

Visible Invisibility: Feedback Bias in the Legal Profession

*Latonia Haney Keith**

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* Interim Dean, Associate Dean of Academics, Associate Professor of Law, Concordia University School of Law; J.D., Harvard Law School; Member, American Bar Association Standing Committee on Pro Bono and Public Service; Former Firm-Wide Pro Bono Counsel, McDermott Will & Emery LLP; Former President, Association of Pro Bono Counsel (AP-BCo). I am grateful to Abigail Morehouse for her invaluable assistance. I am also indebted to Jodi Nafzger, Associate Professor, Concordia University School of Law, and Anne Gordon, Senior Lecturing Fellow and Director of Externships, Duke Law School, for collaborating with me as we explore our own implicit biases and engage in frank dialogue on this issue with colleagues across the academy and the legal profession.

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I. INTRODUCTION

Despite widespread adoption of diversity and inclusion initiatives and increased awareness of the challenges women and people of color face in their advancement, little progress has been made in recent years with respect to diversity within the legal profession.¹ The legal profession remains homogeneous, dominated by a single race and gender.² As Wendi S. Lazar, Chair of the American Bar Association (ABA) Commission on Women in the Profession, stated: “[I]n our profession, our record [of supporting women and people of color] . . . is abysmal. We have few women equity partners, and fewer minority partners. And in terms of diversity and inclusion, our record is poor.”³

Even with the increased attention on bias and discrimination within the profession leading up to and after the approval by the ABA House of Delegates of Resolution 109,⁴ no appreciable increases in the representa-

¹ See *infra* Part II.

² See *infra* Part II.

³ *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision*, AM. BAR ASS’N 18:21–18:40 (Aug. 8, 2016), http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html (voting to amend Model Rule 8.4 on professional misconduct, “to specifically address harassment and discrimination based on race, religion, sex and disability and LGBTQ status in conduct related to the practice of law.”) [hereinafter *House of Delegates: Rule Against Harassment and Discrimination*].

⁴ See Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 DUKE J. GENDER L. & POL’Y 1, 2–10 (2017). See also Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS’N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/9TDS-U86J]; Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, AM. BAR ASS’N (Oct. 2018), [https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/#:~:text=\(g\)%20engage%20in%20conduct%20that,to%20the%20practice%20of%20law.](https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/#:~:text=(g)%20engage%20in%20conduct%20that,to%20the%20practice%20of%20law.) [https://perma.cc/6D8B-IDUX]; Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, A.B.A. J. (June 13, 2019, 11:39 AM), <https://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers> [https://perma.cc/4A75-YMGZ].

tion of women and diverse attorneys, especially within leadership positions, has occurred. Resolution 109 added a new paragraph (g) to Model Rule 8.4 explicitly addressing discrimination and harassment in the black letter rule governing the professional conduct of lawyers.⁵ The slow response to making a dramatic shift to improve diversity is particularly interesting in light of the expanded bounds of conduct that may engender a claim of professional misconduct. The new Comment 3 to the Model Rule 8.4(g) clarifies that discriminatory conduct includes “harmful verbal . . . conduct that manifests bias or prejudice towards others.”⁶ Moreover, the new Comment 4 expands the breadth of interactions or conduct that could result in a violation, including “interacting with . . . coworkers . . . while engaged in the practice of law” and “operating or managing a law firm or law practice”⁷ It is clear that the legal profession is “losing the war on retention, allowing women and minorities to leave the profession because they feel unprotected and undervalued.”⁸ And, as such, it is feasible that the conduct causing this flight—whether by individual lawyers or the legal institutions themselves—could give rise to disciplinary action.

As it is therefore no secret that “the legal profession remains one of the least diverse of any profession,”⁹ the critical question is simply, why? As Tsedale M. Melaku artfully articulates in a recent Harvard Business Review article entitled *Why Women and People of Color in Law Still Hear “You Don’t Look Like a Lawyer”*:

⁵ See AM. BAR ASS’N, REVISED RESOLUTION (2016). Model Rule 8.4(g) reads:

It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate or advocacy consistent with these Rules.

MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016) [<https://perma.cc/288Q-BVJL>].

⁶ MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2016).

⁷ *Id.* at cmt. 4.

⁸ *House of Delegates: Rule Against Harassment and Discrimination*, *supra* note 3 at 18:4340–18:5250.

