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# Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory

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# ADDRESSING BARRIERS TO CULTURAL SENSIBILITY LEARNING: LESSONS FROM SOCIAL COGNITION THEORY

Andrea A. Curcio\*

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## INTRODUCTION

As lawyers, judges and legal educators, we think of ourselves as rational actors.<sup>1</sup> The predominant discourse in law school and amongst lawyers is that

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lawyers are the ultimate rational thinkers.<sup>2</sup> We train law students to “think like lawyers” which presumably includes setting aside any existing biases or prejudices and thinking rationally, logically, and analytically.<sup>3</sup>

An earlier paper discusses the need to help law students understand that “thinking like lawyers” requires that they become culturally sensible lawyers—lawyers who understand that we all have multifaceted cultural backgrounds, experiences, and biases that affect how we perceive and analyze legal problems and how we interact with clients and colleagues.<sup>4</sup> This understanding requires students to grapple with their own biases and stereotypes,<sup>5</sup> as well as the influence cultural factors and systemic racism have had, and continue to have, upon the U.S. legal system.<sup>6</sup> While racial categories are artificial constructs,<sup>7</sup> there is

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<sup>1</sup> Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 236 (2005) (“Lawyers prefer to see themselves as keenly rational thinkers, and negotiators as practitioners of a science with hard skills and identifiable principles.”).

<sup>2</sup> Graham B. Strong, *The Lawyer’s Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 761 (1998) (“Although the phrase ‘thinking like a lawyer’ may be more talismanic than descriptive, it is above all else associated with a logical, analytical style of thought.” (footnote omitted)).

<sup>3</sup> Angela P. Harris & Marjorie M. Shultz, “A(nother) Critique of Pure Reason”: *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1777 (1993) (“The prevailing image of the law is of blindfolded Justice balancing the scales of decision. Because lack of bias or prejudice is essential to adjudication, Justice wears a blindfold to shut out persons and passions that might inappropriately influence her inward deliberation. Even where lawyers are advocates or advisors rather than adjudicators, the profession emphasizes ‘thinking like a lawyer.’ The phrase celebrates thought that is incisively rational, logical, analytical, and especially, dispassionate.”).

<sup>4</sup> Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177 (2014) [hereinafter Curcio et al., *Survey Instrument*].

<sup>5</sup> See *infra* Part II (discussing the need for students to understand their own biases and the barriers those biases may present to effective lawyering).

<sup>6</sup> Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a “Post-Racial” Society*, 4 COLUM. J. RACE & L. 55 (2013) (discussing how, while students have become more aware of the need to understand the role various cultural factors may play in the lawyering process, they have simultaneously become more resistant to acknowledging that institutional and structural racism results in continuing societal racial disparities—disparities students must recognize in order to provide effective client representation); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, The Ego, and Equal Protection”*, 40 CONN. L. REV. 931, 965–77 (2008) [hereinafter Lawrence, *Unconscious Racism Revisited*] (discussing how historical racial subordination continues to influence legal analysis and power structures, and arguing that while there is value in the work done to identify the psychological mechanisms underlying individual’s unconscious biases, that work may obscure the need to take both moral and legal collective responsibility to affirmatively remedy the effects of, and disestablish the institutional embodiments of, white supremacy). For a discussion of the role race has played and continues to play in the development of U.S. laws, see generally DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (6th ed. 2008); A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996). On the use of equal protection theory to maintain racial subordination, see Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 637–54.

a long and ongoing history of real differences in the treatment and, therefore, collective experiences of “racial” groups.<sup>8</sup> Those experiences influence how we perceive and assess facts, attitudes, legal problems, and legal processes.<sup>9</sup> Despite the different experiences resulting from people’s racial, ethnic, or cultural backgrounds,<sup>10</sup> there is a pervasive belief within legal education as well as amongst the bench and bar that legal analysis involves assessing an “objective reality,”<sup>11</sup> and what counts as “objective” is almost always perceived through the lens of white peoples’ experiences and privileges.<sup>12</sup>

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<sup>7</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 55 (1994). On the role of law in this process, see generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. & updated ed. 2006); see also Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL’Y REP. 207, 211–13 (1995) (noting that “strategic essentialism” allows racial identity to become a marker of historic wrongs and struggles for political recognition). As Professor Harris observes “‘race’ is neither a natural fact simply there in ‘reality,’ nor a wrong idea, eradicable by an act of will. ‘Race’ is real, and pervasive: our very perceptions of the world . . . are filtered through a screen of ‘race.’” Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994).

<sup>8</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Society of American Law Teachers, *Racial Discrimination in the Legal Profession* (June 30, 2014), available at <http://www.saltlaw.org/wp-content/uploads/2014/07/June-30-SALT-FINAL-to-CERD-2.pdf>.

<sup>9</sup> See, e.g., MARK PEFFLY & JON HURWITZ, *JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES* 28–67 (2010) (discussing survey results that demonstrate different experiences of the justice system based upon one’s race and ethnicity); Jay C. Carlisle, *Synopsis of the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 19 PACE L. REV. 431 (1999) (describing how white peoples’ experiences of legal problems, legal processes, and interactions within the justice system differed from the experiences of people of color); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 18–26 (1994) (discussing her experience as a Latina law student).

<sup>10</sup> Culture is multi-faceted and all people have multiple cultural experiences and backgrounds that influence perceptions and behaviors. Curcio et al., *Survey Instrument*, *supra* note 4, at 184. Moreover, one cannot assume that people from similar cultural backgrounds have the same beliefs or perspectives. *Id.*; see also Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339 (2012) (discussing the need to be aware of assumptions of “sameness”). See generally Kenneth L. Karst, *Essay, Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) (discussing the United States as a multicultural society in which cultural differences have long been regarded with distrust).

<sup>11</sup> See Margaret Montoya & Christine Zuni Cruz, interviewed by Gene Grant, *Narrative Braids: Performing Racial Literacy*, 33 AM. INDIAN L. REV. 153, 158–61 (2009) (discussing “objectivity” in legal education).

<sup>12</sup> See generally Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245 (2005). See also BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998) (discussing the prerogative of white people not to see race); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (analyzing the evolution of a perceived property interest in white racial identity); John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419 (2000) (discussing whiteness as the “universal norm”). On the impact this has on people of color, see generally Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Cen-*

Two surveys of law students<sup>13</sup> suggest that law students may believe that legal “objectivity” and legal training in rational and analytical thinking makes lawyers less susceptible than others, and especially less susceptible than clients, to having, or acting upon, stereotypes or biases.<sup>14</sup> The survey results suggest that law students may think legal training somehow immunizes lawyers from viewing legal problems and clients through their own cultural lenses, and from having cultural biases that affect their analyses and interactions. And, to the extent they have biases or stereotypes, law students also believe they generally are able to recognize those beliefs, and can identify when they are acting upon them. Social cognition theory forces law students (and law professors, lawyers, and judges) to confront the fallacy of those beliefs, as social cognition studies demonstrate that stereotypes and biases affect most people’s perceptions and interactions.<sup>15</sup> Social cognition theory also helps explain resistance to admitting biases—a resistance that exists at individual<sup>16</sup> and societal levels.<sup>17</sup>

Social cognition theory helps us recognize that our legal training does not immunize us against biases. As Professor Carwina Weng explained nearly a decade ago, social cognition theory provides legal educators a way to help students understand the role cultural biases may play in their own interactions, as well as in the legal process.<sup>18</sup> Additionally, because social cognition theory is grounded in scientific theory, explaining the psychology underlying biases may appeal to students’ interests in developing their rational and analytical thinking and thus make them more receptive to learning about, and confronting, their own stereotypes and biases.

This symposium piece discusses results from two validated law student surveys about the role culture plays in the work lawyers perform, how those results relate to social cognition theory, and what the survey results and social cognition theory suggest for legal educators, lawyers and judges in terms of improving our abilities to work effectively across cultures. While much of this article talks about educating students, the principles and theories discussed often apply equally to educating ourselves.

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*trifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263 (2000).

<sup>13</sup> The initial survey is discussed in Andrea A. Curcio, Teresa M. Ward & Nisha Dogra, *Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process*, 16 UNIV. W. SYDNEY L. REV. 98 (2012) [hereinafter Curcio et al., *Student Attitudes*]. The second survey is discussed in Curcio et al., *Survey Instrument*, *supra* note 4.

<sup>14</sup> See *infra* Tables 1, 2, 5.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Parts II, III.

<sup>17</sup> Lawrence, *Unconscious Racism Revisited*, *supra* note 6, at 931 (discussing how the focus on individual’s unconscious racism may obscure the bigger issue: that racism is a societal problem that should be addressed via collective responsibility and action).

<sup>18</sup> Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369 (2005) (discussing why exposure to social cognition theory could help develop students’ abilities to work effectively across cultures).

Part I discusses the survey results which indicate law students believe that they, and lawyers generally, are less likely than others to view the law and legal problems through a culturally biased lens. It also sets out survey data that suggest law students believe they are fairly adept at identifying when stereotypes or biases potentially affect their conduct or analysis. Part II explores the social cognition theory literature that suggests self-reports of bias are inaccurate because of the power of implicit (hidden) biases that operate on a largely unconscious level, and explains how the survey results are consistent with that literature. It also provides an overview of some studies that demonstrate how implicit bias may affect the lawyering process, to illustrate why it is critical that lawyers understand the cultural lenses and biases through which we all operate. Part III reviews social cognition theory as it relates to understanding our resistance to admitting that we have, and act upon, biases. Part IV discusses how legal educators may use social cognition theory as the cornerstone of a program of legal education that recognizes the need to infuse the curriculum with an awareness of the role culture plays in the lawyering process.

