opportunity to Students of Color*, 12 SCHOLAR 355 (2009-2010), available at <https://ssrn.com/abstract=2987351> citation; Sarah Nutter, Alana Ireland, Angela S Alberga, Isabel Brun, Danielle Lefebvre, K. Alix Hayden & Shelly Russell-Mayhew, *Weight Bias in Educational Settings: a Systematic Review*, 8 CURRENT OBESITY REP. 185 (2019), available at <https://pubmed.ncbi.nlm.nih.gov/30820842/>; Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

duce positive outcomes for our students, for our schools, and for the legal profession.

I. COGNITIVE AND IMPLICIT BIAS: INTER-RELATED AND INTERACTING

Our brains are efficiency masters; over the last 200,000 years, we have evolved to use as little of our brainpower as possible as we move through the world. One way this efficiency manifests is by developing automatic characterizations, or schema, that our brains use to sort through information we encounter in the world.¹² Usually, these schema serve a critical time-saving purpose by allowing us to go on “auto-pilot;” for example, we are able to distinguish a plastic bag from a log in the road while driving, and swerve out of the way (or not) accordingly, all without conscious thought. These schema, however, are also where our cognitive biases live: errors in decision-making and judgment that occur when our brains take shortcuts.¹³ Where our schema intersect with actual or perceived social characteristics, our automatic judgments might activate in ways we do not realize – sometimes they come from our lived experiences, but more often are influenced by stories, books, movies, media, and culture.¹⁴ The frames we construct using these reference are therefore often influenced by gender, racial, and cultural stereotypes.¹⁵ This section will describe some common cognitive biases, and describe how they can influence (and be influenced by) our implicit bias.

A. *Dual Process Theory And Bias*

In his decades of research on judgment and decision-making, Nobel-prize winning economist and psychologist Daniel Kahneman has categorized our thinking into two systems: System One and System Two (often called Dual Process Theory).¹⁶ System One is a cognitive mode that is based on pattern recognition – it operates automatically and quickly, with little or no effort and no sense of voluntary control.¹⁷ System Two allocates attention to the deliberate mental activities that take effort, including complex computations.

¹² JERRY KANG, NAT’L CAMPAIGN TO ENSURE THE RACIAL AND ETHNIC FAIRNESS OF AMERICA’S STATE COURTS, IMPLICIT BIAS - A PRIMER FOR COURTS (Aug. 2009), available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ DANIEL KAHNEMAN, THINKING FAST AND SLOW 20 (2013) (describing Dual Process Theory).

¹⁷ *Id.* at 21.

Operations of System Two are often associated with the experiences of agency, choice, concentration, and self-control.¹⁸

System One processing includes detecting that one object is more distant than another; detecting hostility in a voice; orienting to the source of a sound; and driving a car on an empty road.¹⁹ System Two kicks in with the need to concentrate, for example: look for a woman in the crowd with white hair; focus on the voice of one person in a crowded room; fill out a tax form; check the validity of a complex logical argument; park in a narrow space.²⁰

This split judgment is important in a discussion of bias for two reasons. The first is that implicit bias lives in System One. The split-second decisions we make about our daily life, including associations we make, arise outside of conscious awareness – and may be misaligned with our explicit beliefs and stated intentions. This means that even people who consciously cultivate non-racist beliefs and actions may still unknowingly act in ways that reflect their implicit biases.²¹

Second, because cognitive and implicit biases are unconscious and involuntarily activated as part of System One, we are often not even aware that they exist, and therefore cannot be turned off at will. Put another way, we have trouble avoiding biases, because System Two – responsible for choice, self-control, and concentration – may have no clue to the error. Yet our System One errors can have a tremendous impact on decision-making.²²

Here's more bad news: Our store of concentration, or what is needed to operate in System Two, is limited, in both capacity and endurance. With regard to capacity, System Two can take on only a limited amount of work – we cannot, for example, compute the answer to 17x24 while making a left turn into dense traffic.²³ System Two also tires easily – if we spend too long trying to marshal our self-control and concentration, we do significantly less well in tasks requiring more (including attempting to ward off bias while giving feedback).²⁴

B. Cognitive Biases Live In System One, And Interfere With Our Decision-Making

Cognitive biases are errors of intuitive thought - shortcuts to decision-making that actually lead us to the wrong conclusion. Wikipedia has a fascinating (and growing) list of cognitive biases that contains

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 22.

²⁰ *Id.* at 22.

²¹ *Id.* at 22.

²² *Id.* at 22.

²³ *Id.* at 23.

²⁴ *Id.* at 23.

nearly 200 entries, from Hindsight Bias (the tendency to see past events as being predictable at the time those events happened),²⁵ to the IKEA Effect (the tendency for people to place a disproportionately high value on objects they partially assembled themselves – such as furniture from IKEA – regardless of the quality of the end product).²⁶ These biases live in System One, out of sight of our logical mind.

There are a number of different cognitive biases that clinical teachers should be aware of in our interactions with our students. Keep in mind how these various biases interact with each other, where one bias can form an initial judgment and further biases serve to entrench that judgment.

The first, appropriately, is called the PRIMACY EFFECT (sometimes called “Anchoring Bias”). This is the common human tendency to rely too heavily on the first piece of information offered, which serves to “anchor” subsequent judgments.²⁷ For example, where the first assignment that a student turns in is poor, this bias serves to “anchor” our perception of that student in subsequent interactions. This bias is especially damaging to under-represented students where combined with stereotypes; for example, if because of her stereotype bias a teacher judges that a student will be a poor performer, the professor may “anchor” her perception of that student in an unfair way that sticks with the student in subsequent evaluations. Anchoring bias can also take the form of scrutinizing deviations from a teacher’s view of “the norm” and assigning the difference to the first obvious factor, i.e., a student’s race.

Those worried about evaluating students in a biased manner might also be concerned about the RECENCY EFFECT, or the tendency for recent minor events to have more influence on a teacher’s rating than even major events of many months ago.²⁸ For example, a student who had a rough start but a strong finish to the semester might earn a better grade than a student who was competent throughout,

²⁵ *List of cognitive biases*, En.wikipedia.org, https://en.wikipedia.org/wiki/List_of_cognitive_biases (last visited Feb. 6, 2021).

²⁶ Michael Norton, Daniel Mochon & Dan Ariely, *The IKEA Effect: When Labor Leads to Love*, 22 J. CONSUMER PSYCHOL. 453 (2012), available at https://www.hbs.edu/faculty/Publication%20Files/norton%20mochon%20ariely_6f7b1134-06ef-4940-a2a5-ba1b3be7e47e.pdf.

²⁷ AM. PSYCHOL. ASS’N, DICTIONARY OF PSYCHOLOGY, *Primacy Effect*, available at <https://dictionary.apa.org/primacy-effect> (last visited January 8, 2021); see also KAHNEMAN, *supra* note 16, at 119; Gregory S. Parks, *Race, Cognitive Biases, And The Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1055 (2018).

²⁸ AM. PSYCHOL. ASS’N, *supra* note 27, *Recency Effect*; see also Thomas Earl Geu, *Are Employee Appraisals Making the Grade? A Basic Primer and Illustrative Application of Federal Private Employment Discrimination Law*, 47 S.D. L. REV. 430, 442 (2002).

because their final work product stands out more in the teacher's mind. Depending on your grading methodology (a summative evaluation based on competence rather than growth, for example) – this bias could be interfering with your stated pedagogical goals.

Perhaps the most insidious bias in the realm of teacher bias is CONFIRMATION BIAS: the tendency to selectively search for information that confirms prior beliefs, hypotheses, or judgments.²⁹ For example, where a professor holds implicit bias against a student, judging her as less capable than her peers, a misspelling that would otherwise be overlooked is sought out and given significant (negative) attention. The teacher “knew” that this student would struggle, and indeed she does. The converse is also true – students that are judged as being competent (perhaps because of their appearance, background, manner of speaking, or the like) receive the benefit of a teacher's subconscious willingness to overlook evidence to the contrary.

Similar to the Confirmation Bias is the HALO EFFECT, where one aspect of an individual's performance influences unrelated areas of that student's evaluation.³⁰ Kahneman describes the Halo Effect as increasing the weight of first impressions – sometimes to the point that subsequent information is mostly wasted. So for example, where a student does great in a client interview, the teacher may be more likely to give her a higher grade on a writing project (whether or not they intend to do so).

Another bias those of us in team-teaching situations must be aware of is the BANDWAGON EFFECT. This is our tendency to have our attitudes and beliefs shaped by others, due to our innate desire for social harmony.³¹ If one clinician has an opinion about a student, the other may be unconsciously swayed by that person's opinion and therefore less likely to speak up for a student's talents, even if her opinion differs.³²

Then there is the ATTRACTIVENESS EFFECT - the well-documented tendency for people to assume that those who are physically attractive are also superior performers.³³ Attractive people are more

²⁹ AM. PSYCHOL. ASS'N, *supra* note 27, *Confirmation Bias*; see also Parks, *supra* note 27, at 1039, 1059.

³⁰ AM. PSYCHOL. ASS'N, *supra* note 27, *Halo Effect*; see also KAHNEMAN, *supra* note 16, at 83; John Edward Davidson, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605, 1610 (1995) (identifying subjective influences in the performance appraisal process).

³¹ AM. PSYCHOL. ASS'N, *supra* note 27, *Bandwagon Effect*; see also Parks, *supra* note 27, at 1039, 1058.

³² The situation could be exacerbated in team-taught clinics with faculty of different ranks, where the more junior faculty consciously or unconsciously aims for harmony with her more senior colleague.

³³ DICK GROTE, *HOW TO BE GOOD AT PERFORMANCE APPRAISALS* 105 (2011).

likely to be interviewed for jobs and hired, more likely to advance rapidly in their careers through frequent promotions, and earn higher wages than unattractive individuals.³⁴ Even in the legal realm, attractive people are less likely to be arrested and convicted,³⁵ and more likely to have court cases go in their favor.³⁶ Where so much of our evaluation depends on our subjective assessment of how well a student has, for example, connected with a client, or communicated her professionalism, we must also be willing to interrogate whether the Attractiveness Effect (and our resulting assumptions about our students' competence) plays any role in our decision-making.

Whether related or not to the Attractiveness Effect, there is also the Similar-to-Me Effect, or INGROUP BIAS: the tendency of individuals to rate people who resemble themselves more highly than they rate others.³⁷ For example, interviewers accord more favorable interview ratings to candidates who possess similar attitudinal, biological, and racial characteristics to themselves.³⁸ We do this because similarity increases the likelihood that we will receive consensual validation for our own views and opinions.³⁹ This reinforcement, in turn, evokes favorable feelings toward the similar other. While many organizations believe that they are practicing meritocracy, in reality, they are practicing a "mirror-tocracy," rewarding who look like their leaders, including having gone to the same schools, sharing the same background

³⁴ Dario Maestripieri, Andrea Henry & Nora Nickels, *Explaining financial and prosocial biases in favor of attractive people: Interdisciplinary perspectives from economics, social psychology, and evolutionary psychology*, 40 BEH. BRAIN SCI. (2016), available at <https://pubmed.ncbi.nlm.nih.gov/27283466/>.

³⁵ Kevin M. Beaver, Cashen Boccio, Sven Smith & Chris J Ferguson, *Physical attractiveness and criminal justice processing: results from a longitudinal sample of youth and young adults*, 26 PSYCHIATRY, PSYCHOL. & LAW 669,676 (2019), available at <https://pubmed.ncbi.nlm.nih.gov/31984103/> (finding that more attractive persons were less likely to be arrested and convicted than less attractive persons).

³⁶ Leslie A. Zebrowitz & Susan M. McDonald, *The impact of litigants' baby-facedness and attractiveness on adjudications in small claims courts.*, 15 L. & HUM. BEHAV. 603, 620-621 (1991), available at <https://doi.org/10.1007/BF01065855>; Jennifer M. Kutys, *Juror Decision Making: The Impact of Attractiveness and Socioeconomic Status on Criminal Sentencing and an Examination of Motivated Reasoning in Mock Juror* (2012), https://corescholar.libraries.wright.edu/etd_all/656; for more examples of this phenomenon, see Rob Holler, *Physical Attractiveness in the Legal System*, THE LAW PROJECT (March 2017), <https://static1.squarespace.com/static/5817bb2746c3c4a605334446/t/58cb53ebe4fcb52ea33b8b8a/1489720308340/Attractiveness+Bias+nTMhe+Legal+Systemfy+Rod+Hollier.pdf>.

³⁷ AM. PSYCHOL. ASS'N, *supra* note 27, *Ingroup Bias*; see also G.J. Sears & P.M. Rowe, *A personality-based similar-to-me effect in the employment interview: Conscientiousness, affect-versus competence-mediated interpretations, and the role of job relevance*, 35 CAN. J. BEHAV. SCI. / REV. CAN. SCI. DU COMPORTEMENT 13 (2003) available at <https://doi.org/10.1037/h0087182>.

³⁸ Sears et al, *supra* note 37, at 15.

³⁹ *Id.*

(race, class, gender, etc.) and sharing the same interests.⁴⁰ Similarly, in the clinical context, we may identify characteristics of good lawyering as characteristics we ourselves possess; the more assertive among us will identify assertiveness, the more collaborative, collaboration.

If you are reading these biases and thinking, “I’ve seen these things in others, but they don’t apply to me,” you may be falling prey to the BLIND SPOT BIAS, the tendency of people to see themselves as less susceptible to nonconscious predispositions and cognitive influences than others.⁴¹ For example, people often consider their own political views to be objective and purely fact-based, whereas they believe those who hold opposing political views are influenced by prejudice and party opinion. Like the Blind Spot Bias, we can fall prey to the OBJECTIVITY ILLUSION, the tendency to see ourselves as more impartial, more insightful, and less biased than others.⁴²

It is easy to see how several of these common cognitive biases can interact (such as where an Anchoring Bias or Ingroup Bias is continually reinforced by Confirmation Bias, or when the Blind Spot Bias prevents us from evaluating our motivations objectively). The next section will describe how these common cognitive biases can also interact with implicit bias.

C. Cognitive Biases Interact With Implicit Bias

In this paper, I use “implicit bias” to mean a combination of attitude and stereotype biases, and “cognitive bias” as all other cognitive biases. The distinction is not necessarily clear; implicit attitudes and stereotypes are referred to in the literature, and taught to psychology students, as a kind of cognitive bias.⁴³ We activate stereotypes when we categorize an individual as a member of a social group; thereafter, we bring to mind our beliefs about what members of that group are like: their stereotypes. We also form attitudes about groups that can be implicit even where we would disavow them explicitly. Over time, categorization can activate stereotypes without effort, awareness or intent. People then use activated beliefs as they form an impression of

⁴⁰ Joe Nocera, *Silicon Valley’s Mirror Effect*, N.Y. TIMES, Dec. 26, 2014, available at <https://www.nytimes.com/2014/12/27/opinion/joe-nocera-silicon-valleys-mirror-effect.html> (last visited January 7, 2021).

⁴¹ AM. PSYCHOL. ASS’N, *supra* note 27, *Blind Spot Bias*.

⁴² *Id.*, *Objectivity Illusion*.