⁹ Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/> [<https://perma.cc/X2WC-ZHGC>].

The legal profession needs to keep asking itself why black partners are so rare and what needs to change, at both the individual and industry levels. Why attrition rates among women and people of color remain high, and their advancement rates so low. Why black female associates are hired in greater numbers than black male associates but are promoted to partner far, far less often.¹⁰

Though the answer is multi-faceted, a key component of the equation is feedback bias.¹¹ When providing feedback or evaluating performance, employers and educators reinforce and perpetuate bias, albeit unintentionally, within the legal profession. This in turn fails to help diverse lawyers and law students develop the skills and competencies necessary to become successful leaders and professionals within the legal profession.

This Article first addresses how bias manifests in feedback, why it matters and how it plays out in legal education and in the workplace. In particular, this Article highlights the science and evidence that demonstrate feedback bias; the common types of feedback-related bias; and the natural discomfort with engaging in difficult conversations across gender and racial lines. Though applicable in both the employment and educational context, by way of example, this Article then focuses on how to identify and avoid biased feedback within legal education, by providing ten concrete strategies for faculty to employ in order to ensure accurate assessment of law students' performance and facilitation of their ultimate success.

II. DIVERSITY IN THE LEGAL PROFESSION

Despite the fact that women have comprised almost half of the law school graduating class for approximately 20 years,¹² women currently rep-

¹⁰ Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer,"* HARV. BUS. REV. (Aug. 7, 2019), [<https://perma.cc/X562-2TM7>].

¹¹ While partly attributable to bias, the lack of progress of diversity in the profession is also attributable to the educational pipeline and long-standing structural issues within the legal workplace, including interviewing and hiring practices; distribution of work assignments; mentorship and sponsorship; promotion and compensation; origination credit, billing rates and succession planning; and more. See LORY BARSDATE EASTON & STEPHEN V. ARMSTRONG, FOR THE DEFENSE, HOW TO MINIMIZE IMPLICIT BIAS (AND MAXIMIZE YOUR TEAM'S LEGAL TALENT) (SEPT. 2016) 84; EMMA BIENIAS ET AL., INTELL. PROP. OWNERS ASS'N, IMPLICIT BIAS IN THE LEGAL PROFESSION, 9–13 (2017), [<https://perma.cc/C5H5-LTHE>].

¹² DESTINY PEERY, MANAGING PARTNER FORUM, REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, 2 (2019), [<https://perma.cc/BR4W-CXRR>] [hereinafter NAT'L ASS'N OF WOMEN LAWYERS].

resent only 36% of the legal profession.¹³ Within private practice law firms, representation of women has made steady incremental progress post-recession.¹⁴ “Nonetheless, over this period, the gains have been minimal at best.”¹⁵ Though, in 2018, women comprised almost 51% of law firm summer associate classes, the percentage of women among the associate ranks now sits at roughly 46%,¹⁶ “higher than the 2009 [pre-recession] figure, but by just 0.25 percentage points.”¹⁷ Similarly, female representation in law firm partner ranks increased, but only slightly, from 22.7% in 2017 to 23.36% in 2018.¹⁸ Currently, women represent only 30% of non-equity or income law firm partners.¹⁹

Men continue to be promoted to non-equity partner status in significantly higher numbers than women. Among the non-equity partners who graduated from law school in 2004 and later, 38 percent were women and 62 percent were men. This data remain vexing in light of the longstanding pipeline of women, as women have been graduating from law school in nearly equal numbers for decades.²⁰

Moreover, the gender gap at the leadership levels is striking. Only 22% of equity partners are women,²¹ and women represent just shy of 27% of

¹³ AMER. BAR ASS’N, A.B.A. NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019) [hereinafter 10-YEAR TREND], [<https://perma.cc/VFE2-83DD>].

¹⁴ See NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12; see also NAT’L ASSOC. FOR LAW PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2019) [hereinafter NAT’L ASSOC. FOR LAW PLACEMENT], [<https://perma.cc/C2CE-KEQZ>].

¹⁵ 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS, *supra* note 14, at 5.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 5.

¹⁸ *Id.*; see also JULIE TRIEDMAN, AM. LAWYER, A FEW GOOD WOMEN 38, 41 (June 2015) (“As more firms expand their nonequity tier, women appear to be getting stuck in what some people call a ‘pink ghetto.’ That’s a major problem: On average, nonequity or income partners may expect to make a third [of] what their equity-tier peers are earning; leadership positions are generally not within their grasp.”).