### I. SURVEY RESULTS

To help legal educators “assess the need for cultural competence education and to inform the discussion of what that education might encompass,”<sup>19</sup> we<sup>20</sup> developed a “cultural sensibility survey” instrument. This development occurred in two phases. An initial instrument, administered to 125 incoming law students and 13 upper level clinic students, used a five-point semantic differential response scale<sup>21</sup> (1 = strongly disagree to 5 = strongly agree), and it contained a series of open-ended questions.<sup>22</sup> That initial survey instrument (“Survey 1”) reached a sufficient level of sample adequacy (Kaiser-Meyer Olkin Measure = .713).<sup>23</sup> However, based upon student feedback in the open-ended questions, we believed the instrument could be improved. Using that feedback, as well as feedback from focus groups and expert reviews, we developed a second instrument that was administered to 591 incoming and upper level students at two different schools (“Survey 2”). That instrument used a six-point seman-

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<sup>19</sup> Curcio et al., *Student Attitudes*, *supra* note 13, at 98.

<sup>20</sup> The survey development work was done in collaboration with Dr. Teresa M. Ward and Dr. Nisha Dogra.

<sup>21</sup> A semantic differential response scale measures people’s reactions to words or concepts using a scale with opposing adjectives or descriptors, such as agree/disagree, on either end of the scale. DAVID R. HEISE, *The Semantic Differential and Attitude Research*, in *ATTITUDE MEASUREMENT* 235 (Gene F. Summers ed., 1970).

<sup>22</sup> Curcio et al., *Student Attitudes*, *supra* note 13, at 107.

<sup>23</sup> *Id.* at 108. For a detailed description of the statistical analysis, see *id.* at 110–11.

tic differential response scale (1 = strongly disagree to 6 = strongly agree),<sup>24</sup> and had a reliability alpha of .842.<sup>25</sup>

In both surveys, law students were asked questions that sought information about whether they believed that they held culturally biased views that affected their perceptions and interactions. This article looks specifically at certain questions or subsets of questions from both surveys.<sup>26</sup> The survey results set forth below lay the foundation for the discussion of the interplay between social cognition theory and developing future lawyers' understanding that, despite being trained in rational thinking, they are still likely to be subject to unconscious biases that influence their perceptions and conduct.

As the data in Table 1 illustrate, 589 law student respondents thought lawyers are less likely than clients, and somewhat less likely than judges, to look at legal problems through their own cultural lens. Students were even less likely to think that they, personally, viewed the legal system through a culturally biased lens.

TABLE 1: WHO LOOKS AT LEGAL PROBLEMS THROUGH A CULTURAL LENS<sup>27</sup>

Survey Items	Mean <sup>28</sup>	SD
Clients look at legal problems through their own cultural lens.	5.09	0.97
Judges do not look at legal problems through their own cultural lens. <sup>29</sup>	4.65	1.23
Lawyers look at legal problems through their own cultural lens.	4.01	1.29
I do not view the legal system through a culturally biased lens. <sup>30</sup>	3.86	1.37

As shown in Table 2, students also believed there was a difference in how likely one's cultural background was to influence lawyer/client communica-

<sup>24</sup> The six-point differential scale was to control for a perceived neutral mid-point. Curcio et al., *Survey Instrument*, *supra* note 4, at 210 (there were no descriptive terms beyond 1 = strongly disagree and 6 = strongly agree).

<sup>25</sup> *Id.* at 211. For a more detailed breakdown of the statistical analysis performed, see *id.* at 211–14.

<sup>26</sup> In Survey 2, we compared responses between upper level and incoming students; students from the two different schools participating in the survey; white and non-white students, and men and women. *Id.* at 236–47, apps. B–E. While the mean score answers to most items were generally identical as between all sub-divided cohorts, occasionally there was a 0.01 difference in the mean for a particular item. See *id.* The tables here present data as divided between the two schools. See *id.* at app. C at 239–41.

<sup>27</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. C at 236–37.

<sup>28</sup> 1 = strongly disagree; 6 = strongly agree. n = 588–590.

<sup>29</sup> Reverse coded. When questions are written in the negative, in order to correlate answers with questions that are written in the positive, the answers to the question worded in the negative are “reverse coded”—i.e. a response of “1” [strongly disagree] is coded as if it was a “6” [strongly agree]; a 2 is coded as if it was a 5, etc. For a more detailed explanation of why and how to reverse code survey items, see Karen Grace-Martin, *An Easy Way to Reverse Code Scale Items*, THE ANALYSIS FACTOR, <http://www.theanalysisfactor.com/easy-reverse-code/> (last visited May 3, 2015).

<sup>30</sup> Reverse coded. See *supra* note 29.

tions. While students recognized that communication within the lawyer/client relationship was influenced by both the lawyer's and the client's cultural backgrounds, students found it more likely that the client's communications were influenced by their cultural backgrounds.

TABLE 2: IMPACT OF CULTURE ON LAWYER/CLIENT COMMUNICATIONS<sup>31</sup>

Survey Items	Mean <sup>32</sup>	SD
How a client communicates with his or her lawyer is not influenced by the client's cultural background. <sup>33</sup>	5.19	1.04
How a lawyer communicates with his or her client is not influenced by the lawyer's cultural background. <sup>34</sup>	4.67	0.99

When asked if lawyers brought culturally biased assumptions into the lawyer/client relationship, students, on average, tended to think they did not.

TABLE 3: BRINGING CULTURALLY BIASED ASSUMPTIONS INTO THE LAWYER/CLIENT RELATIONSHIP<sup>35</sup>

Survey Items	Mean <sup>36</sup>	SD
Lawyers belonging to racial and ethnic minorities bring culturally biased assumptions into the lawyer-client relationship.	3.42	1.34
White lawyers bring culturally biased assumptions into the lawyer/client relationship.	3.57	1.50

We also asked students about themselves. As Table 4 indicates, students believed, on average, that they could recognize when they were reacting based upon culturally biased assumptions and stereotypes.

TABLE 4: ABILITY TO RECOGNIZE OWN BIASES<sup>37</sup>

Survey Items	Mean <sup>38</sup>	SD
In general, I can accurately identify my culturally biased assumptions about others who are from cultures different from my own.	4.20	1.04
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs.	4.61	0.91

<sup>31</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. C at 236–37.

<sup>32</sup> 1 = strongly disagree; 6 = strongly agree. n = 589–590.

<sup>33</sup> Reverse coded. *See supra* note 29.

<sup>34</sup> Reverse coded. *See supra* note 29.

<sup>35</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. C at 238.

<sup>36</sup> 1 = strongly disagree; 6 = strongly agree. n = 589–590.

<sup>37</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. C at 237–38.

<sup>38</sup> 1 = strongly disagree; 6 = strongly agree. n = 587.

Finally, in the initial survey, students were asked about their own abilities to identify when they were acting based upon culturally biased assumptions and stereotypical beliefs and about others' abilities to do so. Students felt fairly confident that they could identify when they were acting based upon stereotypes or culturally biased assumptions. Using a scale of 1 (strongly disagree) to 5 (strongly agree), in response to the statement: "In general, I am able to recognize when my reactions to others are based on stereotypical beliefs," approximately 5 percent of the 137 respondents selected numbers 1 or 2 while 73 percent chose either number 4 or 5.<sup>39</sup> In response to the statement, "In general, I can accurately identify my culturally biased assumptions about others who are from different racial/ethnic/cultural backgrounds," no students chose number 1 (strongly disagree) and only 3.7 percent of the respondents selected the number 2, while 64 percent chose number 4 and 8 percent selected number 5.<sup>40</sup> Students not only felt that they could generally identify when their reactions were based on stereotypical beliefs or culturally biased assumptions, they also felt they were much better than others when it comes to recognizing when biases and stereotypes affected their conduct or judgment.

TABLE 5: SELF V. OTHERS<sup>41</sup>

Survey Items	Mean <sup>42</sup>	SD
Most people are unable to recognize when their reactions to other people are based on stereotypical beliefs	3.22	0.92
In general, I am able to recognize when my reactions to others are based on stereotypical beliefs	3.83	0.80
Most people cannot accurately identify their culturally biased assumptions about others who are from different racial/ethnic/cultural backgrounds	3.09	0.87
In general, I can accurately identify my culturally-biased assumptions about others who are from different racial/ethnic/cultural backgrounds	3.76	0.65

The survey results set forth above are consistent with studies that suggest that people have a "bias blind spot" (we can see bias in others but not ourselves).<sup>43</sup> While it is not surprising that law students have the same "bias blind spot" as others, what has not previously been identified is that this "bias blind spot" extends to law students' views about lawyers versus clients.<sup>44</sup> It is unclear

<sup>39</sup> Curcio et al., *Student Attitudes*, *supra* note 13, at app. B at 126, tbl.2.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* These questions were asked only in Survey 1. The comparison of self to other questions were eliminated from Survey 2 both because we wanted Survey 2 to focus on students' self-assessments rather than comparisons, and because we wanted to keep Survey 2 as short as possible.

<sup>42</sup> 1 = strongly disagree; 5 = strongly agree. n = 136-138.

<sup>43</sup> See *infra* Part III.A (discussing bias blind spot).

<sup>44</sup> See *supra* Tables 1, 2.

whether the reason students think lawyers are less likely than their clients to be influenced by their cultural backgrounds is because students see themselves as future lawyers and thus the results are simply an extension of the “bias blind spot,” or if students believe that legal training enables lawyers to better monitor and control for biases and stereotypes. In either case, the survey results suggest that law students would benefit from exposure to social cognition theory<sup>45</sup> to help understand how deeply rooted our biases are, and to dispel the belief that legal training in rational and “objective” thinking trumps lifelong cognitive processes.

## II. SOCIAL COGNITION THEORY AND THE FALLIBILITY OF OBJECTIVITY

Social cognition theory tells us that we all have stereotypes, biases, and prejudices that affect our perceptions and interactions.<sup>46</sup> Inundated with stimuli and information, our brains use heuristics (mental shortcuts) and schema (groupings of information) to process information efficiently.<sup>47</sup> Stereotypes are cognitive schema in which we group people based upon our experiences as well as information from friends, family, neighborhoods, the media, etc.<sup>48</sup> At its core, a stereotype “is a faulty generalization about a group or its members.”<sup>49</sup> Biases and prejudices are generally defined as attitudes based upon applying stereotypes to individuals or social groups,<sup>50</sup> and the terms are often used inter-

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<sup>45</sup> Others have suggested exposing law students to social cognition theory to help them better understand issues that may arise in cross-cultural lawyer/client communications. See, e.g., Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & POL’Y 7 (2013); Weng, *supra* note 18, at 391. The survey results set forth in this article provide hard evidence of the need to do so.