⁴³ Perry Hinton, *Implicit stereotypes and the predictive brain: cognition and culture in “biased” person perception*, 3 PALGRAVE COMMUN. 17086 (2017), available at <https://doi.org/10.1057/palcomms.2017.86> (arguing that stereotypes are so linked to culture, however, that they are not truly cognitive biases, even if they operate at the automatic (System One) level)).

and interact with diverse individuals, outside of conscious effort or attention.⁴⁴

This concept has been supported by experiments measuring reaction time on associations between concepts and demographics. The most famous of these, though not the only one, is the Implicit Association Test, or IAT.⁴⁵ These experiments have shown that people respond more quickly to concepts closely linked together in memory, and betray our attitudes and stereotypes even outside of the realm of conscious thought. These experiments have repeatedly suggested that people more easily associate positive concepts with white faces versus Black faces, for example.⁴⁶ The way this manifests in the IAT is that most subjects are quicker to respond to words like “lazy” following exposure to “Black” than “white” faces that flash quickly on the screen. This research concludes therefore that our automatic responses (sitting in System One) confound our controlled or strategic responses (sitting in System Two).⁴⁷

Again, it is easy to see how implicit biases and cognitive biases can interact. A teacher’s cognitive bias can activate when first meeting a student, whereupon their stereotypes of that group and attitudes toward that group automatically make associations, and other cognitive biases kick in to confirm that initial perception. For example, a white teacher meets a BIPOC student for the first time and unconsciously categorizes that student as unlikely to excel in her class because of stereotypes; thereafter the Halo Effect and Confirmation Bias serve to stick that characterization in the teacher’s mind, and can even cause her to monitor the student’s performance more closely, mining for data that confirms her (biased) first impression.

Our biases are more likely to present when our System Two is weak – this happens when we are cognitively taxed. No matter where the effort comes from (cognitive, emotional, or physical), it draws from the same shared pool of mental energy.⁴⁸ Thus, even where a

⁴⁴ Jeff Stone & Gordon B. Moskowitz, *Non-conscious bias in medical decision making: what can be done to reduce it?* 45 MED. EDUC. 768 (2011), available at <https://online-library.wiley.com/doi/full/10.1111/j.1365-20923.2011.04026.x>.

⁴⁵ *Implicit Association Test - Background Information*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/canada/background/index.jsp> (last visited Feb. 6, 2021).

⁴⁶ Parks, *supra* note 27, at 1046.

⁴⁷ Michael Brownstein, *Implicit Bias*, STAN. ENCYCLOPEDIA PHI.(Edward N. Zalta ed.2019), <https://plato.stanford.edu/entries/implicit-bias/#IntrHistMeasImplSociCogn>, (citing D. Amodio & P. Devine, *On the interpersonal functions of implicit stereotyping and evaluative race bias: Insights from social neuroscience*, in ATTITUDES: INSIGHTS FROM THE NEW WAVE OF IMPLICIT MEASURES 193 (R. Petty, R. Fazio & P. Briñol eds., 2009)).

⁴⁸ KAHNEMAN, *supra* note 16, at 42 (describing a famous experiment in which participants were told to eat radishes while smelling and looking at a plate of fresh-baked cookies. They were then asked to complete puzzles that required a high degree of concentration. Participants who had been told to eat the radishes (as opposed to others

will to act in an unbiased fashion exists, such action requires self-control, and the exertion of self-control requires cognitive resources; when you have less to offer, the effort becomes depleting and unpleasant.⁴⁹ Our System Two tires; there is only so long we can remain hyper-vigilant. As we lose stamina in our System Two, our ego is depleted, as well – after exerting self-control in one task, we quite simply do not feel like making effort in another.⁵⁰ Tasks that have been studied and are known to deplete mental energy include trying to impress others, responding kindly to a partner's bad behavior, making a series of choices that involve conflict, or even inhibiting the emotional response to a stirring film.⁵¹ The results of such depletion include performing poorly in cognitive tasks and logical decision-making (System Two processes). Other situations that have proven to be cognitively taxing include having to make judgments in the face of ambiguity, incomplete information, and time constraints: all commonplace in the life of a clinician.⁵² Each of these situations is a recipe for falling back on our System One processes, where our biases live.⁵³

In Section IV, I will provide a number of techniques that professors can use to mitigate their biases, from long-term de-biasing via anti-racism training to short term solutions such as eating a snack before a meeting with a student. I also make an evidence-based case for altering our feedback framework, through the use of rubrics, and style, aligning with the suggestions of Claude Steele regarding creating wise classrooms. Everyone can use these tools to help mitigate their cognitive and implicit biases, but we have to know that we need them first. Remember that research shows that most human beings suffer from Blind Spot Bias, causing them to think that “other people” are biased, while they are fair and objective.⁵⁴ This is also true in our legal education community. The next section is therefore an effort to counteract the blind spots of everyone reading this article who says, “I have colleagues that really need this,” without also saying, “I really need this.” Because, chances are, you do.

who had been allowed to eat the cookies) gave up much more quickly – leading to the conclusion that they had simply “spent” their System Two energy by resisting the cookies).

⁴⁹ KAHNEMAN, *supra* note 16, at 42; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1529 (2005).

⁵⁰ KAHNEMAN, *supra* note 16, at 42.

⁵¹ *Id.*

⁵² Cheryl Staats, *Understanding Implicit Bias*, AM. EDUCATOR 29 (Winter 2015-16).

⁵³ KAHNEMAN, *supra* note 16, at 41.

⁵⁴ Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGN.SCI., 37, 41 (2007).

II. CLINICIANS HAVE BIAS

Clinicians are lawyers, professors, and smart, competent professionals. But all this intelligence and competence do not insulate us – or our students – from bias.⁵⁵ We might be inclined to think that because we struggle for social justice in our communities; work with diverse students, clients, and colleagues; or care about racial and gender justice we are that we are less prone to the biases described above. In one study, researchers found that law students, too, believe that legal “objectivity” and legal training in rational and analytical thinking makes lawyers less susceptible than others to having, or acting upon, stereotypes or biases.⁵⁶ Because law professors also pride ourselves on being objective and unbiased as a profession, it is often the case that we, in turn, fail to properly assess our individual behavior and biases.⁵⁷ Even members of a minoritized group are prone to biased decision-making: women can still be biased against women, and BI-POC faculty can still be biased against BIPOC students.⁵⁸ We all, quite simply, have bias (and the Blind Spot Bias that makes it hard to diagnose).⁵⁹ The next section is designed to promote acceptance of this idea.⁶⁰

A. *Lawyers Have Bias*

Clinical professors are lawyers, and lawyers are no less subject to bias than the general population.⁶¹ Lawyers are subject to cognitive biases that may interfere with their relationships with their clients and

⁵⁵ Lory Barsdate Easton & Stephen V. Armstrong, *Giving Feedback Across Difference: How to Minimize Implicit Bias (and Maximize Your Team's Legal Talent)*, 58 No. 9 DRI FOR DEF. 80, 82 (2016) (stating that our susceptibility to our biases is pervasive, and has no bearing on our intellect, cognitive abilities, or personalities); Richard F. West, Russell J. Meserve & Keith E. Stanovich, *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERS. & SOC. PSYCHOL. 506, 506 (2012).

⁵⁶ Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537 (2015).

⁵⁷ Easton & Armstrong, *supra* note 55.

⁵⁸ Jennifer Saul, *Implicit Bias, Stereotype Threat, and Women In Philosophy*, in WOMEN IN PHILOSOPHY: WHAT NEEDS TO CHANGE? at 40 (Katrina Hutchison & Fiona Jenkin eds.) (2013), available at <https://books.google.com/books?id=YOASDAAAQBAJ&lpg=PA39&ots=E67n9mdRAw&dq=classroom%20%22implicit%20bias%22&lr&pg=PA41#v=onepage&q=classroom%20%22implicit%20bias%22&f=false>.

⁵⁹ See also LAYLA SAAD, *ME AND WHITE SUPREMACY* 67-68 (2020) (defining “white exceptionalism” as the belief that you, as a person holding white privilege, are exempt from the effects, benefits, and conditioning of white supremacy and therefore that the work of antiracism does not really apply to you; that white exceptionalism is what convinces you that you don’t *really* need to do the work, because you are “one of the good ones”).

⁶⁰ Kang, *supra* note 49, at 1529 (stating, “To counter otherwise automatic behavior, one must accept the existence of the problem in the first place.”).

⁶¹ Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 8 CLIN. L. REV. 783 (2002-2003).

their judgment about cases.⁶² Even seemingly-objective analyses can be tainted by lawyer bias. In two studies, researcher and consultant Dr. Arin Reeves set out to ask whether Confirmation Bias unconsciously causes supervising lawyers to more negatively evaluate minority lawyers' performance.⁶³ In the first, she and her team sent to a group of diverse law partners two identical writing samples from a "third-year associate" containing a number of errors, including minor spelling/grammar errors, substantive technical writing errors, errors in fact, and errors in the analysis of the facts.⁶⁴ The only difference between the two samples was that half identified the writer, NYU alumnus Thomas Meyer, as Black; the other described him as white. The study authors then asked for feedback from the partners on the associates' work.

The results showed a clear bias in favor of the "white-written" (but in fact identical) writing sample. In every category, including grammar, technical writing, and errors of fact, the partners found more errors in the "Black associate's" sample. The quantitative comments were illuminating, as well. In comments about the white writer, partners were more likely to write off errors as aberrations, with comments such as, "generally good writer but needs to work on. . ." whereas the Black writer was described as "average at-best," with one mentioning, "[I] can't believe he went to NYU." The conclusion of the study was not simply that the partners rated the Black student more harshly for the same errors; it is that they *found more errors in the first place*, despite identical writing. The study's authors conclude that Confirmation Bias caused the partners to look more carefully for errors in the Black student's work, and more easily disregarded errors by the white student, who fit their stereotype of a generally competent law student. The troubling aspect is this: that by the time the partners graded the Black student's writing sample, their grades were correct; there *were* a number of errors. It was a difference in the *finding* of the errors in the first place that led to the troubling difference in the grades.⁶⁵

In the second study, Dr. Reeves found that minority summer associates at a law firm were consistently being evaluated more negatively than their majority counterparts.⁶⁶ As a result, the firm instituted a blind grading system and compared the results to associ-

⁶² *Id.*

⁶³ Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014) <https://nextions.com/portfolio-posts/written-in-black-and-white-yellow-paper-series/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

ates' other evaluations. The firm discovered that the blind evaluations produced more positive feedback than other assessments – but only for minorities and women. The opposite was true for white men (their blindly graded assessments were generally less positive than their other assessments), leading to the conclusion that white associates' grades were inflated as a result of their race.⁶⁷ While such “positive feedback bias” seems to benefit white students, it in fact deprives them of the opportunity to diagnose areas for improvement, and learn from their mistakes.

B. Judges Have Bias

Clinicians are also sometimes former judges. Despite their responsibility to adjudicate their cases in a fair and bias-free way, numerous studies have shown that judges are also subject to cognitive biases (such as the Anchoring Effect and Blind Spot Biases) just as other human beings are.⁶⁸ Take one study of the Anchoring Effect, where German judges with an average of more than 15 years of experience on the bench first read a description of a woman who had been caught shoplifting, then rolled a pair of dice that were loaded so that every roll resulted in either a three or a nine.⁶⁹ As soon as the dice came to a stop, the judges were asked whether they would sentence the woman to a term in prison greater or lesser, in months, than the number showing on the dice. On average, the judges who rolled a 9 said they would sentence her to 8 months; those who had rolled a 3 said they would sentence her to 5 months: the anchoring effect was 50%.⁷⁰ Similar studies⁷¹ have found the effects of the Anchoring Effect to have remarkable (and unsettling) effects on judicial decision-

⁶⁷ *Id.*

⁶⁸ Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014) (“This psychological blind spot prevents us from seeing our own cognitive biases, yet allows us to see them in others.”); see also Joyce Ehrlinger, Thomas Gilovich, & Lee Ross, *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERS. SOC. PSYCHOL. BULL. 680, 681-82 (2005); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXP. SOC. PSYCHOL. 565 (2007).

⁶⁹ KAHNEMAN, *supra* note 16, at 125.

⁷⁰ KAHNEMAN, *supra* note 16, at 126 (citing Birte English, Thomas Mussweiler & Fritz Strack, *Playing Dice With Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERS. SOC. PSYCHOL. BULL. 188 (March 2006), available at https://www.researchgate.net/publication/7389517_Playing_Dice_With_Criminal_Sentences_The_Influence_of_Irrelevant_Anchors_on_Experts'_Judicial_Decision_Making)).

⁷¹ Birte English & Thomas Mussweiler, *Sentencing under uncertainty: Anchoring effects in the courtroom*, 31 J. APPL. SOC. PSYCHOL. 1535 (2001), available at https://www.researchgate.net/publication/279893564_Sentencing_under_uncertainty_Anchoring_effects_in_the_courtroom/citation/download.

making (finding, for example, that experienced criminal judges sentenced defendants 76% longer when a higher vs. lower number is proposed by a prosecutor or even a journalist).⁷² Judges also exhibit a significant Attractiveness Bias, where the more unattractive the criminal, the higher the sentence (and conversely, the more attractive the criminal, the lower the sentence).⁷³

Still more research has found significant evidence of Ingroup Bias among judges, based on the race of the plaintiff and judge in small claims court.⁷⁴ Judges even exhibit negative Ingroup Bias, where members of the in-group are treated more harshly when they violate a social norm.⁷⁵ For example, in juvenile cases, Black juveniles who are randomly assigned to Black judges are more likely to be incarcerated (as opposed to being placed on probation), and receive longer sentences than if they had been assigned to a judge of a different race.⁷⁶ The same held true for white juveniles assigned to white judges. Female judges, too, have also been shown to impose longer sentences on female defendants.⁷⁷

Bias can stem from a condition as simple as when judges have taken lunch breaks. One study reported in the Proceedings of the National Academy of Sciences evaluated eight parole judges in Israel who spent entire days reviewing applications for parole.⁷⁸ The cases were presented in random order, and the default was denial (only 35% of requests were approved). The authors of the study plotted the proportion of approved requests against the time since the last food

⁷² Birte English, Thomas Mussweiler & Fritz Strack, *supra* note 70; *see also* Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 *IND. L.J.* 695, 714-719 (2015) (describing numerical bias identified in results of surveys in which judges were asked to make hypothetical sentencing decisions in years, and gave sentences significantly longer than when asked to sentence in months).

⁷³ Zebrowitz & McDonald, *supra* note 36; *see also* John E. Stewart II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 *J. APPL. PSYCHOL.* 348 (1980), *available at* <https://doi.org/10.1111/j.1559-1816.1980.tb00715.x>; for more examples of this phenomenon, *see* <https://static1.squarespace.com/static/5817bb2746c3c4a605334446/t/58cb53ebe4fcb52ea33b8b8a/1489720308340/Attractiveness+Bias+n%e+Legal+Systemfy+Rod+Hollier.pdf>.

⁷⁴ Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias In The Shadow Of Terrorism*, 126 *Q. J. ECON.* 1447 (2011), *available at* www.jstor.org/stable/23015705 (finding that a claim was more likely to be accepted if assigned to a judge who was of the same ethnicity as the plaintiff, and that this effect was associated with terrorism intensity in the area surrounding the court preceding the judicial decision).

⁷⁵ Briggs Depew, Ozkan Eren & Naci Mocan, *Judges, Juveniles, and In-Group Bias*, 60 *J.L. & ECON.* 239 (2017), *available at* <http://www.nber.org/papers/w22003>.

⁷⁶ *Id.*

⁷⁷ John Gruhl, Cassia Spohn & Susan Welch, *Women as Policymakers: The Case of Trial Judges*, 25 *AM. J. POL. SCI.* 308 (1981), *available at* <https://doi.org/10.2307/2110855>.