¹⁹ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 10.

²⁰ LAUREN STILLER RIKLEEN, NAT’L ASS’N OF WOMEN LAWYERS, WOMEN LAWYERS CONTINUE TO LAG BEHIND MALE COLLEAGUES: REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2015) [<https://perma.cc/LFG4-QP6A>].

²¹ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 11.

general counsels at Fortune® 500 companies.²² Across all law firms, 22% of law firm managing partners are women;²³ however, women represent only roughly 10% of firmwide law firm chairs or managing partners in the largest 100 law firms in the country.²⁴ “[R]oughly one in five firms still has no woman on their top governing committee.”²⁵ And, of those firms with female representation on their governance committees, women typically comprise only 25% of committee members.²⁶

“At the root of retention and advancement disparities, say experts, is the subtle bias that plays out in compensation decisions.”²⁷ And, it appears that for women the compensation gender gap is holding steady. Though billing rates for starting female and male associates are essentially equal, a minimum 5% gap develops by the time attorneys attain non-equity partnership and persist at a minimum of 5% into equity partnership.²⁸ In response to the 2018 Annual Survey by the National Association of Women Lawyers (NAWL), very few responding law firms reported having a woman as its highest revenue generator or its highest earner.²⁹ In fact, 93% of responding firms reported that “their most highly compensated attorney is a man,” and of the ten most highly compensated attorneys and top ten revenue generators, on average, only one is a woman.³⁰ Moreover, the data reflects that female equity partners typically earn on average 88% of the compensa-

²² See MCCA’s 18th Annual General Counsel Survey, *Breaking Through the Concrete Ceiling: One Woman at a Time*, DIVERSITY & THE BAR, Winter 2017, at 9 [hereinafter MCCA’s 18th Annual Survey] (“There are more women general counsel in the Fortune® 500 than ever before. This year 132 women lead the legal departments of the biggest corporations in the country. . . . Though women have advanced more than minorities, the legal profession remains a male-dominated industry.”).

²³ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 7, 16–17.

²⁴ See Jake Simpson, *Only 12 BigLaw Firms Have Women Running the Show*, LAW360 (Apr. 21, 2015), [<https://perma.cc/2SJV-RYY9>] (“Of the 143 firmwide chair and managing partner positions at the top 100 firms in the Law360 400, only 15 are held by women.”); see also TRIEDMAN, *supra* note 18, at 46.

²⁵ TRIEDMAN, *supra* note 18, at 38.

²⁶ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 7.

²⁷ TRIEDMAN, *supra* note 18, at 41.

²⁸ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 7.

²⁹ *Id.* at 12.

³⁰ *Id.*

tion credited to their male counterparts³¹ and that men continue to outpace women in client origination or rainmaking credit and billable rates.³²

[T]he problem often occurs . . . among female partners who may bill thousands of hours a year but aren't regarded as rainmakers—even if their skill, time and energy has helped land a client or significantly expanded that relationship. They are not getting the credit for what they do . . . or opportunities to inherit big clients, which at some firms . . . tend to get handed down to men.³³

Furthermore, as articulated in an empirical study of the participation of women as lead counsel and trial attorneys in civil and criminal litigation, “women are consistently underrepresented in lead counsel positions and in the role of trial lawyer for all but a few types of cases.”³⁴

The statistics are far worse when looking at racial and ethnic bias. According to the ABA National Lawyer Population Survey, the legal profession is homogeneous, with 85% of lawyers identifying as Caucasian/White, 5% identifying as Black, 5% as Hispanic, 2% as Asian and less than 1% identifying as all other races or ethnicities.³⁵

Despite the fact that minorities comprise roughly 35% of law school graduates,³⁶ minorities are less likely to be employed full-time after gradua-

³¹ *Id.* at 13; *see also* TRIEDMAN, *supra* note 18, at 41 (highlighting that “according to a survey of more than 2,000 large law firm partners last year by Major, Lindsey & Africa, compensation for male partners was 32 percent higher than that of their female colleagues.”).

³² NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 12–15; *see also* Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL ST. J. (May 4, 2014, 6:03 PM), [<https://perma.cc/X4M4-HSX6>] (“[F]emale law-firm partners continue to lag behind their male counterparts when it comes to billing rates, commanding on average 10% less for their services, according to a new analysis of \$3.4 billion in legal work.”).