<sup>46</sup> Michelle R. Gomez, *The Next Generation of Disparate Treatment: A Merger of Law and Social Science*, 32 REV. LITIG. 553, 568–69 (2013).

<sup>47</sup> Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 555–56 (2002).

<sup>48</sup> Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 324 (2012).

<sup>49</sup> Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1908 (2009).

<sup>50</sup> See, e.g., John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 829 (2001) [hereinafter Dovidio, *Contemporary Prejudice*] (defining prejudice as “an unfair negative attitude toward a social group or a person perceived to be a member of that group”); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 384 (2008) (adopting Dovidio’s definition); see also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 742 (1995) (noting that prejudice “consists of derogatory personal beliefs”). But see Bartlett, *supra* note 49 (noting that social scientists describe biases and prejudices as “positive or negative attitude that can attach to a stereotype”) (emphasis added). Cognitive bias has been described as, “the use of categories that are themselves shaped or contaminated by confining stereotypes and habitual ways of thinking about nondominant groups in our society.” Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467 (1998).

changeably.<sup>51</sup> The reason we may be unaware of our stereotypes, biases, and prejudices is because they become embedded in our subconscious from an early age.

A. *Stereotypes and Bias: The Early Beginnings*

Stereotype schemas begin at a very young age as infants and toddlers begin to categorize people based upon easily observable characteristics such as skin color, gender, age, etc.<sup>52</sup> Professor Jody Armour describes stereotypes as the “well-learned sets of associations among groups and traits established in children’s memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes.”<sup>53</sup> For example, studies show that racial stereotypes are in place before children enter kindergarten.<sup>54</sup> Stereotypes become so internalized that simply seeing someone from a particular social group can prime and activate stereotypes for that group.<sup>55</sup> Rozas and Miller discuss a model, the “cycle of socialization,” that explains how “people enter a world in which their social identity (race, ethnicity, religion, gender, sexual orientation, etc.) influences what they are taught, how they

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<sup>51</sup> As Professor Mahzarin Banaji, one of the principle investigators of implicit bias theory, notes, the terms “bias” and “prejudice” are often used interchangeably. See Transcript of Motion: Evidentiary Hearing at 477, *New Hampshire v. Addison*, No. 07-S-0254, 2008 WL 2675622 (N.H. Super. Ct. Apr. 14, 2008); see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360 n.8 (noting that “bias” and “prejudice” are used interchangeably). The terms also are often used in conjunction with each other. A February 2015 Westlaw search of secondary sources resulted in over eight thousand articles using the phrase “bias or prejudice”. This article follows the convention of using the terms bias and prejudice interchangeably and in conjunction with each other.

<sup>52</sup> Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1093 (1999) (noting that “[e]vidence suggests that race, gender, age, and other characteristics are among the first perceived and associated with specific encounters”).

<sup>53</sup> Armour, *supra* note 50, at 741.

<sup>54</sup> Leland Ware, “*Color Struck*”: *Intragroup and Cross-Racial Color Discrimination*, 13 CONN. PUB. INT. L.J. 75, 107–08 (2013) (discussing studies of children ages three to five connecting positive adjectives to white faces and negative adjectives to black faces). In an oft-cited 1947 study, researchers found that in the United States, children learn as early as age three to devalue people with dark skin color. Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947) (presenting young African American children with light skinned and dark skinned dolls and finding the children preferred the white-colored dolls). A recent preliminary study suggests that this preference for lighter skin remains present in children today. See *Study: White and Black Children Biased Toward Lighter Skin*, CNN (May 14, 2010, 4:24 PM), <http://www.cnn.com/2010/US/05/13/doll.study/>.

<sup>55</sup> Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 798–800 (2012) (describing studies showing how quickly stereotypes, especially racial stereotypes, can be primed and activated).

are treated, and to what information and opportunities they are exposed.”<sup>56</sup> They note that those in whom children place their trust (parents, teachers, family, friends) normalize stereotypes, biases, prejudices, and understandings of the world based upon cultural identities.<sup>57</sup> Through this social acculturation, racism<sup>58</sup> and other forms of social oppression become embedded into both the individual and collective unconscious.<sup>59</sup>

### B. *Repression and Aversive Racism*

While most people, or at least most law students, presumably recognize that acting based upon biases and stereotypes is socially unacceptable,<sup>60</sup> not to mention often illegal,<sup>61</sup> that does not mean it doesn't happen. What does happen is that people tend to either repress or deny the existence of stereotypical thoughts or behaviors,<sup>62</sup> and thus think that they are not acting upon them.

People have biases that may relate to race, ethnicity, gender, religion, sexual orientation, age, disability, etc., many of which exist on a subconscious level.<sup>63</sup> Presumably, most law students would like to think of themselves as low

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<sup>56</sup> Lisa Werkmeister Rozas & Joshua Miller, *Discourses for Social Justice Education: The Web of Racism and the Web of Resistance*, 18 J. ETHNIC & CULTURAL DIVERSITY IN SOCIAL WORK 24, 29 (2009).

<sup>57</sup> *Id.*

<sup>58</sup> Racism is different than individual prejudices. Professor John F. Dovidio notes that racism “involves a widely accepted racist ideology and the power to deny other racial groups the ‘dignity, opportunities, freedoms, and rewards’ that are available to one’s own group through ‘a socially organized set of ideas, attitudes, and practices.’” Dovidio, *Contemporary Prejudice*, *supra* note 50 (quoting JOE R. FEAGIN & HERNÁN VEGA, *WHITE RACISM: THE BASICS* (1995)).

<sup>59</sup> Rozas & Miller, *supra* note 56.

<sup>60</sup> Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1386 (2008) (noting that “even highly prejudiced people usually know that open displays of bias are considered unacceptable”). While there is a social stigma attached to openly endorsing negative stereotypes, that same stigma does not necessarily exist for positive stereotypes even though positive stereotypes may be as harmful as their negative counterparts. See Aaron C. Kay et al., *The Insidious (and Ironic) Effects of Positive Stereotypes*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 287 (2013) (discussing why positive stereotypes are harmful).

<sup>61</sup> Demonstrating an employer acted based upon stereotypes can help establish a violation of Title VII’s prohibition against unlawful employment actions. For a discussion of the role stereotypes play in plaintiffs’ Title VII discrimination claims, see Kerry Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011) (discussing the development and application of evidence of stereotyping as evidence of unlawful employment practices).

<sup>62</sup> Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987) (noting that as our culture has rejected racism as immoral and unproductive, people feel compelled to hide their prejudices). This repression of biases and prejudices by well-meaning people, and especially white people, lays at the heart of studies on aversive racism. See, e.g., Dovidio, *Contemporary Prejudice*, *supra* note 50, at 833–35 (describing studies that indicate how people who endorse egalitarian views do not discriminate directly but often do so unconsciously, especially when their behavior can be justified on the basis of some factor other than race).

<sup>63</sup> The existence of these subconscious biases have been confirmed by Implicit Association Tests (“IAT”). For a discussion of implicit association tests, see *infra* Part II.C. For a discussion of some of the biases measured by IATs, see, e.g., Lawrence, *Unconscious Racism Re-*

prejudiced people (i.e., people who do not endorse or accept the content of negative racial or other cultural stereotypes).<sup>64</sup> While the survey did not ask questions that would indicate whether students endorsed negative cultural stereotypes, it did ask students if they could identify when they were acting based upon stereotypes and culturally biased assumptions, and whether they believed that they looked at the legal system through a culturally biased lens.<sup>65</sup> Their responses indicate that many law students believe they are cognizant of their biases, and that they are less likely than other people, and particularly less likely than clients, to look at legal problems through a culturally biased lens.<sup>66</sup> What students may not recognize is that stereotypes and biases operate on a subconscious basis. Because we live in a society in which racial, gender, religious, and other biases are woven into the fabric of our culture, “consciously biased people (‘high-prejudiced people’) and those who espouse more egalitarian views (‘low-prejudiced people’) demonstrate equal activation of societal stereotypes under conditions when no time exists for personal beliefs to interfere with the unconscious automatic response.”<sup>67</sup>

One of the most studied subconscious biases relates to race.<sup>68</sup> Looking at racial biases between whites and blacks, Professors Gaertner and Dovidio coined the term “aversive racists” to describe white people who consciously endorse egalitarian views yet have negative racial feelings and beliefs (often formed through their socialization processes).<sup>69</sup> Aversive racists are either un-

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visited, *supra* note 6, at 957 (noting that an analysis of tens of thousands of implicit association tests “found that eighty-eight percent of white people had a pro-white or anti-black implicit bias; nearly eighty-three percent of heterosexuals showed implicit bias for straight people over gays and lesbians; and more than two-thirds of non-Arab, non-Muslim testers displayed implicit biases against Arab Muslims”); see also Mark Deal, *Aversive Disablism: Subtle Prejudice Toward Disabled People*, 22 *DISABILITY & SOC’Y* 93 (2007) (discussing implicit biases against disabled people); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 *DUKE J. GENDER L. & POL’Y* 1 (2010) (discussing the development of implicit association tests to measure gender bias in the legal profession).

<sup>64</sup> Armour, *supra* note 50.

<sup>65</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. A.

<sup>66</sup> See *supra* Tables 1, 2, 4, 5.

<sup>67</sup> Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 *WASH. L. REV.* 913, 919 (1999) (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5, 6 (1989)). The automatic activation of stereotypes when decision making occurs quickly is also discussed by Professor Dovidio in his work on aversive racism. See Dovidio, *Contemporary Prejudice*, *supra* note 50, at 840.