⁷⁸ KAHNEMAN, *supra* note 16, at 43.

break, and found that the proportion of parole grants spiked significantly after each meal, when about 65% of requests were granted.⁷⁹ During the two hours or so until the judges' next meal, the approval rate dropped steadily, to about zero just before a food break. The authors carefully checked many other alternative explanations, but the conclusion was unavoidable: tired and hungry judges tend to fall back on the easier default position of denying requests for parole.

Judges also harbor the same kinds of implicit biases as others, despite their role as neutral arbiters, and these biases can influence their judgment (even where they self-assess as lacking such bias).⁸⁰ Research has shown that judges may unintentionally misremember facts in racially-biased ways during proceedings.⁸¹ Other studies of inmate populations in several states strongly suggest that implicit racial bias contributes to increases in the length of sentences based on offenders' darker skin tone and more pronounced Afrocentric features.⁸² Research has found that parties alleging discrimination succeed 10% less when the judge is a male.⁸³ In the immigration realm, factors such as immigration judges' lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review all allow implicit bias to drive decision-making.⁸⁴ And in a disturbing display of the interplay between cognitive and racial bias, one study recently concluded that the emotional shock of one's undergraduate institution unexpectedly losing a football game caused Louisiana judges to sentence Black juvenile defendants more harshly in the week after the loss.⁸⁵

⁷⁹ *Id.* at 44.

⁸⁰ Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2008-2009) (describing one study in which 97% of state court administrative law judges attending an educational conference rated their ability "to avoid racial prejudice in decision-making" in the top half of other judges at the conference); see also Bennett, *supra* note 9 (finding that 92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, and 77% of federal bankruptcy judges ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias).

⁸¹ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 347 (2007) ("Judges and jurors may unintentionally and automatically 'misremember' facts in racially biased ways during all facets of the legal decision making process.").

⁸² See Bennett, *supra* note 68.

⁸³ Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010), available at <https://doi.org/10.1111/j.1540-5907.2010.00437.x>

⁸⁴ Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419 (2011).

⁸⁵ Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J. APPL. ECON. 171 (2018), available at https://www.nber.org/papers/w22611?utm_campaign=ntw&utm_medium=email&utm_source=ntw.

C. Teachers and Professors Have Bias

Clinicians are also teachers, perhaps one of the most-studied groups in documenting the effects of implicit bias. Implicit racial associations by teachers contribute to unequal classrooms starting in early education. If teachers are like other adults in their implicit associations, we can expect that a majority hold medium to large negative implicit associations against Black students, often despite professed views to the contrary.⁸⁶ The conditions of teaching are ripe for cognitive overload: making quick micro-decisions constantly amid cognitively demanding work; precisely the situation in which our System Two is over-taxed and implicit bias has the greatest opportunity to manifest.

This is true in elementary school classes, where teachers' implicit attitudes correspond to a well-documented ethnic achievement gap.⁸⁷ Teachers in one study spent up to two-thirds of their time talking to male students; they were also more likely to interrupt girls but allow boys to talk over them.⁸⁸ Teachers also tend to acknowledge girls but praise and encourage boys. When teachers ask questions, they direct their gaze towards boys more often, especially when the questions are open-ended.⁸⁹ And yet, the Blind Spot Bias still exists; until they view their videotaped interactions, teachers believe they are being balanced in their exchanges.⁹⁰

Academics, too, are biased. In 2014, Professor Dolly Chugh and her team studied whether a student's name would determine whether they could get attention from a professor. They sent emails from a (fictional) prospective out-of-town student to more than 6,500 randomly selected professors from 259 American universities, expressing interest in the professor's Ph.D. program and seeking guidance.⁹¹ These emails were identical and written in impeccable English, vary-

⁸⁶ Natasha Warikoo, Stacey Sinclair, Jessica Fei & Drew Jacoby-Senghor, *Examining Racial Bias in Education: A New Approach*, 45 EDUC. RES. 508 (2016), www.jstor.org/stable/44971847.

⁸⁷ Ineke M. Pit-ten Cate & Sabine Glock, *Teachers' Implicit Attitudes Toward Students From Different Social Groups: A Meta-Analysis*, 10 FRONT. PSYCHOL. 2832 (2019), <https://doi.org/10.3389/fpsyg.2019.02832>

⁸⁸ Soraya Chemaly, *All Teachers Should Be Trained to Overcome Their Hidden Biases*, TIME, Feb. 12, 2017, available at <https://time.com/3705454/teachers-biases-girls-education/>, (citing DAVID SADKER & KAREN ZITTELMAN, STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT (2009)).

⁸⁹ Chemaly, *supra* note 88.

⁹⁰ *Id.*

⁹¹ Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, J. APPLIED PSYCHOL. (2014) (forthcoming, available at SSRN: <https://ssrn.com/abstract=2063742orhttp://dx.doi.org/10.2139/ssrn.2063742>).

ing only in the name of the student sender. The messages came from students with names like Meredith Roberts, Lamar Washington, Juanita Martinez, Raj Singh and Chang Huang, names that earlier research participants consistently perceived as belonging to either a white, Black, Hispanic, Indian or Chinese student. In total, they used 20 different names in 10 different race-gender categories (e.g. white male, Hispanic female).⁹²

The study found that the average response rates for each category of student (e.g., white male, Hispanic female) depended on students' race and gender identity. Professors were more responsive to white male students than to female, Black, Hispanic, Indian or Chinese students in almost every discipline and across all types of universities (including law schools). The most severe bias was in disciplines paying higher faculty salaries and at private universities.⁹³ The study also found that reaching out to someone of the same gender or race — such as a Black student emailing a Black professor, or a woman reaching out to a woman — did not mitigate the effect of bias.⁹⁴ These results mirror other studies that have illustrated similarly harmful name-bias in the business world, which in turn leads to fewer callbacks and job offers for minority groups, such as African-Americans.⁹⁵

Not only do women often find it harder to get their foot in the door in academia, but they also may be penalized for being 'too' competent once they arrive, if they upset the stereotype of how women 'ought to' behave. According to a survey of academics in the field of history,⁹⁶ women felt they were held to a higher standard than men or "had to prove themselves in order to be accepted by scholars," while men in their departments were assumed to be competent until proven otherwise. Here, too, letters of recommendation written for males often described them as "brilliant and original" while similarly situated women are described as "reliable, responsible, and meticulous." These descriptions can be the basis (or the rationalization) for deciding that women lack the intellectual firepower to succeed in the academy.⁹⁷

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (stating that the one exception was Chinese students writing to Chinese professors).

⁹⁵ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 23-4, NAT'L BUREAU ECON. RES., Working Paper No. 9873 (2003), available at <https://www.nber.org/papers/w9873.pdf>.

⁹⁶ ELIZABETH LUNBECK, *THE STATUS OF WOMEN IN THE HISTORICAL PROFESSION* 6 (2005) available at https://www.historians.org/Documents/About%20AHA%20and%20Membership/CWH-Report_5.20.05.pdf.

⁹⁷ See *Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000) (upholding denial

Studies have also shown that women and men receive differential feedback in the form of faculty recommendation letters. A study of 886 recommendations in chemistry and biochemistry found that letters written for men tend to have more “standout descriptors,” such as “the most gifted,” “best qualified,” or “rising star,” than those written for women.⁹⁸ An earlier study showed that letters for men emphasized research while those for women emphasized teaching.⁹⁹ These differential recommendation letters can make a big difference when, for example, a judge is sorting through a stack of recommendation letters and most of the standout recommendations are for men.

III. WHY DOES DE-BIASING OUR STUDENT INTERACTIONS MATTER? THE EXAMPLE OF FEEDBACK

It is critical that law professors learn to de-bias our personal interactions with our students, first and foremost because these one-on-one interactions can be the source of key learning, relationship-building, and feedback. This section will concentrate primarily on feedback, as it is one of the most critical tools we have to teach our students. Feedback is different than assessment or evaluation; while evaluation is a judgment, often comparing one student to others, feedback is the face-to-face and written information we give to students about how they are progressing toward stated learning goals. While we should all be concerned with equitable grading practices, this paper is primarily focused on feedback, and the evaluation metrics that support that feedback. Feedback and bias are linked because feedback conversations are hard, even for the most experienced clinicians – especially when they cross racial lines. This stress, combined with teachers’ implicit bias, leads to a dangerous cycle where teachers experience cognitive overload, leaving them vulnerable to falling back

of plaintiff’s tenure at Barnard College despite unanimous support of her peers in her field and widespread recognition of her teaching and research skills; tenure review board described her as “nice” and “nurturing.”) The dissent characterized the university’s decision to deny Weinstock tenure as “based—ironically—on her perceived success at projecting a stereotypically ‘feminine’ image at work . . . The inappropriate focus on Weinstock’s ‘feminine’ qualities in the tenure process led [the university] and perhaps others to discount her ‘masculine’ success as a researcher and professor.” *Weinstock v. Columbia Univ.*, 224 F.3d 33, 57 (2d Cir. 2000) (Cardamone, dissenting).

⁹⁸ Toni Schmader, Jessica Whitehead & Vicki H. Wysocki, *A Linguistic Comparison of Letters of Recommendation for Male and Female Chemistry and Biochemistry Job Applicants*, 57 *SEX ROLES* 509-514 (2007), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2572075/>.

⁹⁹ Juan M. Madera, Michelle R. Hebl & Randi C. Martin, *Gender and letters of recommendation for academics: Agent and communal differences*, 94 *J. APPL. PSYCHOL.* 1591 (2009), available at <http://www.academic.umn.edu/wfc/rec%20letter%20study%202009.pdf>; Francs Trix & Carolyn Psenka, *Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty*, 14 *DISCOURSE SOC.* 191 (2003).

on their biases, leading to worse feedback and more stilted interactions with their students, which actually interferes with their teaching ability and their students' learning. The biased feedback can lead to a degraded law school experience and fewer opportunities for diverse students once they leave school.

A. *Feedback Is Critical To Teaching*

Feedback is important. It is required in the ABA Standards,¹⁰⁰ and recognized as a critical teaching tool in our toolkit as we work to encourage our students to be reflective, skilled, self-directed, and ethical lawyers. Moreover, clinical faculty are in a unique position in law schools because we have so many opportunities for feedback – it is our specialty. It is also our responsibility to make it fair. Moreover, when we are biased, our students notice.¹⁰¹

Good quality feedback is critical to our students' learning. Feedback and evaluation provide the most meaningful (if occasionally uncomfortable) opportunities for professional development.¹⁰² While feedback is separate from instruction, when feedback combines with a review of work performed, they become intertwined until the process takes the form of new instruction, rather than informing the student solely whether her work is correct.¹⁰³ Students who receive constructive, timely, and specific feedback have the opportunity to build on what they are doing well, and develop in the areas where they have challenges.¹⁰⁴ When students use feedback and are able to improve their performance or understanding, it activates the brain's pleasure and reward centers, releasing dopamine, which motivates the student

¹⁰⁰ A.B.A., 2020-2021 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Chapter Three, Program of Legal Education, Standard 304: Experiential Courses: Simulation Courses, Law Clinics, and Field Placements, Standard 304 (a)(4) (stating that experiential courses must provide “. . .opportunities for student performance, self-evaluation, and feedback from a faculty member, or, for a field placement, a site supervisor”), available at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf.

¹⁰¹ Guy Boysen, David Vogel, Marissa Cope & Asale Hubbard, *Incidents of bias in college classrooms: Instructor and student perceptions*, 2 J. DIVERSITY HIGHER EDUC. 219-231 (2009), available at <https://doi:10.1037/a0017538> (noting that undergraduate and graduate students perceive instructors as a source of bias in the classroom); see also Paula J. Manning, *Word to the Wise: Feedback Interventions to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students*, 18 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 99, 110 (2018).

¹⁰² BAY AREA CONSORTIUM ON EXTERNSHIPS, MANUAL FOR EXTERN SUPERVISORS BEST PRACTICES – A PRIMER (2019), available at <https://www.law.berkeley.edu/wp-content/uploads/2019/10/BACE-Manual-2019.pdf>.

¹⁰³ John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RES. 81, 82 (March 2007), available at <http://www.columbia.edu/~mvp19/ETF/Feedback.pdf>.

¹⁰⁴ *Id.* at 83.

to apply more effort and stick to the task.¹⁰⁵ Feedback plays a crucial role in developing talent, building morale, aligning teams, and solving problems;¹⁰⁶ it can improve performance, efficiency, and work product, as well as boost morale.¹⁰⁷ It also has the potential to alleviate or at least reduce the negative effects of legal education on law student well-being and motivation, and the associated effects that appear to extend beyond graduation and into the profession.¹⁰⁸

Feedback is also of singular importance to nearly every aspect of clinical teaching.¹⁰⁹ The brain needs feedback or it will keep doing the same thing over and over even if that action does not result in improved skill or performance.¹¹⁰ The process of giving feedback is vastly different from other assessment tools available in a law school, and is a central component of the clinical method of teaching.¹¹¹ When our feedback is biased, we fail to help students reap the full benefit of our clinics' offerings – offerings that are critical to students' professional abilities and growth.¹¹² It is therefore our responsibility as clinical instructors to de-bias our feedback interactions with our students in order to fulfill our commitment to be effective teachers.

Good feedback is also critical to our relationship with our students. By engaging in frequent feedback cycles that lead to change, teachers deepen and strengthen their learning partnership with the student. The student recognizes the teacher's willingness to help them get better. This builds trust between them, which is critical because feedback alone does not lead to change – it has to be accepted as valid and actionable by the student.¹¹³ The student then has to commit to using that information to do something different. This can be scary; part of our role as an ally is to offer emotional support, as well as tools.¹¹⁴

¹⁰⁵ ZARETTA HAMMOND, *CULTURALLY RESPONSIVE TEACHING AND THE BRAIN* 102 (2014).

¹⁰⁶ DOUGLAS STONE & SHEILA HEEN, *THANKS FOR THE FEEDBACK: THE SCIENCE AND ART OF RECEIVING FEEDBACK WELL* 5 (2014).

¹⁰⁷ Easton & Armstrong, *supra* note 55, at 82.7.

¹⁰⁸ Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 230–31 (2013).

¹⁰⁹ Victor M. Goode, *There is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223, 224 (2000).

¹¹⁰ Hattie & Timperley, *supra* note 103, at 81-112.

¹¹¹ Goode, *supra* note 109.

¹¹² Ann Thanaraj, *Understanding How a Law Clinic Can Contribute towards Students' Development of Professional Responsibility*, 23 INT'L J. CLINICAL LEGAL EDUC. 89, 90 (2016).

¹¹³ Hattie & Timperley, *supra* note 103, at 82.

¹¹⁴ HAMMOND, *supra* note 105, at 102.

B. Feedback Conversations Are Hard, Especially Across Racial, Gender, And Cultural Lines

Despite the importance of feedback, feedback conversations can be difficult, as most teachers want to communicate unequivocal respect and affection for their students, even when they are pointing out shortcomings in the students' skills or knowledge.¹¹⁵ Even where a teacher does her best to communicate her respect and confidence that a student can do better, a student can become defensive, sensitive, overly self-critical, or otherwise react badly. For these reasons, any feedback conversation can be stressful for a teacher. Yet these conversations also cause stress for our students; and for under-represented students, their stress can be compounded by their perception of a teachers' bias, their own experience with stereotype threat, or the increased mental energy that comes from a cross-cultural interaction with a possibly biased teacher. Mitigating the stress of a feedback interaction is therefore a critical component to supporting our students' learning.