³³ Smith, *supra* note 32 (internal quotations omitted); *see also* NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 20.

³⁴ Stephanie A. Scharf & Roberta D. Liebenberg, *First Chairs at Trial: More Women Need Seats at the Table: A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation*, COMMISSION ON WOMEN IN THE PROF., A.B.A. 4 (2015), [https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.auth_checkdam.pdf]; *see id.* at 13–14 (finding that (i) in civil cases, “men are three times more likely to appear in lead roles than women,” (ii) “women are more likely to be lead counsel representing civil defendants rather than civil plaintiffs,” and (iii) “only a minority of attorneys appearing in criminal cases are women,” and when they do appear, “[w]omen lead counsel in criminal cases represent the government more than twice as often as they represent criminal defendants.”).

³⁵ 10-YEAR TREND, *supra* note 13.

³⁶ NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 6.

tion than non-minorities,³⁷ and the representation of minorities among lawyers at law firms is just over 16%.³⁸ On a positive note, though, minority representation among the law firm summer associate ranks is fairly favorable with minorities comprising 35% of summer associates in 2018.³⁹ Minorities now comprise just over 24% of associates at law firms, which is largely attributable to an increase in the number of lawyers of Asian descent, who now make up nearly 12% of all law firm associates.⁴⁰ The number of associates of Hispanic origin has also risen to 4.71%.⁴¹ In contrast, representation of African-American associates declined steadily between 2010 and 2015, and despite slight increases in the past three years, the representation of African-American associates remains below its pre-recession level at 4.48%.⁴²

Similar to the gender gap in leadership, minority representation as partner in law firms is disheartening. In 2018, minorities represented only 9.13% of law firm partners.⁴³ Among non-equity law firm partners, minorities represent almost 11.3%;⁴⁴ however, only about 8% of equity partners are minorities.⁴⁵ Within the equity partner ranks, 2% identify as Black, 3% as Asian and 2% as Hispanic/Latinx; while other races and ethnicities combined account for about 1%.⁴⁶ Moreover, only 9.5% of firms report having a person of color among their firm-wide managing partners.⁴⁷

Though minority women in the associate ranks increased from roughly 11% between 2009 and 2012 to over 13.5% in 2018,⁴⁸ just 3.19% of partners are women of color,⁴⁹ representing 5% of non-equity partners and on-

³⁷ NALP *Diversity Infographic: Minorities*, NALP (citing NALP, 2015-2016 NALP DIRECTORY OF LEGAL EMPLOYERS (2016)), [<https://perma.cc/EG5S-LUKK>].

³⁸ NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 6.

³⁹ *Id.* at 4, 9.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* (noting that Hispanic representation among law firm associate ranks has slightly outnumbered African-American associates since 2015).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ VAULT/MCCA, 2018 VAULT/MCCA LAW FIRM DIVERSITY STUDY 4 (2018).

⁴⁵ *Id.*; see also NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 12.

⁴⁶ NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 12.

⁴⁷ *Id.* at 16–17.

⁴⁸ NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 5.

⁴⁹ *Id.*; see also VAULT/MCCA, *supra* note 44, at 4.

ly 2% of equity partners.⁵⁰ “[M]inority women continue to be the most dramatically underrepresented group at the partnership level, a pattern that holds across all firm sizes and most jurisdictions.”⁵¹ According to the 2018 Law Firm Diversity Survey completed by Vault and the Minority Corporate Counsel Association (MCCA):

Women of color are being hired in greater numbers than minority men and make up a larger share of the associate population. . . . Yet, in the upper echelons of firm hierarchies, minority women face both a gender gap and a racial divide. Although a majority of the attorneys of color in law firms are female, women of color are far less likely to be partners than either minority men or their white colleagues of either gender. While 54 percent of white men are partners, and 31 percent of both white women and minority men are partners, only 17 percent of minority women are.⁵²

Moreover, “minorities still represent a tiny percentage of Fortune® 500 leaders.”⁵³ According to the MCCA’s 18th Annual General Counsel Survey, women have outpaced people of color in corporate leadership roles with minorities representing just over 11% of general counsels.⁵⁴ And, the advancement of women of color is even further behind, representing less than 5% of the Fortune® 500 general counsels and less than 4% of the general counsels in the Fortune® 1000.⁵⁵ “Women of color are scarce every year in the *MCCA General Counsel Survey*. Typically, three or fewer are newcomer GCs at Fortune® 500 employers, resulting in glaring disparities between these women and their nonminority peers. Nothing indicates the 5-to-1 gap in hiring, promotion and representation will disappear soon.”⁵⁶

⁵⁰ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 10, 12; *see also* VAULT/MCCA, *supra* note 44, at 4.