<sup>68</sup> See, e.g., Dovidio, *Contemporary Prejudice*, *supra* note 50, 840–45 (discussing various studies testing the relationship between unconscious racial biases and people’s behaviors); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *DUKE L.J.* 345, 353–63 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (discussing numerous and wide-ranging studies identifying and discussing implicit racial biases).

<sup>69</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 835. Aversive racists are distinguished from those who openly express bigoted views—those people are coined “old-fashioned, or dominative racists”. Samuel L. Gaertner & John F. Dovidio, *Understanding*

aware of their negative racial beliefs or deny their existence because those beliefs are incompatible with their egalitarian self-images.<sup>70</sup> Aversive racists will not discriminate overtly, but “will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race (e.g., questionable qualifications for a position).”<sup>71</sup> The studies on aversive racism indicated a significant difference in results between people’s self-reports about bias and prejudice, and patterns of (often unconscious) subtle discrimination.<sup>72</sup> Aversive racism theories were built upon observations of people’s conduct, as compared to their self-reports about prejudice.<sup>73</sup> As discussed in the next section, eventually these observations were confirmed via computer technology.

*C. Implicit Association Tests Confirm the Existence of Unconscious Biases*

Because the desire to answer in a socially acceptable manner combined with the subconscious operation of biases result in unreliable self-reports, cognitive and social psychologists developed numerous tests of bias that rely on physiological indicators, rather than self-reports.<sup>74</sup> One of the most widely known and validated<sup>75</sup> of these is the implicit association test (“IAT”). Developed over twenty years ago by Professors Greenwald and Banaji,<sup>76</sup> this test indicates a significant portion of Americans have biases based upon a wide range of cultural factors such as race, ethnicity, religion, gender, age, and sexual ori-

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*and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. SOC. ISSUES 615, 623 (2005).

<sup>70</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 835.

<sup>71</sup> *Id.* An example of how aversive racism manifests can be found in a 1998 study by Professors Dovidio and Gaertner. In that study, employers were presented with candidates with identical credentials. When candidates were equally qualified or unqualified, there was little difference in which candidate was recommended for the job. However, when qualifications were more ambiguous, white study participants recommended the black candidate significantly less often. The authors suggest this finding indicates that white participants tended to give white, but not black, job candidates the “benefit of the doubt.” *Id.* at 836–38.

<sup>72</sup> *Id.* at 838; *see also* Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004) (discussing findings that people try to mask biased decision making in employment and admissions decisions by engaging in casuistry—i.e. they find an unbiased justification for a biased decision, such as inflating their preferred candidates’ qualifications over those of competitors).

<sup>73</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 834–45 (discussing studies that demonstrate the existence of aversive racism amongst those who self-reported egalitarian attitudes).

<sup>74</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 471 (2010) (citing to a wide range of physiological tests that have been developed to assess bias).

<sup>75</sup> *Id.* at 488–89 (discussing IAT validity studies); *see also* Anthony G. Greenwald, *Implicit Association Test: Validity Debates*, [http://faculty.washington.edu/agg/iat\\_validity.htm](http://faculty.washington.edu/agg/iat_validity.htm) (last visited May 3, 2015) (listing links to numerous IAT validity studies).

<sup>76</sup> Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

entation.<sup>77</sup> The test operates upon the premise that it takes slightly longer for an unconsciously biased person to connect positive descriptive words with a member of a disfavored group.<sup>78</sup> Not only does the test uncover unconscious or hidden biases (implicit biases), it also demonstrates that implicit bias differs from explicitly expressed attitudes. “Even those who consciously renounce prejudice have been shown to have implicit or automatic biases that conflict with their nonprejudiced values . . . .”<sup>79</sup>

Well-meaning white people are not the only people who harbor unconscious biases. In our survey, nonwhite students thought white lawyers were more likely than lawyers belonging to racial and ethnic minorities to bring culturally biased assumptions into the lawyer/client relationship.<sup>80</sup> Results from the IAT test suggest that while that may be true, membership in a group that is subjected to biases and stereotypes does not protect one against subconscious endorsement of those stereotypes. For example, the IAT race test found that 88 percent of those self-identifying as white had a pro-white bias while 48 percent of those self-identifying as black showed a pro-white or anti-black bias.<sup>81</sup> The IAT tests also found that women, as well as men, displayed implicit gender stereotypes.<sup>82</sup> The IAT provides evidence that biases are pervasive and may affect even those harmed by the biases.

#### D. *Implicit Bias, Confirmation Bias, and Lawyering*

##### 1. *Implicit Bias*

While the IAT tests do not claim that those with implicit biases consistently act upon them, there is substantial evidence that racial and ethnic stereotypes and biases affect our perceptions, interactions, and behaviors, often without our awareness.<sup>83</sup> For example, studies indicate that our biases may affect our eye

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<sup>77</sup> For a list of the available IAT tests, see PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited June 4, 2015).

<sup>78</sup> Pollard, *supra* note 67, at 918. For a detailed and yet easily comprehensible explanation of how the test works, see MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 32–52 (2013) [hereinafter BANAJI & GREENWALD, BLINDSPOT].

<sup>79</sup> Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCHOL. 757, 757 (2001); see also Dovidio, *Contemporary Prejudice*, *supra* note 50, at 840 (noting that implicit attitudes predict nonverbal behaviors while explicit attitudes predict verbal or deliberative and controlled actions).

<sup>80</sup> Curcio et al., *Survey Instrument*, *supra* note 4, at app. D at 243.

<sup>81</sup> Lawrence, *Unconscious Racism Revisited*, *supra* note 6, at 957 (noting that “victims of white supremacy often internalize racial bias directed against them”).

<sup>82</sup> Levinson, *Forgotten Racial Equality*, *supra* note 68, at 361 (discussing findings that group membership does not insulate one from bias about that group, such as studies finding both women and men displayed implicit gender stereotypes; and both young and old people have a preference for young over old).

<sup>83</sup> BANAJI & GREENWALD, BLINDSPOT, *supra* note 78, at 46–52 (discussing studies showing correlations between implicit biases and racially discriminatory behaviors).

contact, seating distance, and how frequently we smile when interviewing clients and witnesses.<sup>84</sup> Thus, our biases can affect our lawyer/client relationships, and our relationships with colleagues and judges, even when we are unaware that they are doing so.<sup>85</sup> Because implicit biases manifest via nonverbal cues, those that are the target of the biases are aware that the person with whom they are interacting has biases, even if the person believes he or she is acting in a bias-free manner.<sup>86</sup> This difference in perception can have a negative impact on interactions, can interfere with the ability to work effectively together,<sup>87</sup> and can perpetuate inequalities.<sup>88</sup> For example, in a study of teamwork effectiveness amongst college students, interracial teams with aversive racists were the least efficient—even less efficient than those with self-identified prejudiced white team members.<sup>89</sup> To the extent implicit racial attitudes are manifested through nonverbal behavior and detected by people of color, those unconscious biases can affect the group dynamic and impede the group's overall performance.<sup>90</sup>

Studies also show that it does not take much to “prime” stereotypes and, once activated, these stereotypes can play a role in decision making. For example, when study participants listened to rap music, they rated a black person's behavior as less intelligent and more hostile than when they listened to pop music.<sup>91</sup> Changing the skin tone of a perpetrator in a security camera photo affected the way people judged ambiguous trial evidence.<sup>92</sup> Implicit bias can even

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<sup>84</sup> Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1171 (2008) (noting that “studies have shown that white people high in implicit bias toward blacks smiled less frequently, created greater physical distance, and displayed stiffness with their body language during interactions with a black person, and spent less time conversing, as compared to interactions with a white person”).

<sup>85</sup> For a discussion of how implicit biases affect lawyer hiring and promotion decisions and legal workplace dynamics, see Professor Negowetti's thoughtful article in this symposium issue. Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015).

<sup>86</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 842–43.

<sup>87</sup> *Id.* at 845.

<sup>88</sup> *Id.*; see also Negowetti, *supra* note 85, at 942–45 (discussing the negative impact implicit biases can have on law firm work assignments and the other workplace opportunities available to women and people of color as compared to their male or white counterparts).

<sup>89</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 844–45. These attitudes can also negatively impact job performance. Professor Dovidio concludes:

To the extent that Blacks are in the minority in an organization and are dependent on highly prejudiced Whites or aversive racists on work-related tasks, their performance is likely to be objectively poorer than the performance of Whites who predominantly interact with other Whites. Thus, even when Whites harbor unconscious and unintentional biases toward Blacks, their actions can have effects, sometimes even more detrimental than those of old-fashioned racists, on the outcomes and ultimately on the wellbeing of Blacks.

*Id.* at 845.

<sup>90</sup> Dovidio, *Contemporary Prejudice*, *supra* note 50, at 844.

<sup>91</sup> Smith & Levinson, *supra* note 55, at 799 (describing a study in which participants believed they were participating in a marketing study and were asked to listen to music for thirteen minutes).

<sup>92</sup> Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331–39 (2010)

affect how one remembers facts. One study indicates that changing the race of an assailant in an assault case resulted in jurors misremembering facts in racially biased ways.<sup>93</sup>

Legal training in rational and analytical thinking does not immunize one from having and acting upon biases. A study found implicitly biased racial attitudes amongst capital defense lawyers—lawyers one might assume would be least likely to harbor biases and racialized attitudes.<sup>94</sup> Nor is the judiciary immune from implicit biases.<sup>95</sup> One study demonstrates that judges, like everyone else, have implicit biases that affect their perceptions and decision making.<sup>96</sup> During a judicial education conference, Professor Rachlinski and colleagues recruited 133 judges from three jurisdictions to participate in a study.<sup>97</sup> The judges took the IAT race bias test and also analyzed three different fact scenarios to answer questions about conviction, sentencing, and likelihood of recidivism.<sup>98</sup> The IAT test results indicated that the judges, like others, harbor implicit racial biases.<sup>99</sup> The response to questions about the various factual scenarios also indicated that lack of awareness of the biases may affect the judicial decision-making processes and judgments.<sup>100</sup>

## 2. Confirmation Bias

Implicit bias is only one of the biases that operate subconsciously.<sup>101</sup> Another powerful subconscious bias, and one that has implications for lawyers and law practice, is confirmation bias. Confirmation bias has been defined as “the tendency to seek out evidence consistent with one’s views, and to ignore, dis-

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(finding that participants evaluated evidence differently based upon the skin tone of the perpetrator).