Cross-cultural feedback, where the student's demographics or culture differs from that of the teacher, compounds teacher and student stress.¹¹⁶ While cross-cultural interactions can exist between any number of groups, it is no secret that law faculties skew white; it is therefore the special responsibility of white law professors to examine the ways in which we alienate our BIPOC students. Too few white professors were given the opportunity to discuss or meaningfully engage with issues of race and racism in our own undergraduate or law school educations, and most have not been trained to be culturally-proficient advocates or culturally-proficient educators to non-white students.¹¹⁷ The effects of this are many: white professors have not been encouraged to examine and correct the ways we have been socialized to think about (or ignore) race and bias in the context of our legal history and profession; we have not been forced to interrogate our own implicit associations about our students, clients, and communities; and few have seen examples of professors addressing race directly and managing racial tensions that often arise in our clinics and classrooms. Moving beyond Black and white, and importantly for the purpose of this article, is that a lack of deep engagement with issues of implicit bias of all kinds has left many professors unequipped with the tools to meaningfully examine our own associations and attitudes as

¹¹⁵ Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 505, 573 (2012).

¹¹⁶ Anastasia M. Boles, *Seeking Inclusion From the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 224 (2017).

¹¹⁷ *Id.*

we give feedback to our students who have a racial identity, sexual orientation, disability status, or cultural background different from our own. And it leaves room for blind spots, where we are much better able to identify where others are falling short (we have all heard stories of colleagues alienating students with their unconscious bias) but unable to identify deficiencies in ourselves.

The stress of feedback interactions, especially cross-cultural interactions, therefore, takes a toll on a teacher's cognitive load. As explained in Section One, the combined effect of cognitive load and implicit bias lead us to fall back on our biases. This matters because it affects our students' outcomes – not just their grades, but their learning and performance as well. One reason for this is that our biases interfere with our comfort level in teaching.¹¹⁸ For example, teachers' unintentional and automatic racial biases can interfere with their teaching across racial lines (especially where teachers attempt to communicate to the student that they are not biased) in the form of racial anxiety.¹¹⁹ Researchers have discovered that racial anxiety is evidenced by physical manifestations such as decreased eye contact, nervousness, discomfort, awkwardness, speech errors, stiffness, and other subtle avoidance behaviors that convey dislike or unease in the presence of minority group members, possibly due to fear of being labeled a racist or fear of being met with hostility.¹²⁰ These behaviors can be so subtle that we may not even know they we are doing them; they are therefore less controllable through conscious will.¹²¹ Members of minority groups can sense the disjunction between words and behaviors, however (such as words cultivating a desire for connection but body language that shows otherwise), leading them to conclude that the speaker is biased. Knowing a teacher is biased against you, as will be explained later in Section III, can lead a student to reject the teacher's advice, and even have the effect of lowering student performance.¹²²

¹¹⁸ Drew S. Jacoby-Senghor, Stacey Sinclair & J. Nicole Shelton, *A lesson in bias: The relationship between implicit racial bias and performance in pedagogical contexts*, 63 J. Exp. Soc. PSYCHOL. 50 (2016).

¹¹⁹ Mlyniec, *supra* note 115.

¹²⁰ Rachel D. Godsil, *Breaking the Cycle: Implicit Bias, Racial Anxiety, and Stereotype Threat*, 24 POVERTY & RACE RES. ACTION COUNCIL 1, 8 (Jan./Feb. 2015); J.F. Dovidio, K. Kawakami, & S.L. Gaertner, *Implicit and explicit prejudice and interracial interaction*, 82 J. PERS. SOC. PSYCHOL. 62 (2002), available at <https://doi.org/10.1037/0022-3514.82.1.62>; Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. SOC. PSYCHOL. 797, 805–06 (1995) (noting that subtle cues that remind ethnic minority students of their stigmatized status undermine achievement on academic tests).

¹²¹ Kang, *supra* note 49, at 1529.

¹²² Stone & Moskowitz, *supra* note 44. For the classic work on this subject, see Carl O. Word, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPER. SOC. PSYCHOL. 109, 119 (1974) (stating that negative nonverbal behaviors pro-

It is easy to see how this could play out in a faculty-student interaction. A faculty member experiencing racial anxiety when dealing with a different-race student is literally, albeit unconsciously, distracted from the substance of that interaction.¹²³ For example, imagine a white law professor and student of color meeting in office hours for the first time in the law professor's office.¹²⁴ If the law professor is experiencing unconscious racial anxiety during the conversation, the professor's distraction makes them less able to engage the student, build rapport, answer questions, and provide valuable feedback and instruction. This means that the student of color is disadvantaged compared to a similarly-situated white student. Compounding the problem is the likelihood that the student of color may also be experiencing racial anxiety, decreasing the student's ability to ask questions, absorb information, and develop professional and mentoring relationships.¹²⁵

C. Bias Affects Our Teaching And Our Students' Learning

Our biases also interfere with our teaching effectiveness. In one study, white teachers who took an implicit bias test and then taught Black and white students showed that greater instructor implicit bias predicted lower performance for Black (but not white) learners, even controlling for instructor explicit prejudice.¹²⁶ This is because the higher the implicit bias in the educator, the more anxious they become in teaching, and the less effective they were in conveying the necessary information. Interestingly, when the lessons were recorded and played back for Black and white learners, *both* performed better after learning from the teachers who taught the white students. The results were clear: teachers' anti-Black bias made them less effective teachers, and their students (both Black and white) learned less as a result. Moreover, the worse the prejudice, the worse the interaction; prejudiced whites were actually likely to spend *more* cognitive resources trying to make the interaction go smoothly.¹²⁷

Teacher bias affects student performance in subtle ways, as well,

duced poorer performance in job interview setting among both whites and blacks).

¹²³ Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 164 (2018).

¹²⁴ While I have been unable to find studies that relate to these topics, one can easily imagine a similar situation where a professor without a disability experiences stress when working with a student with a disability; a cisgendered professor working with a transgendered student; a professor who speaks only English working with a student with a strong foreign accent, etc.

¹²⁵ Boles, *supra* note 123, at 164.

¹²⁶ Jacoby-Senghor et al, *supra* note 118, at 52.

¹²⁷ Godsil, *supra* note 120.

by interfering with teachers' expectations for their students. Scholars have described the relationship between teacher perceptions and student performance as a "self-fulfilling prophecy:" if the teacher expects high performance, [he/she] receives it, and vice versa.¹²⁸ The process begins with a teacher who expects a student to succeed academically, and this belief likely shapes teacher behavior, such as what assignments are given, the body language the teacher uses, the assignments a teacher gives, and the time spent with a student. Students respond to these high expectations by internalizing them, which may boost their own expectations, as well as their performance. The opposite is also true: teachers underestimating their students' abilities actually cause students to have lower academic expectations of themselves. This is particularly harmful for Black students. Lower expectations can detract from student learning through a variety of mechanisms including less interpersonal warmth and less committed teaching.¹²⁹

Teacher bias also affects students' capacity to learn by activating students' stereotype threat: the knowledge that others hold stereotypes about one's group. Human beings need to have basic needs met before we learn.¹³⁰ If students experience stereotype threat as a result of teacher bias, students may not have the feelings of belonging, esteem, and safety that they need to move onto higher-order cognitive and / learning needs.¹³¹ In this way, stereotype threat creates a high cognitive load for students, thus reducing focus and, ultimately, performance.¹³² This can happen to every student, but is especially common for under-represented students in classrooms, such as women in math¹³³ and engineering,¹³⁴ African-American students in college classes,¹³⁵ and LGBT students in religious institutions,¹³⁶ all of whom experience identity threats that can inhibit their performance.

Curiously enough, some have found that bias may cause minoritized groups to get overly-positive feedback, called "positive feedback bias." Its effects are largely negative, however, because it is not valid

¹²⁸ Hua-Yu Sebastian Cherng, *If they think I can*, 66 SOC. SCI. RES. 170, 171 (2017).

¹²⁹ Jere Brophy, *Teacher influences on student achievement*, 41 AM. PSYCHOL. 1069 (1986).

¹³⁰ A. H. Maslow, *A theory of human motivation*, 50 PSYCHOL. REV. 370 (1943).

¹³¹ Nicolette Cagel, Lecturer in Environmental Science and Policy at Duke University, Presentation to Nicholas School of the Environment at Duke University: Culturally Inclusive Pedagogy, July 29, 2020.

¹³² Steele & Aronson, *supra* note 120.

¹³³ Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women's Math Performance*, 35 J. EXP. SOC. PSYCHOL. 4 (1999).

¹³⁴ Jacoby-Senghor et al, *supra* note 118, at 50.

¹³⁵ Steele & Aronson, *supra* note 120.

¹³⁶ Alyssa N. Rockenbach, Marc A. Lo & Matthew J. Mayhew, *How LGBT College Students Perceive and Engage the Campus Religious and Spiritual Climate*, 64 J. HOMOSEX., 488 (2017), available at <https://doi.org/10.1080/00918369.2016.1191239>.

feedback; it does not provide real information to the recipient about their strengths and weakness, and may actually decrease self-esteem, leading to feelings of guilt and inadequacy.¹³⁷ This manifests, for example, where white teachers show a tendency to give more praise and less criticism to minorities than to fellow whites for equivalent work, leading to insufficient challenge that undermines minority students' academic achievement.¹³⁸ It can also manifest where a white teacher fails to alert a BIPOC student about potential difficulties in their schedule or workload out of fear of appearing biased. But in not giving the advice, the teacher may actually set the student up for failure.¹³⁹ One study showed that both women and people of color can sometimes get overly-positive feedback in the workplace – but only in “zero-sum” situations, or where the diverse performer gets extra praise for attaining a minimal level of acceptable performance.¹⁴⁰ Such “overcorrection” is intended to give credit or even sympathy, so that the reviewer feels that he or she has established their non-prejudice.¹⁴¹

Students of color, women, and others who know or suspect their teachers are biased are also put in a quandary about how to receive feedback on their work. Is negative feedback due to actual performance, or instructor bias? Is positive feedback due to professors' overcorrecting their biases and not giving them the real story about their abilities? This ambiguity is often a contingency of Black students' identity.¹⁴² The ambiguity ultimately creates a dynamic in which students are not fully capable of gauging their own performance and, compounding this, are not fully able to put energy toward listening to, accepting, and make use of feedback.

D. Biased Faculty Negatively Affect Students' Experiences In Law School

Biased professors directly affect minoritized and under-represented students' experiences in law school. Legal scholarship is replete with examples of where law students of color have a degraded

¹³⁷ Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1920 (2009).

¹³⁸ *Students' race and teachers' social support affect the positive feedback bias in public schools*, 104 J. EDUC. PSYCHOL. 1149 (2012), available at <http://psycnet.apa.org/record/2012-10763-001>.

¹³⁹ Crosby, J. R. & B. Monin, *Failure to warn: How student race affects warnings of potential academic difficulty*. 43 J. EXPERIMENTAL SOC. PSYCHOL. 663 (2007), available at <https://doi.org/10.1016/j.jesp.2006.06.007>

¹⁴⁰ Bartlett, *supra* note 137, at 1920.

¹⁴¹ *Id.*

¹⁴² CLAUDE STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 62 (2010); Manning, *supra* note 101, at 110.

law school experience, both inside and outside of the law school classroom, in comparison to their white counterparts.¹⁴³ While the Supreme Court in *Grutter v. Bollinger* articulated an idea of a law school classroom enriched by the diversity of its students,¹⁴⁴ law students of color often face isolation and marginalization in law school classrooms. This can happen in a number of different ways that stem directly from teacher bias.¹⁴⁵ Bias can affect a professor's willingness to be as rigorous during in-class discussion, or to spend extra effort helping the student achieve a breakthrough in one-on-one teaching opportunities.¹⁴⁶ If a professor subconsciously classifies a student as less capable, every time the student under-performs, his bias is confirmed; he may be more likely to give up on the student.¹⁴⁷ This mirrors what we heard from the law firm partners reviewing "Thomas Meyers'" writing sample; because the reader had already classified the student as less capable, any slip-up reinforces this conclusion through Confirmation Bias. This obvious and public reinforcement of the professors' own bias then reinforces the biases of the student's classmates, who may distrust her in collaborative exercises, be less likely to include her in their academic activities and study groups, or simply overlook her altogether.¹⁴⁸ Behind closed doors, professors may also be less likely to provide mentoring opportunities or to recommend BIPOC students for employment.¹⁴⁹

Relatedly, studies have shown that students' mental health may suffer as a result of teacher bias.¹⁵⁰ Professors' racial bias may therefore have a "deep, chronic, and potentially debilitating" effect on stu-

¹⁴³ Darling-Hammond, *supra* note 5, at 5; Boles, *supra* note 116, at 212 (citing generally, Meera Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 86-109 (2011) (surveying empirical data on under-represented law student experiences)); *see also* Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles and Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71 (2010); Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003); Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000); Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997) (describing some of the difficulties of being a Black student at Columbia Law School).

¹⁴⁴ *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

¹⁴⁵ *See generally* Curcio, *supra* note 56.

¹⁴⁶ Boles, *supra* note 123, at 161.

¹⁴⁷ *Id.* This point is particularly salient in larger classes, as it is obvious not only to the student themselves that the teacher is giving up on them, but to others in the class, too.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 1 (2016).

dents' mental health and self-perception.¹⁵¹ Indeed, implicit biases have been correlated with imposter syndrome, which is the pattern of behavior in which people suffer from self-doubt and fear being exposed as a fraud.¹⁵² This, in turn, can lead to reduced academic participation and achievement.¹⁵³ In one study, women's self-ratings of expected task competence did not at all differ from self-ratings of individuals who had actually received negative feedback about their ability.¹⁵⁴

Students from under-represented backgrounds must also contend with stereotype threat, which can influence the intellectual functioning of individual members of a stereotyped group.¹⁵⁵ Students who are members of these groups are, of course, aware of the stereotypes of their group, and when they are asked to perform a task (taking a test¹⁵⁶ or playing a sport,¹⁵⁷ for example) that implicates a negative stereotype about their group, their awareness of the bias can become acute. This can disrupt performance in three ways: 1) physiological stress that directly impairs prefrontal processing, 2) a tendency to actively monitor performance, and 3) efforts to suppress negative

¹⁵¹ *Id.*; see also Kevin Cokley, Shannon McClain, Alicia Enciso & Mercedes Martinez, *An Examination of the Impact of Minority Status Stress and Impostor Feelings on the Mental Health of Diverse Ethnic Minority College Students*, 41 J. MULTICULT. COUNS. DEVEL. 82 (2013), available at doi:10.1002/j.2161-1912.2013.00029.x.

¹⁵² Megan Dalla-Camina, *The Reality of Imposter Syndrome*, PSYCHOL. TODAY, Sept. 3, 2018, <https://www.psychologytoday.com/us/blog/real-women/201809/the-reality-imposter-syndrome>.

¹⁵³ Gregory Walton & Geoffrey Cohen, *A question of belonging: Race, social fit, and achievement*, 92 J. PERS. SOC. PSYCHOL. 82 (2007), available at <https://doi.org/10.1037/0022-3514.92.1.82>; see also Rodolfo Mendoza-Denton, Geraldine Downey, Valerie Purdie, Angelina Davis & Janina Pietrzak, *Sensitivity to status-based rejection: Implications for African American students' college experience*, 83 J. PERS. SOC. PSYCHOL. 896 (2002), available at <https://doi.org/10.1037/0022-3514.83.4.896>; Claude Steele, Steven Spencer, & Joshua Aronson, *Contending with group image: The psychology of stereotype and social identity threat*, 34 ADV. EXP. SOC. PSYCHOL. 379 (2002), available at [https://doi.org/10.1016/S0065-2601\(02\)80009-0](https://doi.org/10.1016/S0065-2601(02)80009-0); Christine Logel, Gregory Walton, Emma Iserman, William von Hippel & Amy Bell, *Interacting With Sexist Men Triggers Social Identity Threat Among Female Engineers*, 96(6) J. PERS. SOC. PSYCHOL. 1089 (2009), available at https://www.researchgate.net/publication/26241091_Interacting_With_Sexist_Men_Triggers_Social_Identity_Threat_Among_Female_Engineers

¹⁵⁴ Madeline E. Heilman, *Gender stereotypes and workplace bias*, 32 RES. ORGAN. BEHAV. 113-135 (2012), available at <https://www.sciencedirect.com/science/article/pii/S0191308512000093> (stating that the only situation in which women's self-ratings equaled men's was when they had received direct and credible positive feedback about their ability).