⁵¹ NAT’L ASS’N FOR LAW PLACEMENT, *supra* note 14, at 5.

⁵² VAULT/MCCA, *supra* note 44, at 9.

⁵³ Thomas Threlkeld, *Measuring the Progress of the Nation’s Legal Leaders: MCCA’s 13th Annual General Counsel Survey*, DIVERSITY & THE BAR 30 (Sept./Oct. 2012).

⁵⁴ MCCA’s 18th Annual Survey, *supra* note 22, at 12, 21–22 (noting that the roster of the 57 minority general counsel consists of 33 men and 24 women, and 31 African-Americans, 9 Hispanic Americans, 16 Asian American/Pacific Islander, one of whom is South Asian, and one Native American).

⁵⁵ *Id.* at 12.

⁵⁶ Lydia Lum, *Breaking Barriers, One Person at a Time: MCCA’s 17th Annual General Counsel Survey*, DIVERSITY & THE BAR 16 (Nov.–Dec. 2016) [<https://perma.cc/B742-AL7Z>]; *see also* MCCA’s 18th Annual Survey, *supra* note 22, at 15 (noting that in 2018, 79 Fortune® 500

Similar to racially diverse attorneys, our legal profession boasts few lesbian, gay, bisexual or transgender (LGBT) lawyers; however, representation in law firms is trending upward.⁵⁷ The overall percentage of LGBT lawyers in 2018 increased slightly to 2.86% with increases seen across all lawyer types.⁵⁸ The presence of LGBT lawyers is highest among the associate ranks at 3.8% and highest within large law firms (with more than 701 lawyers), representing almost 4.2% of associates.⁵⁹ LGBT partners represent roughly 2% of all partners, which is consistent across non-equity partners and equity partners.⁶⁰ Among leadership ranks, though, only 6% of firms reported having an LGBTQI (lesbian, gay, bisexual, transgender, queer or intersex) individual among their firm-wide managing partners.⁶¹ Rising numbers of LGBT summer associates, which represented 5.73% of the 2018 summer associate classes, however, indicate a potential for growth among LGBT lawyers.⁶² Wide geographic disparities though exist within these numbers.⁶³ “[I]n fact about 55% of the reported LGBT lawyers are accounted for by just four cities: New York City, Washington, DC, Los Angeles, and San Francisco. . . . In these same four cities, the percentage of LGBT summer associates is also higher – about 7% compared with 5.73% nationwide.”⁶⁴ Within corporations, representation of LGBT lawyers is unclear as the MCCA has yet to include LGBT individuals as part of its annual general counsel survey.⁶⁵

general counsels were either new to their companies or their companies were new to the Fortune® 500 list, and “[o]f this group of 79 lawyers, 26 are women and 7 are minorities.”).

⁵⁷ See NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 7; see also Justin McCarthy, *Americans Still Greatly Overestimate U.S. Gay Population*, GALLUP (June 27, 2019), [<https://perma.cc/J3T7-7J8H>] (noting that while Gallup's methodology is not the only way to estimate the percentage of the population that is gay or lesbian, its 2017 estimate is that 4.5% of Americans are LGBT).

⁵⁸ NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 7.

⁵⁹ *Id.*; see also NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 3 (noting that LGBTQI individuals of all genders represent about 4% of associates and 2% of non-partner track attorneys).

⁶⁰ See NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 7; NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 10, 12.

⁶¹ NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 12, at 16–17.

⁶² NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 14, at 7.

⁶³ *Id.* at 4, 7.

⁶⁴ *Id.* at 7.

⁶⁵ Lum, *supra* note 56, at 27 (noting existing efforts to expand the MCCA's annual general counsel survey in future years to include LGBT general counsel).