<sup>93</sup> Levinson, *Forgotten Racial Equality*, *supra* note 68, at 390–406 (discussing findings that mock jurors more accurately remember facts supporting the defendant’s aggressive behavior when the defendant is black than when the defendant is white).

<sup>94</sup> Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).

<sup>95</sup> See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010) (discussing one judge’s dismay at discovering he harbored implicit biases); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing a study in which a significant percentage of white judges demonstrated a white preference on the IAT).

<sup>96</sup> Rachlinski et al., *supra* note 95, at 1197.

<sup>97</sup> *Id.* at 1205.

<sup>98</sup> *Id.* at 1214–19.

<sup>99</sup> *Id.* at 1221.

<sup>100</sup> Interestingly, the study suggested that when made aware of biases and motivated to control for them, judges were able to do so. *Id.*

<sup>101</sup> A discussion of the numerous biases that may affect perception and judgment is outside the scope of this article. For a discussion of the various biases that give rise to “bias blind spot,” see generally Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37 (2006) [hereinafter Pronin, *Perception and Misperception*].

miss, or selectively reinterpret evidence that contradicts them.”<sup>102</sup> Confirmation bias explains how our unconscious perceptions affect our evaluations of people and evidence.<sup>103</sup>

A recent study illustrates how confirmation bias may come into play in the legal workplace.<sup>104</sup> Five partners from different law firms deliberately inserted grammatical, factual and analytical errors in a legal research memo about trade secrets in internet start-ups.<sup>105</sup> The memo then was analyzed by fifty-three different law firm partners who agreed to participate in a study on “writing competencies of young attorneys.”<sup>106</sup> The partners were asked to edit the memo for all factual, technical, and substantive errors and to rate the memo’s overall quality.<sup>107</sup> The partners received the same memo, with a cover page indicating the memo was drafted by a male third-year associate who graduated from NYU Law School. Half were told the associate was “Caucasian,” and the other half were told the associate was “African American.”<sup>108</sup>

The identical memo averaged statistically significant lower overall ratings for the African American associate (3.2/5.0) versus the Caucasian associate (4.1/5.0).<sup>109</sup> More errors were found in the memo written by the African American associate,<sup>110</sup> and the qualitative comments were more negative for the African American “writer.”<sup>111</sup> Based upon these data, the study authors concluded that confirmation bias played a role in the study results. They noted that “[w]hen expecting to find more errors, we find more errors.”<sup>112</sup> The combination of unconscious biases about writing abilities of African American lawyers and confirmation bias produced an “objective” evaluation that scored an African American associate much more poorly than his Caucasian counterpart for exactly the same work product.<sup>113</sup>

A similar finding—that implicit bias and confirmation bias were at play in associates’ evaluations—was seen in another study the same authors conducted. In one law firm, minority summer associates were consistently being evaluated

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<sup>102</sup> Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. ON PSYCHOL. SCI. 390, 391 (2009).

<sup>103</sup> See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (explaining confirmation bias and how it manifests).

<sup>104</sup> ARIN N. REEVES, NEXTIONS, YELLOW PAPER SERIES 2014-0404, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS, NEXTIONS (2014), available at [http://www.nextions.com/wp-content/files\\_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf](http://www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf)

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

more negatively than their majority counterparts. To test whether those evaluations were accurate, the firm developed a blind grading system for a couple of assignments.<sup>114</sup> Comparing the “blindly graded” assignments to the summer associates’ other assessments, the law firm found that the blind evaluations were generally more positive for minorities and women than their other assessments. The opposite was true for white men—their blindly graded assessments were generally less positive than their other assessments.<sup>115</sup> These studies provide additional evidence that unconscious biases affect how lawyers “objectively” evaluate evidence and performance.<sup>116</sup>

### III. SELF-AWARENESS, SOCIAL COGNITION THEORY, AND RESISTANCE TO MULTICULTURAL EDUCATION

#### A. *Bias Blind Spot and Multicultural Education*

Social cognition theory teaches us that not only do most people have unconscious biases, they also have a “bias blind spot” (i.e. people tend to believe that while others are relatively susceptible to bias, they are relatively bias-free).<sup>117</sup> People over-estimate their ability to control their judgments and feelings,<sup>118</sup> and even when they know they are using biased processes to make decisions, they believe their decisions are “objective” and untainted by bias.<sup>119</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> As Professor Negowetti aptly points out, failure to recognize the impact of implicit bias on legal workplace dynamics and evaluations may be one reason for the persistent lack of diversity seen in major law firms across the country. Negowetti, *supra* note 85, at 934–35 (discussing lack of diversity at large law firms); *id.* at 945–49 (discussing the role implicit bias may play in law firm evaluations of associates’ performance).

<sup>117</sup> Pronin, *Perception and Misperception*, *supra* note 101, at 37–38 (discussing the wide range of biases and people’s tendencies to believe others have biases while they are immune to them); Emily Pronin & Kathleen Schmidt, *Claims and Denials of Bias and Their Implications for Policy*, in *THE BEHAVIORAL FOUNDATIONS OF POLICY* 195, 196–97 (Eldar Shafir ed., 2013) (listing the various research that supports evidence of bias blind spot in various cognitive and motivational biases); Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 680 (2005) (discussing how people generally have a bias “blind spot” when it comes to identifying their own biases and discussing studies which demonstrate that people are less likely to think they are guilty of bias in a specific instance than in the abstract, and that people tend to believe that their personal connection to an issue makes them less likely to be biased but that others’ personal connections makes them more likely to be biased). *See generally* BANAJI & GREENWALD, *BLINDSPOT*, *supra* note 78.

<sup>118</sup> Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 *PSYCHOL. BULL.* 117, 125–26 (1994) (discussing how their studies suggest that people underestimate their own susceptibility to bias and overestimate their ability to control their own thoughts and feelings).

<sup>119</sup> *See generally* Katherine Hansen et al., *People Claim Objectivity After Knowingly Using Biased Strategies*, 40 *PERSONALITY & SOC. PSYCHOL. BULL.* 691 (2014).

Like the students in our survey,<sup>120</sup> people also tend to think they are better than others when it comes to recognizing when they are acting based upon biases and stereotypes.<sup>121</sup> In answering the question “why do people tend to see bias in others while being blind to it in themselves,” Emily Pronin and Mathew Kugler attribute this tendency, at least in part, to what they call the “introspection illusion.”<sup>122</sup> They found that when judging bias, people tended to judge others’ biases by looking at others’ behavior, but to judge their own biases by looking introspectively at their own thoughts and feelings.<sup>123</sup> People tend to be unaware of the limitations of their own introspections, thus they over-value their ability to accurately assess when they are acting based upon biases (i.e. they are unaware that bias generally manifests unconsciously and thus, introspection does not yield evidence of bias).<sup>124</sup> One way that researchers have found to counteract this “bias blind spot” is to provide students with studies about: 1) subconscious influences on attitudes and behaviors; 2) the failure of introspection to access what occurs in our minds on an unconscious level; and 3) people’s lack of awareness regarding when they have been unintentionally influenced.<sup>125</sup> This exposure reduces students’ susceptibility to bias blind spot (i.e. after reading an article about these studies, students were less likely to “claim objectivity” in their own judgments while “imputing bias” to others).<sup>126</sup>

This finding has implications for legal educators who encourage self-reflection as a methodology that helps students develop their cultural sensibility skills.<sup>127</sup> To the extent law students fall prey to “introspection illusion,” their

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<sup>120</sup> See *supra* Table 5.

<sup>121</sup> See generally Ehrlinger et al., *supra* note 117; Pronin, *Perception and Misperception*, *supra* note 101; Emily Pronin, *How We See Ourselves and How We See Others*, 320 SCIENCE 1177 (2008); Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL., 369 (2002).

<sup>122</sup> Emily Pronin and Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 566 (2007).

<sup>123</sup> *Id.* at 570.

<sup>124</sup> *Id.* at 571.

<sup>125</sup> *Id.* at 574–75.

<sup>126</sup> *Id.* at 575.

<sup>127</sup> Many advocate self-reflection as a key component of multicultural education. See, e.g., Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 64–78 (2001) (discussing the need for law students to engage in self-reflection and explaining how self-reflection plays a part in various aspects of developing “habits” that lead to effective intercultural lawyering); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL’Y 37, 47 (2008) (arguing for the need to develop students’ self-awareness about the role their own cultural perspectives play in lawyer/client interactions); see also Dovidio et al., *Why Can’t We Just Get Along: Interpersonal Biases & Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 100 (2002) (suggesting that overcoming ingrained racial attitudes requires actively engaging in self-reflection); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 410–11 (2002) (discussing how social workers and counselors are taught about the need for self-reflection as a skill necessary for intercultural counseling).

self-reflection without exposure to social cognition theory literature may actually be counter-productive. It may simply entrench students' belief that they are "objective"<sup>128</sup> while others are biased. It appears that for introspection to make inroads into students' awareness of their biases, that introspection should be preceded with exposure to social cognition theory, including studies and literature about the existence of bias blind spot and the reasons it exists.

*B. Self-Awareness, Resistance, and Multicultural Education*

Exposure to social cognition theory about subconscious biases can help de-stigmatize bias and encourage students to explore their own biases and the impact those have upon the lawyering process.<sup>129</sup> It provides students with a neurological explanation for why legal analytical training is unlikely to trump a lifetime of subconscious cognitive processes. It also potentially addresses one reason law students might resist learning about the role culture plays in the lawyering process: their belief that they already recognize when they have, and are acting upon, stereotypical or culturally biased beliefs.<sup>130</sup> Students may see no reason to learn about something they think they already understand,<sup>131</sup> especially if they believe that their training in analytical "objective" analyses makes them less susceptible to operating from biases or stereotypes.<sup>132</sup> Learning about social cognition theories such as implicit bias, aversive racism, confirmation bias, and bias blind spot may help eliminate resistance based upon students' beliefs that they already have a solid grasp on how their own biases affect them.