¹⁵⁵ Steele & Aronson, *supra* note 120, at 805-6; Manning, *supra* note 101.

¹⁵⁶ Steele & Aronson, *supra* note 120, at 805-6.

¹⁵⁷ Sian L. Beilock, William A. Jellison, Robert J. Rydell, Allen R. McConnell & Thomas H. Carr, *On the Causal Mechanisms of Stereotype Threat: Can Skills That Don't Rely Heavily on Working Memory Still Be Threatened?* 32 PERS. & SOC. PSYCHOL. BULL. 1059 (2006).

thoughts and emotions in the service of self-regulation.¹⁵⁸ These mechanisms combine to consume executive resources needed to perform well on cognitive and social tasks.¹⁵⁹ Therefore, a stereotyped law student in a final exam not only has to issue spot, remember the law, and write clearly and quickly, but also must work hard to suppress her concern that her performance will support a stereotype (e.g., that Black students are less academically gifted). The same goes for office hours or clinical interactions, where a student must work hard to show her competence while at the same time contending with the increased cognitive load that comes from her stereotype threat. Importantly, this is not an issue of self-esteem; a test-taker can know herself to be knowledgeable and competent (or even excellent) with respect to the task at hand.¹⁶⁰ It is the presence of the stereotype, and her knowledge of it, that creates the extra work and tends to depress performance.¹⁶¹ This is why the phenomenon can impact the academic performance of even (maybe, especially) the best-prepared students of color.¹⁶²

IV. TOOLS TO DE-BIAS OURSELVES AND OUR STUDENT INTERACTIONS

There are three ways to prevent our biased interactions from having the negative effects on students described above. The first is mitigating our own implicit bias; the second is not falling prey to those biases; and the third is changing our processes. None of these is easy. Fortunately, psychology provides us with a guide. Emerging research shows that implicit and explicit cognition systems are connected and that people can use explicit processes to change and control their implicit responses.¹⁶³ NYU psychologist Jonathan Haidt uses an analogy to explain how to change behavior when change is difficult: the Elephant and the Rider.¹⁶⁴ Our Elephant is our emotional side (our System One). The Rider is our rational side (our System Two). The Rider of the Elephant looks like she is in charge, and often she is, but when there is a disagreement between the Elephant and the Rider, the Elephant usually wins. We also know this from Daniel Kahneman's research on cognitive load (see Section I, above): when

¹⁵⁸ Toni Schmader, Michael Johns & Chad Forbes, *An integrated process model of stereotype threat effects on performance*, 115 *PSYCHOL. REV.* 336 (2008), available at <https://doi.org/10.1037/0033-295X.115.2.336>.

¹⁵⁹ *Id.*

¹⁶⁰ Darling-Hammond, *supra* note 5, at 5.

¹⁶¹ *Id.*

¹⁶² *Id.* (citing Steele & Aronson, *supra* note 120).

¹⁶³ Stone & Moskowitz, *supra* note 44.

¹⁶⁴ HAIDT, *supra* note 10 at 4; HEATH & HEATH, *supra* note 10.

the Rider gets weak, the Elephant takes over. Haidt models a third way to change behavior beyond the wrestling match between Rider and Elephant: shaping the path. Just as an actual Elephant tends to follow a path that has been cut out of the brush, changing our surrounding environment to facilitate our own internal change makes change easier. The suggestions in this section will use these metaphors to highlight the steps you can take to make change: taming your Elephant by changing your implicit bias, strengthening your rational Rider by preventing you from falling back on your biases, and shaping your path to encourage bias-free teaching and evaluation.

A. Change Your Elephant: Rid Yourself Of Implicit Bias

If eliminating our implicit bias were as simple as just willing it to happen, none of us would struggle. In fact, as we know, it is not that easy; indeed, concentrating hard on how NOT to be biased may make our biases worse.¹⁶⁵ Instead, changing our attitudes and stereotypes requires work: long-term, intensive training, exposure to a broader range of people in our personal and professional lives, and the knowledge that change is possible – both for ourselves and our students. All will help you tame your biased “inner Elephant.”

1. Training

Law professors can and should seek education on internalized bias and the link to discriminatory outcomes. “One-shot” diversity trainings, however, do not resolve the larger issues at play.¹⁶⁶ One research-proven intervention that researchers have found to be effective was an eight-week program that featured a bias education and training program likening the expression of implicit biases to a habit; providing information linking implicit bias to discriminatory behaviors across a wide range of settings (e.g., interpersonal, employment, health); and describing how to apply a variety of bias reduction strategies in daily life.¹⁶⁷ Another study that has shown strong potential for reducing implicit bias included instruction in the social psychology of

¹⁶⁵ C.N. Macrae, G.V. Bodenhausen, A.B. Milne & J. Jetten, *Out of mind but back in sight: Stereotypes on the rebound*, 67 J. PERS. SOC. PSYCHOL. 808 (1994), available at <https://doi.org/10.1037/0022-3514.67.5.808> (stating that when people attempt to suppress unwanted thoughts, these thoughts are likely to subsequently reappear with even greater insistence than if they had never been suppressed (i.e., a “rebound” effect)).

¹⁶⁶ Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 595 (2006).

¹⁶⁷ Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 J. EXP. SOC. PSYCHOL. 1267–1278 (2012).

stereotyping and prejudice, to circumvent the unconscious biases that contribute to unintended forms of discrimination.¹⁶⁸ This course included encouraging participants to articulate their egalitarian goals (in the clinical context, this would mean seeing students as representing opportunities to help make the world a better place); identifying common identities (inhibiting activation of stereotypes by activating “in-group identities” through finding common interests, activities, or other social identities you may have in common with the student); counter-stereotyping (finding information that is counter to the specific negative beliefs that the teacher holds about a minority group), and perspective taking (imagining and appreciating the difficult situation faced by a stigmatized student or group, making the teacher less likely to activate negative stereotypes and foster a more favorable impression of the student).¹⁶⁹

Because implicit stereotypes have reached the level of automatic associations, they are responsive only to intensive and long-term interventions.¹⁷⁰ Psychologists have found that while many interventions designed to reduce racial prejudice were quite effective temporarily, subsequent testing showed that the beneficial effect disappeared within a day or so.¹⁷¹ The conclusion is clear: while implicit associations are malleable in the short term, brief interventions have no long term effect.¹⁷²

It is therefore imperative that teachers who care about reducing their implicit bias engage in a long-term, deep exploration of their biases. There are a number of high-quality resources online and through trained experts that can help increase your knowledge of anti-racist theory, critical race theory, queer theory, feminist theory, liberation theology, and other critical frameworks for considering race, power, and marginalization in our society. One source of information is the ABA Section of Litigation’s Task Force on Implicit Bias, which

¹⁶⁸ Stone & Moskowitz, *supra* note 44.

¹⁶⁹ *Id.*; A. R. Todd, G.V. Bodenhausen, J. A. Richeson & A. D. Galinsky, *Perspective taking combats automatic expressions of racial bias*, 100 J. PERS. SOC. PSYCHOL. 1027–1042 (2011), available at <https://doi.org/10.1037/a0022308>; Cynthia S. Wang, Tai Kenneth, Gillian Ku & Adam D. Galinsky, *Perspective-Taking Increases Willingness to Engage in Inter-group Contact*, 9 PLOS ONE e85688 (2014), available at <https://doi.org/10.1371/journal.pone.0085681>.

¹⁷⁰ Devine et al, *supra* note 167.

¹⁷¹ C. K. Lai et al., *Reducing implicit racial preferences: II. Intervention effectiveness across time*, 145 J. EXP. PSYCHOL. GEN. 1001–1016 (2016), available at <https://psycnet.apa.org/doiLanding?doi=10.1037%2Fxxg0000179>

¹⁷² Longer-term interventions of course require more investment in time and money; it is worth asking what responsibility our institutions bear in providing the necessary support for the kind of ongoing, long-term training that produces real outcomes (perhaps even the kind of outcomes that could be considered in a faculty performance evaluation).

includes videos, facilitator resources, and a “toolbox” for self-study.¹⁷³ Law schools can and should encourage these efforts by providing financial support and space in faculty schedules for such study, and adopting policies for encouraging institution-wide change.¹⁷⁴

2. *Exposure To Diversity*

Another way to mitigate bias is through exposure to under-represented exemplars in the profession.¹⁷⁵ For example, viewing examples of excellent women in philosophy has been shown to reduce stereotypes of women in the field; doing thought experiments about being assaulted by a white person and rescued by a Black person was shown to temporarily reduce anti-Black bias.¹⁷⁶ If the exposure is not coupled with long-term strategies, however, the effect goes away quickly.¹⁷⁷ Such long-term exposure in our schools could mean inviting women and BIPOC speakers to speak in class and at seminars and conferences; making deliberate efforts to hire more faculty of color; highlighting diverse faculty, staff, and students in our literature and on our websites; and ensuring that reading lists include diverse authors.¹⁷⁸ The effects of these interventions are two-fold – they ensure that the significant contributions of diverse voices in the law do not continue to be overlooked, and they serve a de-biasing function in our students and ourselves. Facilitating and enabling extended, meaningful engagement between individuals with different racial, ethnic, religious, and other identities also helps to reduce racial anxiety and mitigate bias.¹⁷⁹ With enough exposure, the brain stops activating a threat response in cross-cultural interactions, meaning less cognitive taxation and more brain power for conscious decision-making and au-

¹⁷³ ABA SECTION OF LITIGATION, IMPLICIT BIAS INITIATIVE, <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/> (last visited Feb. 5, 2021)

¹⁷⁴ Institutional accountability structures make training and other interventions more effective. See Kalev et al, *supra* note 166, at 590. For a good model of institutional training, see Loyola University Chicago, *Anti-Racism Pedagogy Series* <https://www.luc.edu/fcip/professionaldevelopment/anti-racismpedagogyseries/> (last visited Feb. 6, 2021) (setting curriculum and scheduling for a university-wide initiative that includes training, mechanisms for monitoring faculty and reporting on compliance, and tools for assessing and amending curricula).

¹⁷⁵ Jerry Kang and Mahzarin Banaji call these people “debiasing agents.” Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of ‘Affirmative Action,’* 94 CAL. L. REV. 1063, 1109 (2006).

¹⁷⁶ Saul, *supra* note 58, at 50; Lai, *supra* note 171.

¹⁷⁷ Godsil, *supra* note 120; Lai, *supra* note 171.

¹⁷⁸ I have even heard of some professors including authors’ photos in their syllabi.

¹⁷⁹ Staats, *supra* note 52, at 29, 32; see Keon West & Rhiannon Turner, *Using extended contact to improve physiological responses and behavior toward people with schizophrenia*, 50 J. EXP. SOC. PSYCHOL. 57, 61 (2013) (describing how the same effect held true for exposure to people with mental illness), available at <https://doi.org/10.1016/j.jesp.2013.06.009>.

thentic connection.¹⁸⁰

Sustained, direct contact can prepare people for changing their attitudes toward and expectancies of outgroup members.¹⁸¹ Impressively, researchers concluded that extended contact not only led to more positive explicit outgroup attitudes, but also reduced anticipatory physiological responses.¹⁸² This, in turn, improved non-verbal behavior and subsequent intergroup interactions.¹⁸³ Further, researchers found that extended contact interventions can go so far as to genuinely improve intergroup interactions for outgroup members who may meet participants at a later point.¹⁸⁴ Such contact need not be in person; even "vicarious intergroup contact interventions" such as a workshop based on undocumented immigrants and a documentary film concluded that such interventions were effective for improving attitudes toward undocumented immigrants.¹⁸⁵

Increasing inter-group interactions, having cross-racial friendships, and even hearing secondhand about positive inter-group interactions can help reduce racial anxiety and bias.¹⁸⁶ Thus, law professors seeking to minimize racial anxiety, both in themselves and toward their students, should seek out opportunities to interact with different-race students; suggestions for increasing cross-cultural interactions include attending a variety of student events and encouraging attendance at office hours.¹⁸⁷ Make specific efforts to mentor and support first-generation professionals, and students of color. It will help broaden your horizons about what kind of law students "fit the mold." ¹⁸⁸

Many of us know the power of narrative to persuasively tell our clients' stories; an additional benefit of a focus on narrative is that it reduces bias and increases empathy.¹⁸⁹ Even Harry Potter can help: in one study, reading the novels improved students' attitudes toward stigmatized groups, as they generalized Harry's positive attitudes and

¹⁸⁰ Godsil, note 120.

¹⁸¹ Staats, *supra* note 52, at 61.

¹⁸² West & Turner, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 303.

¹⁸⁶ Boles, *supra* note 123, at 164.

¹⁸⁷ *Id.* at 164.

¹⁸⁸ Elizabeth Morehead, *The Next Step to Diversifying the Workforce? Support First-Generation Professionals*, SLATE, Nov. 3, 2017, <https://slate.com/human-interest/2017/11/the-next-step-to-diversifying-the-workforce-support-first-generation-professionals.html>.

¹⁸⁹ Dan Johnson, Daniel Jasper, Sallie Griffin & Brandie Huffman, *Reading narrative fiction reduces Arab-Muslim prejudice and offers a safe haven from intergroup anxiety*, 31 SOC. COG. 578 (2013), available at <https://doi.org/10.1521/soco.2013.31.5.578> (describing how participants read a narrative excerpt about a Muslim woman's contact with outgroup members, and found that it decreased bias and increased empathy).

behaviors toward stigmatized fantasy groups (e.g., house elves and ‘mudbloods’) to real-life outgroups (immigrants, LGBT individuals, and refugees).¹⁹⁰

The conclusion for law faculty is clear: working to deliberately foster interactions with diverse students, colleagues, clients, and communities will pay dividends in our feedback interactions with students in our clinics and externships. The harder we work to recruit students of color to our classes, the less our brains will signal that this particular student does not “fit the mold,” cause anxiety, and activate stereotypes. Instead, authentic and sustained exposure actually changes the mold itself. A reminder: this goes for faculty of color and women faculty, as well – studies have shown that mere membership in a marginalized group does not guarantee that internalized biases about that group (or others) does not translate to our students.

3. *Cultivate A Growth Mindset*

Much has been written about the positive benefits of helping our students cultivate a growth mindset: the belief that intelligence, ability, and personal qualities are not set, and can grow with effort, strategy, and help from others.¹⁹¹ Encouraging a growth mindset in our students helps them react adaptively to feedback, become more motivated and resilient, and perform better in class.¹⁹² A growth mindset can even neutralize the effect of stereotype threat, because if intelligence can be developed and grown, students do not need to be as concerned about confirming the stereotype that members of their group have lower levels of intelligence.¹⁹³ Students can then feel safer to take intellectual risks (asking for help, seeking harder content), and learn more.¹⁹⁴

But professors’ mindset matters, too. In one study, racial achievement gaps in courses taught by more fixed-mindset faculty

¹⁹⁰ Loris Vezzali, Sofia Stathi, Dino Giovannini, Dora Capozza & Elena Trifiletti, *The greatest magic of Harry Potter: Reducing prejudice*, 45 J. APPL. SOC. PSYCHOL. 105 (2015), available at <https://doi.org/10.1111/jasp.12279> (this was true as long as students identified with Harry and not with Voldemort).