Similarly, compared with the general population,⁶⁶ representation within our legal profession by lawyers with a disability⁶⁷ is minimal. Only between 1 to 2% of law school graduates self-identify as having a disability.⁶⁸ Graduates with a disability are “the least likely to be employed after graduation compared to men, women, minorities or graduates identifying as lesbian, gay or bisexual.”⁶⁹ Within law firms, individuals with disabilities account for just over 0.46% of associates and 0.50% of partners.⁷⁰ Additionally, only 1.5% of law firms report having a person with a disability serving as a firm-wide managing partner.⁷¹

Notwithstanding many law firms and legal organizations’ having made a commitment to diversity, retention of women and minorities remains problematic within the legal profession. Lawyers of color represent 22% of the attorneys who left their firms in 2017, and among associates, represent 28%.⁷² “These figures are the highest reported in 11 years, including during the peak of the recession, when minorities were hit particularly hard by layoffs.”⁷³ Though the overall percentage of women among attorney departures has hovered around 40% over the last eleven years, departures by white women has slowly declined from 31% in 2010 to 29% in 2017.⁷⁴ However, the number of minority women departing their law firms has

⁶⁶ See Kristen Bialik, 7 *Facts About Americans With Disabilities*, PEW RES. CTR. (July 27, 2017), [https://perma.cc/Y6HN-AGW5] (noting that according to the U.S. Census Bureau “[t]here were nearly 40 million Americans with a disability in 2015, representing 12.6% of the civilian non-institutionalized population”).

⁶⁷ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2)(A), 104 Stat. 328 (codified as amended at 42 U.S.C. § 12102(1)(a) (2018)) (according to Section 3(2)(A) of the American with Disabilities Act of 1990, an individual with a disability is a person who has “a physical or mental impairment that substantially limits one or more major life activities of such individual”).

⁶⁸ NAT’L ASS’N FOR LAW PLACEMENT, *supra* note 14, at 7.

⁶⁹ NALP *Diversity Infographic: Disabilities*, NALP 1, [https://perma.cc/AWU5-UNPC]; see also A.B.A. COMM’N ON MENTAL AND PHYSICAL DISABILITY LAW, A.B.A. DISABILITY STAT. REP. STAT. REP. 6 (2011), [https://perma.cc/98BF-DABQ] (noting that in a 2009 NALP study, law school graduates with disabilities reported earning a mean salary of \$84,018 and a median salary of \$62,973, compared to a mean salary of \$93,454 and a median salary of \$72,000 for male and female graduates of all races and ethnicities).

⁷⁰ NAT’L ASS’N FOR LAW PLACEMENT, *supra* note 14, at 6; see also NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 3 (noting that persons with disabilities represent less than 1% of associates and non-partner track attorneys).

⁷¹ NAT’L ASS’N OF WOMEN LAWYERS, *supra* note 12, at 16–17.

⁷² VAULT/MCCA, *supra* note 44, at 5.

⁷³ *Id.*

⁷⁴ *Id.* at 7.

continued to rise, representing 10% of departures in 2010 and now 12% in 2017.⁷⁵ In fact, “more than 15 percent of associates who left firms [in 2017] were women of color, the highest number to date.”⁷⁶ As a means of understanding this phenomenon, the MCCA, in partnership with Russell Reynolds Associates, launched an Inclusion Index survey in 2018.⁷⁷ In asking attorneys how they feel about their organizations’ diversity and inclusion efforts, the survey found that:

[A]ttorneys who come from diverse backgrounds consistently rate their employers lower than others on key inclusion metrics. These ratings translate into low belonging scores, meaning that many people of color feel they have to adapt their behaviors in order to succeed. They are particularly likely to feel excluded from career development opportunities, and ultimately, the possibility of promotion to top leadership levels.⁷⁸

One important reason is bias. Bias is at the heart of the problem, and feedback bias is at its core.⁷⁹

⁷⁵ *Id.*

⁷⁶ *Id.* at 9.

⁷⁷ JEAN LEE ET AL., MCCA & RUSSELL REYNOLDS ASSOCS., UNLEASHING THE POWER OF DIVERSITY THROUGH INCLUSIVE LEADERSHIP 3 (2018) (measuring eight factors related to culture, including working across differences; leveraging of different perspectives; workplace respect; voice and influence; employee recruitment, development and retention; accommodating differences; organizational fairness; and leadership commitment.) [https://perma.cc/9W47-TTV8].

⁷⁸ *Id.* at 1.