On the other hand, teaching students about the pervasiveness of unconscious biases, even amongst well-meaning people, presents some risks. For example, too much focus on the socialization that underlies the development of individuals' subconscious cognitive biases may lead students to focus on bias

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<sup>128</sup> Belief in one's own objectivity is itself problematic. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012) (discussing study by Uhlmann and Cohen that demonstrates that when subjects were primed to feel objective, they were more likely to show gender-based discrimination when making a hypothetical hiring decision).

<sup>129</sup> Understanding the neurological processing that underlies subconscious biases and stereotypes, and learning that even well-meaning people are not immune to that processing, can help de-stigmatize bias which, in turn, can lead to a willingness to admit to one's own biases. Without recognition that bias exists, one cannot work to counter-act it. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1529 (2005) (noting that "to counter otherwise automatic behavior, one must accept the existence of the problem in the first place.").

<sup>130</sup> See *supra* Tables 4, 5.

<sup>131</sup> Bryant, *supra* note 127, at 80 (noting that students may believe cross-cultural education is unnecessary for "progressive well-meaning" people). This attitude may carry over into the workplace and lead to a resistance to recognizing the need to address racial disparity within the legal workplace. See Negowetti, *supra* note 85, at 953-54 (noting that, without education about the existence and impact of implicit biases, many white lawyers may resist, or at least fail to support, corrective actions designed to create more diverse legal workplaces).

<sup>132</sup> Bryant, *supra* note 127, at 61 ("Resistance occurs when students fail to see the relevance of cross-cultural instruction or ascribe greater value to learning other skills."). Belief in one's objectivity is not confined to law students. In fact, most people generally feel that their perceptions, judgments, and opinions are objective. Pronin & Schmidt, *supra* note 117, at 200.

as an individual problem and ignore its institutional manifestations, and the fact that, as a society, we bear a collective responsibility to remedy the effects of that bias.<sup>133</sup> Also, learning that unconscious biases are a result of our socialization runs the risk of normalizing bias and encouraging a “my culture made me do it” approach to dealing with issues in which biases surface.<sup>134</sup> Exposure to social cognition theory also has the potential to increase, rather than decrease, some students’ resistance to multicultural education. The path to developing multicultural perspectives and understandings requires engaging in critical thinking about our cultural identities, power, and privilege.<sup>135</sup> It challenges people to engage in self-exploration about their own biases and prejudices.<sup>136</sup> This self-exploration can engender anxiety and resistance because it threatens one’s sense of oneself and one’s place in society.<sup>137</sup>

Many educators argue that developing students’ cross-cultural lawyering skills requires engaging students in a critical examination of how race, ethnicity, sexual identity, socio-economic class, and other cultural factors have influenced the law and legal systems in ways that have disempowered non-European groups.<sup>138</sup> For some students, this means they must re-examine their world views about merit and justice.<sup>139</sup> Students may grapple with information that challenges their beliefs in meritocracy, social justice, and that they exist separate from, and uninfluenced by, the society around them.<sup>140</sup> Discussion of

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<sup>133</sup> Professor Lawrence warns that normalizing bias can lead to denial of both individual and collective responsibility for ongoing behavior that “creates and perpetuates racial hierarchy” and which results in continued discrimination and inequality. Lawrence, *Unconscious Racism Revisited*, *supra* note 6, at 960–65.

<sup>134</sup> Eric Luis Uhlmann & Brian A. Nosek, *My Culture Made Me Do It: Lay Theories of Responsibility for Automatic Prejudice*, 43 SOC. PSYCHOL. 108 (2012) (finding study participants often attributed their subconscious racial biases to their culture rather than accepting personal responsibility for their thoughts and actions).

<sup>135</sup> Kathleen Holtz Deal & Cheryl A. Hyde, *Understanding MSW Student Anxiety and Resistance to Multicultural Learning: A Developmental Perspective*, 24 J. TEACHING SOC. WORK 73, 74 (2004).

<sup>136</sup> Jessica Jean Kastner, *Beyond the Bench: Solutions to Reduce the Disproportionate Number of Minority Youth in the Family and Criminal Court Systems*, 15 J.L. & POL’Y 941, 947 (2007) (citing numerous scholars who argue that multicultural competence requires acknowledging the existence of racism and white privilege which means confronting uncomfortable truths about ourselves and our society, especially for those of us who have enjoyed the privileges accorded to the dominant culture).

<sup>137</sup> Deal & Hyde, *supra* note 135.

<sup>138</sup> Archer, *supra* note 6, at 70 (arguing that teaching students about cultural differences is insufficient and that teachers must be willing to challenge students’ “post-racial beliefs and the way in which these beliefs help to perpetuate racism, inequality, and white-privilege”); Kastner, *supra* note 136 (noting that numerous educators believe that multicultural competency education requires discussion of racism and white privilege).

<sup>139</sup> Connie S. Chan & Mary Jane Treacy, *Resistance in Multicultural Courses: Student, Faculty, and Classroom Dynamics*, 40 AM. BEHAV. SCI. 212, 213 (1996).

<sup>140</sup> *Id.* at 214; see also Beverly Daniel Tatum, *Talking About Race, Learning About Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1, 6 (1992) (“An understanding of racism as a system of advantage presents a serious

issues involving oppression such as racism, classism, gender bias, ageism, anti-Semitism, etc. often “generates powerful emotional responses in students that range from guilt and shame to anger and despair.”<sup>141</sup> However, it is exploration of issues relating to race and ethnicity that tend to provoke the greatest resistance, particularly amongst white students.<sup>142</sup> It is challenging to raise issues of personal and structural bias and racism<sup>143</sup> because the prevalent and dominant discourse asserts that racism is a thing of the past and we now live in a “color-blind” society.<sup>144</sup>

In a recent training about unconscious biases, one white man, after taking the IAT, was both aghast and disbelieving of the results. “How can this be?” he asked. “I have worked for [Congressman] John Lewis<sup>145</sup> for the past ten years.”<sup>146</sup> His response to the IAT results is not surprising or unexpected. Learning that one harbors unconscious biases can create a high level of discomfort when it conflicts with one’s belief that one operates from an unbiased, egalitarian viewpoint. The conflict between conscious thought processes and unconscious preferences can result in dissociation—“the occurrence, in one and

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challenge to the notion of the United States as a just society where rewards are based solely on one’s merit.”).

<sup>141</sup> Tatum, *supra* note 140, at 1–2.

<sup>142</sup> Bridget Turner Kelly & Joy Gaston Gayles, *Resistance to Racial/Ethnic Dialog in Graduate Preparation Programs: Implications for Developing Multicultural Competence*, 29 C. STUDENT AFF. J. 75, 79 (2010) (noting that in a study of graduate student preparation programs “[a]cross race, ethnicity, gender, and preparation programs, participants reported experiencing resistance to discussing multicultural issues, primarily related to race/ethnicity”). See generally Tatum, *supra* note 140 (discussing resistance to learning about racism).

<sup>143</sup> Structural racism is a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes.

William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2011–12).

<sup>144</sup> See generally Lawrence, *Unconscious Racism Revisited*, *supra* note 6 (discussing how the Supreme Court, and society in general, seeks to deny that race is a continuing factor in the institutional and structural inequalities that exist in the United States today); see also Archer, *supra* note 6, at 64–68 (discussing her law school clinic students’ belief that we live in a “post-racial” society which resulted in a reluctance to acknowledge the role racial discrimination played in the inequalities their clients experienced); Curcio et al., *Survey Instrument*, *supra* note 4, at app. D at 242 (indicating that most white students did not believe that experiences stemming from their racial or ethnic identities influenced their views of the U.S. legal system); Kelly & Gayles, *supra* note 142, at 77 (relaying a study finding that “students of color” reported thinking about their racial/ethnic background daily, whereas the white students reported that they thought of this “relatively infrequently”); Jean Koh Peters & Susan Bryant, *Talking About Race*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 375, 380 (Susan Bryant et al. eds., 2014) (noting that some may believe that acknowledging difference or bias violates a commitment to equality, e.g. “I do not see black people, I just see people.”).

<sup>145</sup> Congressman Lewis is an African-American congressman who is one of this country’s most ardent civil rights and racial equality advocates.

<sup>146</sup> Conversation with Dr. Kimberly Jones, Decatur High School Counselor, (May 2014).

the same mind, of mutually inconsistent ideas that remain isolated from one another.”<sup>147</sup> Discovery of one’s dissociative thoughts via IATs may produce cognitive dissonance—an uncomfortable mental state in which we become aware of conflicts between our beliefs and our actions or two simultaneously coexisting beliefs, a conflict which interferes with our desire for mental harmony.<sup>148</sup> Because social cognition theory about subconscious biases may force students to confront unpleasant realities, exposure to it may trigger resistance to cross-cultural education efforts.<sup>149</sup>

Student resistance, while not the only barrier to effective multicultural teaching,<sup>150</sup> presents a significant barrier to learning. Student resistance manifests in various ways. In some cases, students resist uncomfortable material via overt challenges to the material and/or professor. “Claims of course bias, reverse ‘victimization,’ and the ‘right’ to be provocative (e.g., make racist or sexist comments) are strategies to distance oneself from what is perceived as ‘dangerous’ material.”<sup>151</sup> Students may challenge the accuracy of data and critique autobiographical accounts based upon their subjectivity.<sup>152</sup> At the other end of the spectrum, students may passively resist learning via silence<sup>153</sup> or attempting to shift the conversation to a “class not race” dialogue.<sup>154</sup>

On one level, law professors should welcome resistance. Student questions and challenges indicate engagement with provocative material<sup>155</sup>—exactly the kind of learning atmosphere we hope to produce in our law classes. “[D]eep cognitive shifts that reflect knowledge integration” require learners to resist

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<sup>147</sup> BANAJI & GREENWALD, *BLINDSPOT*, *supra* note 78, at 57–58.