¹⁹¹ CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 13 (2016)

¹⁹² Dweck relates that a mindset workshop had a significant impact on students’ learning and grades. DWECK, *id.* at 215 (“This one adjustment of students’ beliefs seemed to unleash the brain power and inspire them to work and achieve.”); see also Carrie Sperling & Susan Shapcott, *Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 LEG. WRITING: J. LEGAL WRITING INST. 39, 68 (2012); see also E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEX. A. & M. L. REV. 83, 97 (2013).

¹⁹³ Claude Steele, *A threat in the air. How stereotypes shape intellectual identity and performance*. 52 AM PSYCHOL. 613 (1997), available at <https://doi: 10.1037//0003-066x.52.6.613>.

¹⁹⁴ *Id.*

were twice as large as the achievement gaps in courses taught by more growth-mindset faculty.¹⁹⁵ Course evaluations revealed that students of color were demotivated and had more negative experiences in classes taught by fixed-mindset faculty.¹⁹⁶ Faculty mindset beliefs predicted student achievement and motivation above and beyond any other faculty characteristic, including their gender, race/ethnicity, age, teaching experience, or tenure status.¹⁹⁷ Professors' mindsets also predict the type of feedback they give.¹⁹⁸ It is easy to see why. If professors believe, for example, that students fall into a simple dichotomy of good and bad writers, their classroom and feedback will probably reflect that.¹⁹⁹ Similarly, where a fixed-mindset faculty member rates their students' intelligence and ability based on race, that professor may be communicating to under-represented students that they lack the ability to significantly build their skills and abilities beyond a (lower) set-point.²⁰⁰

Cultivating your growth mindset can help all of our students, but the effects are particularly profound on students of color.²⁰¹ Therefore, creating anti-racist classrooms includes creating authentic, growth-mindset classroom cultures that include words, deeds, and values that directly and unequivocally convey the message that all students can grow their knowledge and skills.²⁰²

How does one cultivate a growth mindset? First, consider your own beliefs about intelligence. If you are unaware of your own beliefs, take a test.²⁰³ Typically this involves rating how much you agree with statements such as "Your intelligence is something very basic about

¹⁹⁵ Elizabeth Canning, Katherine Muenks, Dorianne Green & Mary Murphy, *STEM faculty who believe ability is fixed have larger racial achievement gaps and inspire less student motivation in their classes*, 5 *SCI. ADVANCES* (Feb. 2019), available at: <https://doi.org/10.1126/sciadv.aau4734>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Kyunghye Lee, *A Study of Teacher Responses Based on Their Conceptions of Intelligence*, 31 *J. CLASSROOM INTERACTION*, 1, 9 (1996) (giving an example of when researchers recorded the type of feedback given to students, teachers with a fixed mindset framed feedback in a way that suggests intelligence is fixed 62 percent of the time and teachers with an incremental mindset gave effort and incremental orientated feedback 88 percent of the time).

¹⁹⁹ Sperling & Shapcott, *supra* note 192, at 73-4.

²⁰⁰ Canning et al, *supra* note 195.

²⁰¹ *Id.* (noting that faculty that had a growth mindset narrowed their achievement gaps by half or more).

²⁰² Sperling & Shapcott, *supra* note 192, at 74 (offering tips on fostering a growth mindset-oriented classroom, including starting at orientation, creating process-oriented assignments, giving mindful feedback that creates a growth mindset, and providing growth-oriented mentors for incoming students).

²⁰³ These are widely available on the internet; the most famous of which is the Dweck Mindset Instrument, available at <https://osf.io/pjwgs/> (last visited January 14, 2021).

you that you can't change very much," and "You can always substantially change how intelligent you are."²⁰⁴ Read the research on the science of brain development and the research on the effects of harboring a fixed mindset.²⁰⁵ Adopting a growth mindset will not only produce rewards in your own life and work, but that mindset will permeate the classroom and the feedback you give your students.²⁰⁶ You can also explicitly foster a classroom environment that cultivates a growth mindset, for example by not penalizing students for getting something wrong on the first try. Tell them that everyone will get questions they cannot answer and experience the stress of that feeling. Tell them that that stress is a sign of learning, not a sign that they don't belong. Get to know your student's struggles and fears to help them overcome these obstacles. Your belief in your own capacity to change your mindset, and your teaching, will directly influence your students' perception of their capacity to learn. Their confidence, resilience, and performance will increase as a result.

B. Strengthen Your Rider: Take Charge Of Your Brain

While everyone should seek to be aware of and ameliorate their own bias, often the best one can do is to learn to recognize situations in which mistakes are likely, and try harder to avoid significant mistakes when the stakes are high.²⁰⁷ This section therefore outlines interventions that can help move us out of System One – the intuitive, non-thinking mode – and into System Two, where we can be more deliberate and intentional with our thoughts and actions. In this category, some interventions are temporary: after all, no intervention will rid us of the basic human need to commune with others (leading to the Bandwagon Effect) or the motivation to confirm our previous beliefs (Confirmation Bias). Others can be part of a longer-term practice to foster awareness of our own thoughts and emotions. This section shows that change may not take a grand shift in our perception of marginalized groups or reckoning with the racist legacy of the legal world; sometimes all it takes is some sleep, a deep breath, or a snack.

1. Be Mindful

Potentially the most powerful method we have to reduce cognitive overload is mindfulness: the simple act of intentionally paying at-

²⁰⁴ DWECK, *supra* note 191, at 17.

²⁰⁵ *Id.* at 13 (providing a readable and enjoyable outline of these effects, which include everything from increased happiness, well-being, and resilience to more productive relationships).

²⁰⁶ Sperling & Shapcott, *supra* note 192, at 74.

²⁰⁷ KAHNEMAN, *supra* note 16, at 28.

tention to yourself (your emotions as well as your physical state) in the present moment.²⁰⁸ Emerging evidence in the health care field suggests that a mindfulness meditation practice can reduce the likelihood that implicit biases will be activated in the mind, calming the amygdala, which is responsible for the threat responses, including in the presence of racial cues.²⁰⁹ Mindfulness practice can increase our ability to become aware of our emotions and biases and therefore better able to engage our self-regulatory processes, so we can act in a manner congruent with our values.²¹⁰ Mindfulness meditation has also been proven to increase self-compassion, compassion toward others, and empathy, leading to greater social connection and willingness to engage in inter-group contact.²¹¹ Evidence also suggests that a person who has a regular mindfulness meditation practice will be less likely than her non-meditating counterparts to be experiencing burnout and other internal sources of cognitive load (e.g., stress and compassion fatigue), so that implicit biases will be less likely to arise.²¹² Incorporating mindfulness into student-teacher interactions has benefits that are two-fold: the students receive focused attention and assistance, and students experience reduced stress and anxiety. Thus, the quality of the interaction necessarily improves.²¹³ As an added bonus, research has found that mindfulness meditation can reduce implicit bias as well as discriminatory behavior.²¹⁴

Mindfulness training may also have advantages over current approaches to addressing implicit bias because it focuses on the development of skills through practice (a concept that all clinical professors are well acquainted with). Mindfulness meditation fosters non-judg-

²⁰⁸ Scott L. Rogers, *The Role of Mindfulness in the Ongoing Evolution of Legal Education*, 36 U. ARK. LITTLE ROCK L. REV. 387, 389 (2014).

²⁰⁹ Diana J. Burgess, Mary Catherine Beach & Somnath Saha, *Mindfulness practice: A promising approach to reducing the effects of clinician implicit bias on patients*, 100 PATIENT EDUC. COUNS. 373 (February 2017), available at <https://doi.org/10.1016/j.pec.2016.09.005>.

²¹⁰ *Id.*

²¹¹ C. A. Hutcherson, E. M. Seppala & J. J. Gross, *Loving-kindness meditation increases social connectedness*, 8(5) EMOTION 720–724 (2008), available at <https://doi.org/10.1037/a0013237>; Todd, *supra* note 167; Wang, *supra* note 167.

²¹² Burgess et al, *supra* note 209, at 374; Martin Lamothe, Émélie Rondeau, Catherine Malboeuf-Hurtubise, Michel Duval, & Serge Sultan, *Outcomes of MBSR or MBSR-based interventions in health care providers: a systematic review with a focus on empathy and emotional competencies*, 24 COMPLEMENT. THER. MED. 19 (2016), available at <https://doi.org/10.1016/j.ctim.2015.11.001>

²¹³ Elizabeth Mack & Katie Hupp, *Mindfulness in the Writing Center: A Total Encounter*, 14 PRAXIS: A WRITING CENTER JOURNAL 7 (2017), available at <http://www.praxisuwc.com/mack-and-hupp-142>.

²¹⁴ A. Lueke & B. Gibson (2016). *Brief mindfulness meditation reduces discrimination*, 3 PSYCHOL. CONSCIOUSNESS: THEORY, RES. & PRACTICE, 34 (2016), available at <https://doi.org/10.1037/cns0000081>

mental awareness; individuals learn to accept all feelings that come up in the present moment, with the knowledge that these feelings come unbidden and do not control our actions unless we let them. This can help us accept even prejudiced feelings and beliefs without pushing them away, so we can examine them. Mindfulness training may also be an “easier sell” to the reticent among us, as it focuses on giving professors tools to combat the many stressors they face on a daily basis, and to promote resilience and well-being.²¹⁵

2. *Reduce Your Cognitive Fatigue*

Biases are more likely to manifest when a person is cognitively fatigued; where the Rider has been struggling with the Elephant for too long, and eventually tires and the Elephant takes over. Automatic characterization and stereotyping can be controlled, however, if people are properly motivated and have the ability to regulate their responses.²¹⁶ A few simple steps, if implemented deliberately, may help us stop bias of all kinds in its tracks.

One simple and easy way to stop a retreat into cognitive overload (and bias) is to try to reduce the number of cognitively taxing activities before individual student interactions. When people are cognitively taxed, they are more likely to fall back on their biases; they are more likely to make selfish choices, use sexist language, and make superficial judgments in social situations.²¹⁷ Similarly, interpersonal stress, impending deadlines, a sleepless night, and even bodily discomfort can lead to cognitive taxation. All this is to say: try not to schedule an entire day of back-to-back supervision meetings, or a student meeting directly after a stressful faculty meeting. If you must schedule back-to-back student interactions, take a moment to pause and recommit to principles of non-discrimination (some may even read the “Why Does De-Biasing Our Feedback Matter” section above for motivation).²¹⁸

Another easy way to re-charge our motivation and cognitive batteries is as simple as eating a snack.²¹⁹ The nervous system consumes more glucose than most other parts of the body, and demanding mental activity appears to be especially “expensive” in the currency of glucose. When we are actively involved in difficult cognitive reasoning or engaged in a task that requires self-control, our blood glucose

²¹⁵ Burgess et al, *supra* note 209.

²¹⁶ Stone & Moskowitz, *supra* note 44.

²¹⁷ KAHNEMAN, *supra* note 16, at 41.

²¹⁸ *Id.* at 42 (describing how in several experiments, people were also able to resist the effects of ego depletion when given a strong incentive to do so).

²¹⁹ *Id.* at 43.

level drops. Researchers have therefore proven that the effects of cognitive depletion (and ego depletion) can be undone by ingesting glucose.²²⁰ Remember the judges whose parole grants spiked after a meal, and declined near zero just before eating? The conclusion was clear: when we are tired and hungry, we fall back on our defaults (which may include our biases). Who knows; perhaps Ronald Reagan developed a jellybean habit to try to make better decisions!²²¹

Getting sleep, de-stressing, snacking are temporary measures, however; they must also be combined with the longer-term educational strategies outlined in the previous section. This is because, for prejudiced individuals, interacting with a person of a different race causes cognitive strain.²²² Particularly with regard to feedback, these discussions are already stressful, and adding a layer of cross-cultural stress makes them more so. Because we are all biased, longer-term racial equity work is critical to avoiding cognitive overload and the bias that results.

C. *Shape The Path: De-Bias Your Process By Using Rubrics*

While the previous sections outlined research-proven ways to reduce our implicit bias, lessen our cognitive load, and work toward de-biasing ourselves in our teaching and lives, there is another important way to keep bias at bay during interactions with our students: de-biasing our processes. We can do this by reducing the amount of ambiguity in our evaluations. Ambiguity is particularly detrimental to bias-free evaluations, because it involves intuitive judgments – the “gut feelings” that can override other more objective measurements. Because of all those System One dependencies on decision-making – hunger, sleep, a cool breeze through the window, a tough interpersonal interaction – intuitive judgments are easily impaired by bias.²²³ This unpredictability (and our inability to know what’s going on in our System One), makes us susceptible to coming to different decisions under different circumstances, even without knowing it. Humans are incredibly inconsistent in making summary judgments of complex information.²²⁴ Auditors, radiologists, managers, and other professionals contradict themselves approximately 20% of the time when asked to re-evaluate a previous judgment, even when the re-evaluation is

²²⁰ *Id.* at 43.

²²¹ RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM, *Jelly Belly® Jelly Beans and Ronald Reagan*, <https://www.reaganlibrary.gov/reagans/ronald-reagan/jelly-bellyr-jelly-beans-and-ronald-reagan> (last visited Feb. 7, 2021).

²²² KAHNEMAN, *supra* note 16, at 42.

²²³ *Id.* at 232.

²²⁴ *Id.* at 225.

only a few minutes later.²²⁵ Ambiguity also creates a condition where we are more likely to fall back on our biases, leading to less consistency and potentially skewed results. How many of us are confident we'd give exactly the same grade and comments to every student if asked to re-do last semester's evaluations? If the answer makes you uncomfortable, using formulas, or teaching rubrics, can help mitigate the problem.

A rubric-based solution to professor bias is actually a quite hopeful solution to the often-intractable-seeming problem of bias. Humans are inscrutable in a way that formulas are not.²²⁶ Our explanations for our behavior are shifting and constructed after the fact, falling prey to interferences in our Systems One and Two, and then the biases that reinforce those interferences. Changing hearts and minds is no easy undertaking. A rubric, however, is black and white. You can choose what formula to use: you can choose to prioritize growth or competence, to grade on results or effort, to measure proof-reading or ideas. But using a rubric ensures that every student is measured fairly. What's more, it's relatively simple to ensure that your rubric is fair to everyone in your clinic and class – more simple, anyway, than trying to see your own bias blind-spots.

1. *Create A Rubric*

If we are serious about making the best, least-biased decisions when evaluating our students, we must use a formula.²²⁷ While this will likely require more work and mental energy on the front end, the dividends it will pay in stress and precision of evaluation will pay dividends. Without structure, we are more likely to rely on gender, race, and other stereotypes when making decisions, instead of thoughtfully constructing assessments using agreed-upon processes and criteria that are consistently applied.²²⁸ A good rubric will make the performance evaluation metrics explicit, concrete, and consistent.²²⁹ The criteria in the rubric should be based on the learning goals of the clinic, including what the professor has identified students should be able to

²²⁵ *Id.* at 232.

²²⁶ Sendhil Mullainathan, *Biased Algorithms Are Easier to Fix Than Biased People*, N.Y.TIMES, Dec. 6, 2019, available at <https://www.nytimes.com/2019/12/06/business/algorithm-bias-fix.html>.