<sup>148</sup> *Id.* at 59; Elisabeth L. McFalls & Deirdre Cobb-Roberts, *Reducing Resistance to Diversity Through Cognitive Dissonance Instruction: Implications for Teacher Education*, 52 J. TEACHER EDUC. 164, 165 (2001) (discussing the dissonance that occurs when students in multicultural education courses are exposed to information inconsistent with their prior beliefs and experiences).

<sup>149</sup> BANAJI & GREENWALD, *BLINDSPOT*, *supra* note 78, at 59–60 (noting that people may be uncomfortable coming to terms with the IAT results, but finding that most people they encountered would rather know about their unconscious assumptions).

<sup>150</sup> For a discussion of additional barriers to multicultural teaching, see Khadija Khaja et al., *Multicultural Teaching: Barriers and Recommendations*, 21 J. ON EXCELLENCE C. TEACHING 5 (2010) (discussing results of university wide survey asking 464 faculty members across disciplines about perceived barriers to multicultural teaching); see also Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 557–60 (1996) (discussing challenges law faculty may confront when addressing diversity issues within the classroom).

<sup>151</sup> Deal & Hyde, *supra* note 135, at 75.

<sup>152</sup> Tatum, *supra* note 140, at 6.

<sup>153</sup> Deal & Hyde, *supra* note 135, at 76; Aja E. LaDuke, *Resistance and Renegotiation: Pre-service Teacher Interactions with and Reactions to Multicultural Education Course Content*, MULTICULTURAL EDUC., Spring 2009, at 37, 39.

<sup>154</sup> LaDuke, *supra* note 153, at 40–41 (providing an example of how during discussions of white privilege as it relates to access to higher education students sought “to move analysis away from race, often on to issues of class and socioeconomic status.”).

<sup>155</sup> Chan & Treacy, *supra* note 139, at 214.

learning and their teachers to engage that resistance.<sup>156</sup> That said, resistance can be a disruptive force.<sup>157</sup> The following section briefly discusses how to address student resistance as well as other pedagogical issues.

#### IV. SOCIAL COGNITION THEORY AND LAW SCHOOL MULTICULTURAL EDUCATION PEDAGOGY

##### A. *Dealing with Student Resistance*

Many have written lengthy and thoughtful articles about the causes of student resistance to multicultural learning, and potential remedies thereto.<sup>158</sup> While it is beyond the scope of this article to provide an in-depth review of suggestions for overcoming student resistance to diversity education, some common themes emerge. For example, teachers are encouraged to focus on the value of learning about how the most effective lawyers understand the role culture, and our own cultural biases, play in the lawyering process.<sup>159</sup> To the extent students understand how biases affect one's ability to represent clients and succeed in the workplace,<sup>160</sup> they may be more open to exploring those bias-

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<sup>156</sup> Jessica Berit Kindred, "8/18/97 Bite Me": *Resistance in Learning and Work*, 6 MIND CULTURE & ACTIVITY 196, 198-99 (1999); see also Helen A. Moore, *Student Resistance in Sociology Classrooms: Tools for Learning and Teaching*, SOC. VIEWPOINTS, Fall 2007, at 29, 38-39.

<sup>157</sup> Barbara Applebaum, *Engaging Student Disengagement: Resistance or Disagreement?*, 2007 PHIL. EDUC. Y.B. 335, 337-39 (discussing the alienating effect on students of color when white students refuse to acknowledge social facts that are at odds with those students' experiences).

<sup>158</sup> *E.g., id.* (identifying ways privileged students may resist learning and suggesting that students be told they do not need to adopt a particular viewpoint but do need to engage with course material that challenges their notions of themselves and society); Archer, *supra* note 6 (discussing challenges of teaching students who believe we live in a "post-racial" society and suggesting that in addition to raising cultural issues in context of client representation, students should be "immersed" in the history, social science and context of racial discrimination); Dark, *supra* note 150 (discussing why it is important to raise diversity issues in law school classes and how to create a supportive and open classroom environment that makes it easier to do so); McFalls & Cobb-Roberts, *supra* note 148 (suggesting that resistance can be lowered by exposing students to cognitive dissonance theory); Peters & Bryant, *supra* note 144 (discussing why students are resistant to talking about race and ways to work through that resistance); Tatum, *supra* note 140 (identifying sources of student resistance to talking about race and learning about racism and some strategies to overcome the resistance).

<sup>159</sup> Bryant, *supra* note 127, at 81 (discussing how when we help students understand the significance of cultural similarities and differences and help them see how that understanding is critical to good lawyering, we lower student resistance to learning about the role their own, and others' culture plays in the lawyering process); Dark, *supra* note 150, at 569 (emphasizing the need to connect diversity discussions with "legal theory, doctrine or practice."); Kha-ja, *supra* note 150, at 22 (suggesting that focusing on the value of learning and applying diverse viewpoints helps lower student resistance to multicultural learning).

<sup>160</sup> See *supra* Part II.D (discussing how unconscious biases affect legal representation and legal workplaces). For an in-depth discussion of how implicit biases help explain the lack of diversity in large law firms, especially at the partner level, see generally Negowetti, *supra* note 85.

es.<sup>161</sup> Professors Peters and Bryant suggest that law teachers regularly ask the question: “what role does race play in our work” both to monitor individual biases and stereotypes and to raise consciousness about the role race plays in the development and application of legal rules and legal systems.<sup>162</sup> Teachers also should create an atmosphere of open discussion and inquiry in which all students understand that the professor is not asking them to endorse a particular viewpoint, but is asking them to be open to, and respectful of, different experiences and viewpoints.<sup>163</sup> Teachers also must become active listeners—observing body language and listening to what is said and what is unsaid by both the speaker and the non-speakers—in order to address what is left unsaid.<sup>164</sup> It has even been suggested that because people often experience cognitive dissonance when they learn that their internal biases do not coincide with their conscious thought processes students should be exposed to the psychological literature about cognitive dissonance.<sup>165</sup> As teachers, we also likely will be more adept at understanding student resistance if we acknowledge our own biases and honestly grapple with the surprise and discomfort that causes us.<sup>166</sup>

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<sup>161</sup> While cultural self-awareness is a key component of culturally sensible lawyering, to be effective cross-cultural lawyers, students must also understand “the nature of racism and the impact that racial differences have on daily life.” Archer, *supra* note 6, at 69. Professor Archer suggests this understanding can be developed through deliberately teaching students “about the history, social science, and context of racial discrimination, themes that are foreign to many of them.” *Id.* at 72.

<sup>162</sup> Peters & Bryant, *supra* note 144, at 383. They also note that paying explicit attention to race is a way to counteract unconscious bias. *Id.* at 383–84.

<sup>163</sup> Chan & Treacy, *supra* note 139, at 217 (suggesting that if students understand that what counts is engagement with the material but not necessarily agreement with it, students will be less resistant); Dark, *supra* note 150, at 565–66 (arguing that law professors should consistently encourage participation from all students during class discussions); Peters & Bryant, *supra* note 144, at 381 (noting “that teachers must build an atmosphere of trust in which participants understand that they are learning together, and learning involves making mistakes and providing each other honest feedback about those mistakes”); Tatum, *supra* note 140, at 18 (noting that the first step in creating a safe space for all students to speak requires “[e]stablishing the guidelines of confidentiality, mutual respect, ‘no zaps,’ and speaking from one’s own experience on the first day of class”). *But see* Applebaum, *supra* note 157 (identifying the importance of not allowing class to be dominated by those who discount data about racism and racial injustice because when that happens, it further marginalizes already marginalized students); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133, 174 (2004) (noting that “[w]hile some students might consider a safe environment to be one in which people ‘do not get angry,’ or ‘raise their voices,’ others, particularly students of color, ‘may view this as an effort to squelch their expression of the angering experiences with racism that they have lived through and want to talk about’”).

<sup>164</sup> Dark, *supra* note 150, at 569–70.

<sup>165</sup> *See generally* McFalls & Cobb-Roberts, *supra* note 148 (discussing their study which indicates that exposure to cognitive dissonance literature helped some students understand their reactions to information that was inconsistent with their beliefs, opinion and experiences and thus lowered their resistance to learning about diversity issues).

<sup>166</sup> *See* Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 244 (2002) (noting that intercultural competency training only succeeds if “those of us who train lawyers confront our own humanity, our own racial demons,

Whatever instructional techniques are used, the key is to understand, and be prepared for, resistance, even amongst those who express a desire to learn about the role culture plays in the legal system.

*B. Introducing Social Cognition Theory During Orientation*

While not totally without risk, adding social cognition theory to multicultural teaching provides perspective and a way for students to understand bias and its impact on lawyering. Exposure to social cognition theories such as aversive racism,<sup>167</sup> implicit bias as evidenced by the Implicit Association Tests,<sup>168</sup> bias blind spot,<sup>169</sup> and confirmation bias<sup>170</sup> can help students understand the pervasiveness of bias, even in well-meaning people. Exposure to studies of how these biases manifest in legal practice<sup>171</sup> help students understand the relevance of learning about the role culture plays in the lawyering process. It also teaches them that their analytical training does not protect them from having, and acting upon, subconscious biases.<sup>172</sup>

Given the importance of developing lawyers equipped to work in today's multicultural world, I suggest exposing students to social cognition theory as it relates to subconscious biases and their implication for lawyering during law school orientation, or shortly thereafter. To help students understand how implicit biases both affect them as future lawyers, and play a role in the legal system, students could be assigned selected reading about the impact of various subconscious biases on interactions and legal decision making.<sup>173</sup> Students also should be made aware of the dangers of "bias blind spot" in order to improve their self-reflective abilities.<sup>174</sup> Framing this education as an important compo-

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uncomfortable and messy as that may be"); Tatum, *supra* note 140, at 18 (suggesting that teachers speak from their own experiences); *see also* Seth Donal Hannah & Elizabeth Carpenter-Song, *Patrolling Your Blind Spots: Introspection and Public Catharsis in a Medical School Faculty Development Course to Reduce Unconscious Bias in Medicine*, 37 *CULTURE MED. & PSYCHIATRY* 314 (2013) (recognizing that to be effective teachers, faculty must explore their own biases and discussing a medical school faculty development course designed to raise faculty's awareness of their own subconscious biases).