²²⁷ KAHNEMAN, *supra* note 16, at 232.

²²⁸ Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479 (2008), available at <https://ecastill.scripts.mit.edu:444/docs/Gender,%20Race,%20and%20Meritocracy%20%28Castilla%20AJS%20May%202008%29.pdf>

²²⁹ Lori Mackenzie, JoAnne Wehner, & Shelley J. Correll, *Why Most Performance Evaluations Are Biased, and How to Fix Them*, HARV. BUS. REV. Jan. 11, 2019, available at <https://hbr.org/2019/01/why-most-performance-evaluations-are-biased-and-how-to-fix-them>.

know and do by the end of the semester or year. Within these goals, benchmarks may describe varying levels of student performance. Students will know that the metrics will be applied equally among them and their colleagues, and know where to devote their efforts to improve. Rubrics can be used for externship programs,²³⁰ legal writing programs,²³¹ and across the clinical curriculum.²³² Rubrics can be used to provide feedback to students on diverse types of assignments, from papers, projects, and oral presentations to oral arguments and group projects.

Rubrics help students in a number of ways. They break down the elements of the course into our learning goals; provide students a sense of what constitutes not just A-level work but also what constitutes B, C, D, and F level work; provide students clear guidance on areas for improvement in their work; and help students “become aware of their own learning.”²³³ More than this, however, rubrics communicate to students that everyone is being measured by the same criteria and that any internal bias held by their professor will not lead to a poorer grade.

More specific than letter grades or raw numbers, rubrics describe how a student performed in a number of areas. Varying in complexity and approach, rubrics identify the knowledge and skills a teacher assesses, and provide criteria for how a student demonstrates success in these skills. Rubrics have no set form. A professor may describe varying levels of performance in a rubric or make a checklist that describes the criteria necessary to meet the highest criteria only, or divide an assignment into its component parts and provide a detailed description of what constitutes acceptable levels of performance for each part.²³⁴ A good rubric will also distinguish between formative and summative assessment: formative assessments should be ongoing, with the focus on development and planning, whereas summative assessments are designed to be evaluative, and help with determining how a

²³⁰ Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 *CLIN. L. REV.* 467, 480 (2014).

²³¹ Leslie M. Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading is More Consistent with Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 *LEGAL WRITING: J. LEGAL WRITING INST.* 123, 126 (2011).

²³² Alistair E. Newbern & Emily F. Suski, *Translating the Values of Clinical Pedagogy Across Generations*, 20 *CLIN. L. REV.* 181, 210 (2013); Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics-Explicit Grading Criteria*, 2004 *MICH. ST. L. REV.* 1 (2004).

²³³ Newbern & Suski, *supra* note 232, at 210–11.

²³⁴ Sparrow, *supra* note 232, at 1, 7–8; *see also* Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 *CLIN. L. REV.* 467, 480 (2014).

given student has met the requirements of the clinic.²³⁵ Both kinds of assessments are opportunities to give biased (or unbiased) feedback. Rubrics don't have to be a matter of mathematical precision; they are useful whether or not one assigns numerical values to rubric categories.²³⁶

Students can help in the creation of rubrics. Working with clinic students to develop competencies, and creating rubric categories from those competencies, allows teachers to get more buy-in for the clinic's goals. It also allows students to refer to these competencies when developing their own goals for their clinic experience.²³⁷ Synthesizing the student's goals with the goals of the clinic will ensure that a student has realistic goals for her experience, and help the teacher know what skills the student wants to focus on. It is also easier for students to self-evaluate using a rubric, with categories agreed upon (or at least communicated) ahead of time.

A good rubric will also help the teacher, by easing the pain of a stressful feedback discussion. Feedback discussions can be difficult where teachers cannot find the precise words to describe what they need from the student, leading to the conversation seeming random and unstructured.²³⁸ Sometimes this is the result of incomplete or unarticulated goals for the clinic.²³⁹ Where teachers can be precise and name concepts, they create a common vocabulary and can extrapolate from one situation to another. Without such clarity, the message teachers seek to convey for future learning may be muddled, disjointed, and cause cognitive strain (and the associated awkwardness that can cause students to reject our feedback).²⁴⁰

Ensure the rubric covers both behavior and results. Include a specific section for goals to which a student can refer her performance. Give space for comments, both on individual items and in a final summary – do not give a simple numerical rating; give an explanation that provides context for the rating. Ensure that the form describes what the ratings mean – does “Meets Expectations” mean they did a great job, or that they did just average? Also make space for the

²³⁵ ABA, 2020-2021 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 100, at Standard 314.

²³⁶ The use of rubrics when curves are involved is a topic for another paper; this note is only to flag that even with diligent use of a rubric, there may still be opportunities for subjective evaluations and bias when faculty must place students' final grades into a curve.

²³⁷ For an in-depth discussion of how students can set their own goals for their time in your clinic, see *Charting Your Path to Success – Professional Development Planning, in LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION* 15 (Leah Wortham, Alexander Scherr, Nancy Maurer & Susan L. Brooks eds., 2016).

²³⁸ Mlyniec, *supra* note 115.

²³⁹ *Id.*

²⁴⁰ *Id.*

student to comment on her own appraisal of her work,²⁴¹ including space to discuss and celebrate her strengths.²⁴²

I have heard from multiple colleagues variations on this theme: “I just can’t use a rubric because there are too many factors that go into my evaluations,” or “rubrics don’t leave room for flexibility.” To the latter argument, my point is: exactly. Flexibility, gut-feelings, and impressions are where bias lives. I had a colleague who found it difficult to contemplate a grading rubric because they had a hard time figuring out how to incorporate things like “good judgment” and “diligence” into other skills-based assessments like “uses topic sentences” and “treats client with respect.” They therefore referred to a long list of skills and attributes that students in their clinics might possess, and when it came time to record grades, gave their overall impression of a student’s performance. The problem with this technique is that relying on “impressions” of a student’s competence and professionalism creates fertile ground for biased decision-making, as explained above, which then gets rationalized by Objectivity Bias (the tendency to see ourselves as more impartial, more insightful, and less biased than others), and reinforced by Confirmation Bias.

To the former argument, that it is simply not possible to label and prioritize everything we’re evaluating students on, I would argue that this is a problem borne out of an inability to honestly label the skills and competencies we require of our students. This is not fair to them. If a faculty member cannot decide what they want the student to learn, how is the student to know how they’re being evaluated (and, not-tangentially, how is the professor making an informed decision about what and how to teach)?

A third critique of rubrics goes like this: in the clinical setting, the instructor is looking less to evaluate than to identify and cultivate student strengths. This is true for many of us; and for those of us who have the luxury of a Pass/Fail grading system, the evaluation is rarely about the grade at all. Yet rubrics are still useful as a tool for teachers to identify their own teaching goals and priorities, and as a guide to feedback discussions with our students. The grade is really beside the

²⁴¹ GROTE, *supra* note 33, at 109-110.

²⁴² Research in the field of Positive Psychology has proven that celebrating one’s strengths cultivates happiness and well-being. (See, e.g., Zhang, Yonghong, and Mengyan Chen, *Character Strengths, Strengths Use, Future Self-Continuity and Subjective Well-Being Among Chinese University Students*, 9 *FRONTIERS IN PSYCHOL.* 1040 (2018) available at <https://doi:10.3389/fpsyg.2018.01040>). Krieger and Sheldon have also documented the happiness effect of feeling competent, which accrues from the development of practice skills, rather than from the more typical theoretical learning provided by most law schools. See Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 *GEO. WASH. L. REV.* 554, 579, 591, n.146 (2015).

point; the goal of a rubric is to link learning goals and with honest, equitable, and supportive guidance.

A final critique I will mention here is that clinics are difficult places for rubrics because the environment is dynamic: students may work on different projects, they may have more or less difficult clients, and their cases may require different skills. While all these things are unquestionably true, this critique is easily assuaged by deliberately linking the rubric back to learning goals and outcomes in the design of the course. If a clinical program sets forth clear learning outcomes, then whatever activities students engage in should follow from those learning outcomes and accompanying assessments. The learning outcomes themselves then provide for a uniform standard process, even if the activities students engage in are different. The difficulty with rubrics therefore may not come from the rubric itself, which is, after all, simply a tool. The difficulty may come instead from a professor's failure to create a rubric in a way that ties directly back to her goals for her students. I will provide here a quick primer on how to create a useful rubric for our clinics – not in an effort to supplant anyone else's, but to show that using a rubric in the clinical context is possible and a useful bulwark against bias.

Here are some examples of effective competency descriptions. The first two are for competencies might be considered universal – appropriate for everyone in a clinic. The second two describe performance in a specialized area, perhaps on the individual team level.

- *Attendance / Punctuality / Dependability*: Comes to class and team meetings on time. Is fully prepared and ready to work at beginning of class / meetings and participates without distraction. Makes appropriate arrangements when other commitments might delay attendance or delivery of work product. Lets professor and teammates know immediately when unexpected programs cause absence, lateness, the need to leave early, or the delay of work product. Completes the minimum required number of hours for the clinic.
- *Technical Skills / Legal Knowledge*: Knows the relevant law in the client's case. Knows relevant facts of the client's case or what steps are necessary to gather more facts. Makes good suggestions about course of action to take in the case. Is able to prioritize tasks in a way that makes sense to the case. Can explain the client's needs, the team's strategic decisions, and the course of action to take in the case. Makes active efforts to stay up-to-date with case progress and client communication.
- *Relationship Building / Teamwork*: Builds and maintains relationships with teammates, clients, experts, and faculty. Extends and

accepts invitations from others to build effective working relationships, including actively working to solve team problems where they arise. Sensitive to what people around her are feeling. Promotes the contributions and accomplishments of teammates and clients to others.

- *Appellate Brief Writing*: Able to articulate legal question(s) in case. Writes using an outline. Does effective and efficient legal research. Articulates the correct procedural posture and jurisdictional statement of the case. Writing conforms to IRAC style. Writing is proof-read and error-free. Writing has a blend of sentence and paragraph lengths. Writing does not use passive voice. Writing uses plain English and professional tone.

I will also attach in Appendix A a reflective writing rubric created by our colleague Kendall Kerew at Georgia State.²⁴³ While reflective writing is a component for many law school clinics and externships, the personal nature of such writing can make some teachers resistant to using a rubric. As the attached rubric shows, however, it is possible even in this kind of assignment. What a professor can characterize as a gut reaction to the “quality” of a reflection can instead be broken into component parts and evaluated in an objective manner (whether the teacher chooses to assign numerical values to each component or simply uses it to guide her own final grade). An example of a rubric that assigns point values is Megan Bess’s Lawyering Skills Reflection Rubric in Appendix B.²⁴⁴ Similarly, Appendix C shows a rubric for a characteristic instead of a skill: “grit.” Characteristics may seem challenging at first, but measuring and assessing them can and should be done if you are going to let them factor into your evaluation at all.²⁴⁵ I hold up these examples not to suggest that this is what your rubrics should look like, but rather as an outline for those who would like to try to incorporate rubrics into your assessment. Appendix D is an outline for how to create your own rubric based on your articulated learning goals.

2. *Audit Your Rubric*

The next step after creating a rubric is to do an equity audit of your rubric. Just as automated processes and algorithms can

²⁴³ Thanks to Kendall Kerew, Director of Externships and Associate Clinical Professor of Law, Georgia State University College of Law, for creating and sharing this rubric.

²⁴⁴ Thanks to Megan Bess, Assistant Professor of Law and Director of the Externship Program, UIC John Marshall Law School, for creating and sharing this rubric.

²⁴⁵ Thanks to Zachariah DeMeola and Logan Cornett of the Institute for the Advancement of the American Legal System (IAALS) for creating and sharing this rubric. This rubric and many others will be found in the Foundations for Practice project, Phase Two: Developing Learning Outcomes, set to release in Spring 2021.

reproduce disparate gender and racial impacts in the criminal justice and welfare-benefits systems,²⁴⁶ so too can rubrics serve to replicate and amplify bias in our classrooms if not carefully audited.

Review the stated markers of success to ensure your rubric does not elevate the skills and attributes that are cultivated more in men than women, or that entrench white supremacist ideals of professionalism. For example, ensure that the rubric does not promote ideals of the legal profession that are masculine and male-centric, which can lead to both 1) a biased view of female performance and capabilities and 2) biased feedback about their performance and capabilities.²⁴⁷ This is particularly true if the teacher is a male with a narrow definition of what being a “successful lawyer” looks like (remember the Similar-to-Me Bias / “mirror-tocracy” from Section I). For example, some lawyers associate complete devotion to a project or organization with being an “ideal” worker (or ideal student).²⁴⁸ This is, of course, at odds with the social expectations and standards that women are held to, such as being “ideal caregivers.” The devotion standard therefore militates against women insofar as they are not always as free to contribute long hours, be visibly busy, and organize their lives around work.²⁴⁹ Does the clinic’s rubric communicate that putting in the minimum number of hours is good, but that in order to really excel in the clinic the requirement is actually far higher? How does this affect students with families, or jobs or responsibilities outside their schoolwork?

In addition to privileging male characteristics when creating a prototype of a “successful lawyer” or law student, white supremacy culture explicitly and implicitly privileges whiteness and discriminates against non-Western and non-white professionalism standards related to dress code, speech, work style, perfectionism, and timeliness.²⁵⁰ The story unfolds in many ways: in white and Western standards of dress and hairstyle (straightened hair, suits but not saris, and burqa and beard bans in some countries); in speech, accent, word choice, and communication (never show emotion, must sound “American,” and

²⁴⁶ Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO, L. REV. 1671, 1674 (2020).

²⁴⁷ Laura L. Bierema, *Women’s Leadership: Troubling Notions of the “Ideal” (Male) Leader*, 18 ADV. DEV. HUM. RESOUR. 119 (2016).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 120-1.

²⁵⁰ Aysa Gray, *The Bias of ‘Professionalism’ Standards* STAN. SOC. INNOVATION REV. June 4, 2019, available at https://ssir.org/articles/entry/the_bias_of_professionalism_standards (citing Tema Okun, *White supremacy culture*, available at https://collectiveliberation.org/wp-content/uploads/2013/01/White_Supremacy_Culture_Okun.pdf (last visited Jan. 7, 2021)).

must speak white standard English); and in attitudes toward timeliness and work style.²⁵¹

Auditing your rubric to avoid entrenching and perpetuating white supremacist and male values is essential to ensure that our measurements describe a standard that is achievable by all of our students, not just a small section. Enlisting fellow clinicians or hiring experts in equity and inclusion to audit your rubric will ensure that your blind-spot biases do not cause you to create seemingly “neutral” metrics that are actually infected by bias.

3. *Use The Rubric in Feedback and Assessment*

After creating and auditing the rubric, use it well. A rubric should be the basis for productive feedback discussions, not just end-of-semester grading. Kahneman advises collecting the information one trait at a time, scoring each before moving on to the next one; don't skip around, and resist the urge to change the ranking after adding everything up.²⁵² Always try to make the sources of information independent of each other; you should be examining each element in the rubric independently. This will prevent you from allowing an early indicator of a student's success to influence an unrelated performance metric (remember that the Anchoring Bias increases the weight of first impressions – sometimes to the point that subsequent information is mostly wasted – and the Halo Effect can make competence in one area spill over into unrelated areas).²⁵³

Kahneman describes that he used to grade students by looking at everything one student does before moving onto the next student. But he noticed that if he gave a high grade in an early assessment, he gave the student the benefit of the doubt with later poorer performance. And of course the opposite was true if the first factor was poor. So he started evaluating the first element of the grade for *each student* before moving onto the second (and hiding the score from the first from himself). His confidence in grading was much lower after making the change – he was tempted to reduce the discrepancy between a later poor grade when he had given a high mark to an earlier one.²⁵⁴ He had to force himself not to yield to that temptation, however – the fact that he was less happy, and less confident, was an indication that the new process was superior. This is because the first produced cognitive ease – System Two was happy because it was lazy – and with the

²⁵¹ Gray, *supra* note 250.