<sup>167</sup> *See supra* Part II.B.

<sup>168</sup> *See supra* Part II.C.

<sup>169</sup> *See supra* Part III.A.

<sup>170</sup> *See supra* Part III.A.

<sup>171</sup> *See supra* Part II.D.2.

<sup>172</sup> *See supra* Part III.B.

<sup>173</sup> For example, Professor Banaji and Greenwald's book provides a quick, digestible and comprehensive explanation of implicit bias, its manifestations in the justice system, and strategies for avoiding unintended discriminatory conduct. BANAJI & GREENWALD, *BLINDSPOT*, *supra* note 78.

<sup>174</sup> *See supra* text accompanying note 126 (discussing how exposure to studies about unconscious biases eliminated the bias blind spot effect). Of course, exposure during orientation to social cognition theory is unlikely to result in a long-term change in students' decision-making processes. Lilienfeld et al., *supra* note 102, at 393 (noting that some argue that instruction alone cannot combat subconscious biases); Kang, *supra* note 129, at 1528–35 (suggesting that it is difficult or even impossible, to eliminate completely the effects of implicit

ment of effective lawyering<sup>175</sup> explains both why it is a part of their law school orientation, and potentially lessens student resistance to what, for many of them, may be new and challenging concepts.<sup>176</sup>

Assigning reading that exposes students to social cognition literature as it relates to biases during orientation sends the message that “thinking like a lawyer” means considering the role cultural biases have played, and continue to play, in legal representation. Introducing the topic in orientation helps set the stage for ongoing discussions in a wide range of law school courses, and it increases students’ awareness that lawyers, just like clients, are influenced by their cultural biases and stereotypes.

### C. Teaching Techniques Based upon Social Cognition Theory Studies

Once the stage is set during orientation, faculty may raise issues of both explicit and implicit bias in the ways that are best suited to the class and the professor’s teaching style. While it is outside the scope of this article to engage in an in-depth exploration of ways to raise students’ awareness of both implicit and explicit racial and other cultural biases in judicial decision making as well as their own analyses, the following are just a few of the multiple opportunities to raise these issues throughout the curriculum.<sup>177</sup> In civil procedure, the seminal case of *Iqbal v. Ashcroft*<sup>178</sup> can be used to introduce students to the role implicit biases based upon racial and ethnic stereotypes may have on judicial decision-making.<sup>179</sup> Later in the course, showing the video in *Scott v. Harris*<sup>180</sup>

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bias). *But see* Rachlinski et al., *supra* note 95 at 1221 (finding that judges’ conscious awareness of implicit racial bias helped change their decision-making processes).

<sup>175</sup> See *supra* Part II.D.1 (discussing how cultural biases impact lawyering) and Part II.D.2 (discussing how biases impact employer evaluations).

<sup>176</sup> See *supra* Part IV.A.

<sup>177</sup> For an example of how to integrate cultural sensibility education into doctrinal courses, see ANTHONY O’DONNELL & RICHARD JOHNSTONE, DEVELOPING A CROSS-CULTURAL LAW CURRICULUM (1997) (suggesting numerous ways to integrate discussions of the influence culture has on legal analysis and decision making in torts, property and equity courses). For additional suggestions, see Mary A. Lynch et al., *Teaching the Newly Essential Knowledge, Skills, and Values in a Changing World*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville et al. eds.) (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2558863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558863). For a discussion of how to talk about race in a law school classroom, see generally Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Frank René Lopéz, *Pedagogy on Teaching Race & Law: Beyond “Talk Show” Discussions*, 10 TEX. HISP. J.L. & POL’Y 39 (2004); Peters & Bryant, *supra* note 144.

<sup>178</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>179</sup> See, e.g., Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013) (discussing a study that demonstrates in the post-*Iqbal* shift from notice pleading to a subjective plausibility pleading standard, the dismissal rates of black plaintiff’s claims has increased and there is a difference in pleading dismissals between white and black judges—a difference the author postulates may be attributable to implicit racial bias).

and discussing why a young black man may be fleeing from the police in a situation in which white students would have likely pulled over presents another opportunity to discuss how rational decisions, and assessments of those decisions, may be related to one's cultural experiences. In family law, students can be asked to explore how cultural factors inform the development and analysis of the factors used to determine whether something is in the best interests of the child in all types of child placement decisions.<sup>181</sup> In criminal law, understanding the history of how the American government took American Indian children away from their parents and placed them in institutions may help students understand why an American Indian mother did not bring her sick child to a government hospital.<sup>182</sup> Clinical experiences also provide ripe ground for educating students about the role culture plays in the lawyer/client relationship and legal decision-making process.<sup>183</sup> Legal writing classes are also a place where students can be taught to analyze the role culture and bias plays in legal analysis.<sup>184</sup>

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<sup>180</sup> *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott v. Harris*, the police attempted to pull over Mr. Harris, a young African American man who was speeding. Mr. Harris, who was driving on a suspended license, decided not to stop because he was afraid of going to jail. Mr. Harris initiated a high-speed car chase. To end the chase, Deputy Scott rammed Harris's car with the police cruiser. Harris crashed. As a result of the crash, Harris became a quadriplegic. Harris sued Scott alleging that Scott had violated his Fourth Amendment rights by using excessive force. Scott claimed qualified immunity—a claim the Supreme Court upheld. A video in which both Mr. Harris and Deputy Scott discuss what happened is available at [vik2k3, Why I Ran](http://www.youtube.com/watch?v=vik2k3WhyI Ran), YOUTUBE (Dec. 8, 2009), <http://www.youtube.com/watch?v=vik2k3WhyI Ran>.

<sup>181</sup> Professor Tanya Washington, a colleague at Georgia State University College of Law, uses this idea in her family law class. For an in-depth discussion of this issue, see generally Cynthia R. Mabry, *The Browning of America—Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 413 (2010).

<sup>182</sup> Professor Nirej Sekhon, a colleague who teaches criminal law, engages his first year criminal law students in this discussion based upon the case of *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971). For a discussion of that case and the cultural underpinnings of the parents' decision, see Megan H. Dearth, Comment, *Defending the "Indefensible": Replacing Ethnocentrism with a Native American Cultural Defense*, 35 AM. INDIAN L. REV. 621, 639–40 (2011).

<sup>183</sup> Numerous clinical legal educators have discussed both the importance of educating their students about the role culture plays in the lawyering process and methods to do that. For a discussion of methodologies useful in teaching clinic students about the role culture plays in the lawyering process, see generally Susan Bryant and Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY, *supra* note 144. For additional thoughts on teaching clinic students, see Lisa Bliss et al., *Client and Patient Relationships: Understanding Cultural and Social Context*, in POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 125, 147 (Elizabeth Tobin Tyler et al. eds., 2011); López, *supra* note 127; see also Archer, *supra* note 6, (discussing the importance of facilitating clinic students' understanding of the existence and implications of racism as well as other cultural factors in order to best equip students to represent effectively their clients).

<sup>184</sup> See, e.g., Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1 (2003); Johanna K.P. Dennis, *Ensuring a Multicultural Ed-*

Raising awareness of various cultural perspectives involved in legal decision making is actually a “de-biasing” technique. One study found that perspective taking (i.e. looking at the problem from someone else’s perspective) diminished the use of outgroup stereotypes.<sup>185</sup> Another “de-biasing” teaching methodology involves asking students to “consider the opposite” and think about rival viewpoints or counterfactual outcomes. This teaching strategy also has been somewhat effective in countering confirmation and related biases.<sup>186</sup> “Perspective taking” and “consider the opposite” are teaching methodologies already familiar to many law professors. Providing students with a grounding in social cognition theory and using these familiar teaching methodologies across the curriculum hopefully will enhance students’ abilities to identify when their own, and others’, cultural and racial experiences, perspectives, and attitudes may influence factual or legal analyses, decisions about culpability, and decisions about the most appropriate course of conduct.<sup>187</sup>

#### CONCLUSION

The survey data suggest that law students, like others, are subject to “bias blind spot,” both on a personal level and in their conceptions about lawyers. Students believe that they approach legal problems relatively bias-free, and that lawyers are less likely than clients to be affected by their cultural experiences and biases. As the social cognition studies discussed above indicate, it is unlikely students accurately assess either their own, or lawyers’, susceptibility to subconscious biases. To remedy this deficiency, social cognition theory about unconscious biases should be amongst the many facets of cultural sensibility education, and this education should begin during orientation. Understanding subconscious biases, their pervasiveness, and their impact on perceptions, interactions, and analyses, helps prepare lawyers to represent people from cultural and racial backgrounds different from their own, and to address both individual and institutional injustice.

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*ucational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 TEX. WESLEYAN L. REV. 613 (2010).

<sup>185</sup> See Lilienfeld et al., *supra* note 102, at 393 (2009). Outgroup stereotypes are those stereotypes we attribute to people who do not belong to one of our socially constructed groups. Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law’s Power to Advance Equality*, 13 TEX. WESLEYAN L. REV. 515, 538–39 (2007) (“[I]ndividuals see members of their own group (the ingroup) as more like themselves, and others (the outgroup) as more different from themselves than they would without the group identity. People in a group are also much less able to see differences among members of the outgroup.” (footnote omitted)).

<sup>186</sup> See Lilienfeld et al., *supra* note 102, at 393. Some studies suggest that health care clinicians who took the time to consider alternative viewpoints and perspectives were less likely to make decisions based upon confirmation bias. *Id.* The same finding is likely to be true for lawyers and law clinic students.

<sup>187</sup> Archer, *supra* note 6, at 69–70 (noting that a cross-cultural lawyer must acknowledge how her own “attitude about race and racism may impact her interactions with her client, her examination of the legal and factual issues presented in the case, the course of action selected, and the attribution of blame”).