²⁵² KAHNEMAN, *supra* note 16, at 233.

²⁵³ *Id.* at 83.

²⁵⁴ *Id.* at 84.

new system, it was not allowed to be.²⁵⁵

Those lucky enough to teach in clinics with multiple supervisors have the good fortune to be able to engage in a practice known as a calibration (or “rater reliability”) session that are used by as many as 60-70 percent of large organizations.²⁵⁶ In one of these sessions, the faculty members write preliminary appraisals of the students, including proposed conclusions. Then the faculty can meet and show their conclusions along with the rationale behind the conclusion. Additional faculty can then post and explain their own proposed assessment; faculty are therefore challenged to back up their judgments with evidence and perhaps adjust up or down depending on others’ input. These sessions have the advantage of mitigating bias in the first place (because faculty are pressed to base their judgments on objective measures) and may cause further elimination of bias when forced to confront their own assessments against others’ ratings.

To mitigate the effects of cognitive biases such as the Primacy Effect and Confirmation Bias, student evaluation should be an ongoing process – not something to be brought out only at the end of the semester. To illustrate a point: a student who may have had a poor semester but solved a sticky teamwork problem toward the end might have her evaluation undeservedly skewed toward the positive, just because it is easy to recall something good that the student did. Using a rubric would allow her teacher to reflect on the whole of the student’s semester instead of one competency that they did well (or poorly) that might overshadow the rest of the student’s evaluation. It also helps mitigate the Halo Effect, where an impression created in one area can influence opinion in another area (say, where a student who is generally liked might be judged as more competent than they actually are, because of the spillover from their likeability). There are many ways to establish tracking systems to log information throughout the semester or year.

For example, keeping a journal with tabs for individual students; dedicating a computer file to ongoing performance notes (with reminders in an electronic calendar to enter notes on a regular basis); keeping notes and copies / drafts of documents that reflect the quality of the student’s work; and/or setting up email folders for each person in the clinic, where copies of emails can be placed for reference at assessment time.²⁵⁷ Another way to collect data is to ask each student to send a brief monthly report, or have a monthly check-in about performance (not just about case progress). The report / check-in might

²⁵⁵ *Id.* at 85.

²⁵⁶ GROTE, *supra* note 33, at 129.

²⁵⁷ GROTE, *supra* note 33, at 91.

have four topic areas: 1) Key accomplishments, 2) Disappointments / concerns / problems, 3) What will be accomplished next month, and 4) Suggestions to improve the case / clinic as a whole. In addition to being a valuable collection of documents for assessment time, the information can be a valuable source of coaching material and might alert a teacher to problems they might not have known about.²⁵⁸

4. Use Good Feedback Practice

When it is time for a one-on-one feedback discussion, include a conscious interruption and re-frame. Before a feedback discussion, take a break, or a breath – anything that will interrupt System One (automatic, quick, lacking voluntary control) processes and deliberately move into System Two (involving agency, concentration, and choice).²⁵⁹ A visual reminder of student or clinic goals, or a teacher's commitment to egalitarian ideals, would be a useful exercise to help re-center toward those goals.

In the discussion, use a method from what Claude Steele calls “wise” schooling²⁶⁰ that both contributes to students' understanding and communicates that a teacher is not giving the feedback through the lens of bias.²⁶¹ As Steele and others found in a study of feedback methods, Black students who received unbuffered critical feedback responded less favorably than White students both in ratings of the evaluator's bias and in measures of task motivation. By contrast, when the feedback was accompanied both by an invocation of high standards and by an assurance of the student's capacity to reach those standards, Black students responded as positively as White students and both groups reported enhanced identification with relevant skills and careers. This “wise,” two-faceted intervention proved more effective than buffering criticism either with performance praise or with an invocation of high standards alone.²⁶²

²⁵⁸ *Id.* at 92.

²⁵⁹ KAHNEMAN, *supra* note 16, at 21-22.

²⁶⁰ Claude M. Steele, *Race and the Schooling of Black Americans*, *The Atlantic Monthly*, April 1992 available at <http://www.theatlantic.com/past/docs/unbound/flashbks/blacked/steele.htm>, (“Erving Goffman, borrowing from Gays of the 1950s, used the term ‘wise’ to describe people. . . in whose eyes the full humanity of the stigmatized is visible, people in whose eyes they feel less vulnerable. If racial vulnerability undermines black school achievement, as I have argued, then this achievement should improve significantly if schooling is made “wise”—that is, made to see value and promise in black students and to act accordingly.”)

²⁶¹ Manning, *supra* note 101, at 110 (citing CLAUDE M. STEELE, *WHISTLING VIVALDI* (2010) and GEOFFREY L. COHEN & CLAUDE M. STEELE, *A Barrier of Mistrust: How Negative Stereotypes Affect Cross-Race Mentoring*, in *IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION* 303, 311-312 (Joshua Aronson ed., 2002)).

²⁶² Geoffrey L. Cohen, Claude M. Steele, & Lee D. Ross, *The Mentor's Dilemma*, 25

So for example, in addition to communicating the high standard expected of students' work, a "wise" teacher would say, "The comments I provide [below] are quite critical but I hope helpful. Remember, I wouldn't go to the trouble of giving you this feedback if I did not think, based on what I've read in your [work], that you are capable of meeting the higher standard I mentioned."²⁶³ Black students rated this reviewer as less biased than one who gave a "positive buffer" in their comments.²⁶⁴ In addition to appearing biased, a milquetoast positive buffer (or a meaningless "compliment sandwich") actually undermines your feedback, leading to reduced motivation, persistence, and perceived autonomy.²⁶⁵ On the flip side, specific, sincere, and credible positive feedback can produce positive emotion, engagement, and increased motivation toward learning goals that promote a growth mindset.²⁶⁶

Check your ambiguity bias trigger by giving specific feedback on the student's work, using evidence from the student's actual performance, aided by your rubric. Where possible, quote from what the student said or wrote. Instead of, for example, "Your replies to clients about their concerns are often not on point," a more specific example would be better such as: "You have missed important opportunities to provide clear and concise information, such as X. I have some thoughts on how you could prevent that from happening again, such as Y."²⁶⁷ Aiming for specifics does three things: 1) it forces the teacher to examine whether the feedback is really about the student's work rather than her own bias or impressions, 2) it avoids vague comments like, "your writing unclear" or "you could be more professional," which do not help students with specific information about how they could improve, 3) It also adds to a teacher's credibility with the student – communicating that the feedback comes from the stu-

PERS. SOC. PSYCHOL. BULL. 1302 (1999).

²⁶³ *Id.* at 1307.

²⁶⁴ *Id.* (noting typical comments such as "Overall, nice job. Your enthusiasm for your teacher really shows through, and it's clear you must have valued her/him a great deal. You have some interesting ideas in your letter and make some good points. In the pages that follow, I've provided some more specific feedback and suggested several areas that could be improved").

²⁶⁵ Manning, *supra* note 108, at 243.

²⁶⁶ Roger Schwarz, *The "Sandwich Approach" Undermines Your Feedback*, HARV. BUS. REV. (Apr. 2013), available at <https://hbr.org/2013/04/the-sandwich-approach-undermin->; Martin Bressler & C. W. Von Bergen, *The sandwich feedback method: Not very tasty*, 7 J. BEHAV. STUDIES IN BUSINESS (September 2014) available at https://www.researchgate.net/publication/281034931_The_Sandwich_Feedback_Method_not_very_tasty; see also Manning, *supra* note 108, at 253.

²⁶⁷ More examples of specific, helpful, and supportive feedback can be found in Manning, *supra* note 108.

dent's performance rather than the teacher's bias.²⁶⁸

V. CONCLUSION

Law students – all law students – deserve to reap the benefits of personal interactions with faculty in our law schools. It is therefore imperative that law professors work not only to create inclusive classroom spaces, but also create an atmosphere of support and equity in our face-to-face feedback interactions with our students. This is particularly true when giving feedback. In order to mitigate our biases, we must first acknowledge that we have them; both our cognitive biases as a result of being human, and the implicit biases as a result of living in a white supremacist (and misogynist, ableist, and homophobic) culture. Acknowledging these biases is critical because such biases affect our interactions with our students by interfering with our teaching, our students' learning, and the opportunities that all of our students deserve. It is therefore imperative that law professors take affirmative steps to mitigate our cognitive and implicit biases. We can do this by reducing the conditions that make us fall back on our cognitive biases (such as reducing cognitive fatigue) and making a concerted effort to reduce our implicit biases. We must also adopt processes for feedback and evaluation that keep us from reverting to our biases. Only after acknowledging and mitigating our biases will we be living up to the ideals of equity, diversity, and belonging that are central to our pedagogical, professional, and personal goals.

²⁶⁸ Manning, *supra* note 101, at 110.

**APPENDIX A: REFLECTIVE WRITING RUBRIC, Kendall Kerew,
Georgia State University College of Law**

Criteria	Needs Work: 1	Competent: 2	Excellent: 3
Timeliness	o N/A	o N/A	o Submitted on time.
Depth of Self-Reflection	<i>What? – Describe something you did or an event you observed at your externship.</i>		
	o Merely lists tasks performed or events observed at externship without providing a narrative or description of the externship experience.	o Provides a general narrative of externship experience(s) – describes task performed or events observed with minimal detail.	o Provides a thorough narrative of externship experience(s) – describes task performed and/or events observed with detail sufficient to give full context.
	<i>So What? - Personal Reaction - Describe your reaction to what you did or observed.</i>		
	o Describes externship experience(s) without any personal reactions, analysis, or critical evaluation of the experience(s).	o Includes some personal reactions to externship experience(s), providing a surface analysis and evaluation of experience(s).	o Includes meaningful personal reactions to externship experience(s), thinking deeply about issues raised, insights gained, and developments of changes in writer’s own knowledge, values, and beliefs in response to the externship experience(s).
	<i>So What? - Lesson about Lawyering - Describe the lesson you can take away from the experience.</i>		
	o Does not generalize personal reactions by connecting experience(s) to lessons learned and/or conclusions reached.	o Attempts to generalize personal reactions but does not effectively step back to see the big picture by including lessons learned and/or conclusions reached.	o Generalizes personal reactions by stepping back to see the big picture, including lessons learned and/or conclusions reached.
Quality of Writing and Attention to Detail	<i>Now What? - What do you plan to do the same or differently in your professional future?</i>		
	o Does not describe how the broader generalizations or lessons learned will apply to similar experience(s) in the future.	o Provides a surface description of how the broader generalizations or lessons learned will apply to similar experience(s) in the future.	o Provides a full description of how the broader generalizations - lessons learned or conclusions reached - will apply to similar experience(s) in the future.
Quality of Writing and Attention to Detail	o Writing is unclear and disorganized. Thoughts are not expressed in a coherent or logical manner; or o Many (5 or more) spelling errors and/or typos.	o Writing is not consistently clear, concise, and/or well-organized. Thoughts are not always expressed in a coherent and logical manner; or o Several (3-5) spelling errors and/or typos.	o Writing is clear, concise, and well-organized. Thoughts are expressed in a coherent and logical manner; and o Few (0-3) spelling errors and/or typos.

APPENDIX B: LAWYERING SKILLS REFLECTION RUBRIC, Megan Bess, UIC John Marshall Law School

	Absent	Developing	Proficient	Exemplary
Prompt 1: Clearly identifies skills, characteristics, and competencies from readings and research and connects them to success. (18 points)	Identifies no skills/ characteristics from readings and research (0 points)	Identifies 1-2 skills from readings and research with minimal explanation of why each is important (1-6 points)	Identifies 3-4 skills from readings and research and explanation of why most are important (7-12) points)	Identifies 3-4 or more skills from readings and research with detailed explanation of why each is important (13-18 points)
Prompt 2: Demonstrates reflection on reaction to research (18 points)	No reflection on reaction to research (0 points)	Demonstrates 1- 2 points of reflection on research, including one surprising skill and one non-surprising skill (1-6 points)	Demonstrates 3-4 points of reflection on research and explains reflection/ reaction (7-12 points)	Demonstrates multiple points of reflection on several skills and characteristics from research and explains each reflection/ reaction (13-18 points)
Prompt 3: Provides a detailed example of at least one of the skills in context (18 points)	No example of identified skill in context (0 points)	Provides an example of a skill in context without details or evaluation of what went well and what could have gone better (1-6 points)	Provides an example of skill in context with some detail and minimally explains what went well and/or what could have gone better (7-12 points)	Provides a descriptive and thorough example of one of the identified skills in context and clearly evaluates what went well and what could have gone better (13-18 points)

APPENDIX C: GRIT RUBRIC, Zachariah DeMeola and Logan Cornett, Institute for the Advancement of the American Legal System (IAALS) in Foundations for Practice project, Phase Two: Developing Learning Outcomes (release Spring 2021)

Definition of Foundation: Grit			
Grit is a characteristic/trait of self-control and stick-to-it-iveness; it is firmness of character, mind, or spirit; it is also perseverance and passion for long-term goals.			
Operationalization of Foundation			
Grit is measured through the consistent and persistent display of positive risk taking, ability to overcome setbacks and put forth maximum effort towards self-identified long-term goals, including course completion, project completion and graduation.			
Date of Completion:	Beginning	Developing	Mastering
Name of Observer:	<ul style="list-style-type: none"> • Student chooses not to take positive risks when presented with the opportunity. • Student does not seek or use resources, activities, or opportunities to challenge themselves. 	<ul style="list-style-type: none"> • Student has displayed acts of positive risk taking but has not done so consistently throughout the year; when given challenging opportunities student uses them to improve but does not actively seek out challenging opportunities. • Student understands their own strengths and weaknesses but does not put extra effort into practicing or improving them. 	<ul style="list-style-type: none"> • Student has displayed four or more acts of positive risk taking, in a year's time, such as pushing oneself to explore new and different academic opportunities or seeking resources or activities to challenge themselves to improve. • Student has faced and overcome two or more academic struggles • Student clearly understand their own strengths and weaknesses; works to practice/improve • Student displays maximum effort towards course completion and graduation
Name of Observed:	<ul style="list-style-type: none"> • Student has not begun or is just beginning to understand their own strengths and weaknesses • Student tends to give up when faced with an academic challenge or set back • Student puts forth minimum effort necessary to complete courses and move towards graduation. 	<ul style="list-style-type: none"> • Student puts forth effort towards course completion and graduation but has room for growth. 	
Additional Evidence of Foundation			
<p>Examples: Student took initiative to ask for resources and activities to improve writing skills. Student initiated their participation in the externship program.</p>			

**APPENDIX D: BLANK RUBRIC (Zachariah DeMeola and Logan
 Cornett, Institute for the Advancement of the American
 Legal System (IAALS) in Foundations for
 Practice project, Phase Two:
 Developing Learning Outcomes (release Spring 2021).**

<u>Definition of Foundation</u>			
<u>Operationalization of Foundation</u>			
<u>Date of Completion:</u>	<u>Beginning</u>	<u>Developing</u>	<u>Mastering</u>
<u>Name of Observer:</u>			
<u>Name of Observed:</u>			
<u>Additional Evidence of Foundation</u>			