⁷⁹ See BIENIAS ET AL., *supra* note 11, at 1 (“Unconscious biases in the workplace can hinder diversity, recruiting, and retention efforts and can shape an organization’s culture in detrimental ways. Unconscious bias can skew talent and performance reviews. They can affect whom an organization hires, promotes, and develops—which unintentionally reinforces barriers to opportunity.”); JOAN C. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION 8 (2018) (noting that “[b]ias is pervasive throughout lawyers’ work lives”) [https://perma.cc/BF2M-MBLJ]; Renwei Chung, *Implicit Bias: The Silent Killer of Diversity in the Legal Profession*, ABOVE THE LAW (Feb. 6, 2015, 11:02 AM), [https://perma.cc/G5J5-EJMA] (“Besides hampering the recruiting process, unconscious racial bias also severely affects a firm’s mentorship and culture, which have a direct impact on retention.”); Rachel Emma Silverman, *Gender Bias at Work Turns Up in Feedback*, WALL ST. J., (Sept. 30, 2015, 5:44 AM) [https://perma.cc/8VV4-ND65] (“If companies are looking for gender bias in their workplace, here’s one place they may want to start: feedback.”).

III. BIAS—THE SCIENCE OF IT ALL

It is important to note that, as humans, we are all biased. And, it all has to do with how our brain functions. The human brain excels at processing information, and it wants to process information as quickly as possible.⁸⁰ It therefore develops schemas.⁸¹ Schemas are sets of mental constructs for relationships.⁸² They create generalizations and expectations about categories of objects, places, events, activities, and most importantly, people.⁸³ Schemas are mental shortcuts; they are automatic and reflexive⁸⁴ – or what some researchers call “unconscious cognition.”⁸⁵ People use schemas in order to make sense of and navigate the incredible volume of sensory data and input encountered on a day-to-day basis.⁸⁶

But schemas can be right or wrong; they can be helpful or unhelpful. Helpful examples include tying shoes, driving, or riding a bike.⁸⁷ Once learned, these are tasks people do quickly without conscious thought or effort. But schemas can also lead to discriminatory behaviors, inequity and unfairness. One of the starkest examples is the case of Amadou Diallo. In 1999, New York City police were searching for a black suspect and approached Diallo.⁸⁸ When Diallo reached into his coat for his wallet and identification, the police thought he was reaching for a gun, and they shot him 41 times.⁸⁹ In that case, the question arose whether the police would have responded in the same way if the suspect the police were seeking was

⁸⁰ BIENIAS ET AL., *supra* note 11, at 2 (“Psychologists estimate that our brains are capable of processing approximately 11 million bits of information every second.”).

⁸¹ See EASTON & ARMSTRONG, *supra* note 11, at 83–84.

⁸² *Id.* at 83.

⁸³ *Id.*

⁸⁴ *Id.*; see also BIENIAS ET AL., *supra* note 11, at 2–3 (noting that “everyone has implicit biases, regardless of race, ethnicity, gender, or age.”).

⁸⁵ See generally Martijn E. Wokke et al., *The Flexible Nature of Unconscious Cognition*, 6 PLOS ONE 9 (2011), (discussing the “boundaries of Unconscious cognition”), [<https://perma.cc/X6UY-PK89>].

⁸⁶ EASTON & ARMSTRONG, *supra* note 11, at 83–84; see also BIENIAS ET AL., *supra* note 11, at 2–3.

⁸⁷ EASTON & ARMSTRONG, *supra* note 11, at 83.

⁸⁸ Christian Red, *Years Before Black Lives Matter, 41 Shots Killed Him*, N.Y. TIMES (July 19, 2019), [<https://perma.cc/263R-TJ4P>].

⁸⁹ *Id.* (explaining that “Mr. Diallo’s death became the rallying cry for those who believed the Police Department operated with racial bias.”).

of a different race.⁹⁰ Substantial evidence exists that race played a critical role in the police's response. "Race stereotypes can lead people to claim to see a weapon where there is none. Split-second decisions magnify the bias by limiting people's ability to control responses."⁹¹

Social categories (or social cognition) and stereotypes are types of schemas.⁹² People develop them very early in life.⁹³ Moreover, they tend to strengthen over time and are reinforced from multiple sources – whether family, friends, media, direct or vicarious experiences and positive or negative associations.⁹⁴ In fact, arguably, media, especially social media, is playing a much larger role in the reinforcement of social cognition and stereotypes.⁹⁵ Social media platforms are structured to push content to users that mimic content users are already reading or "liking."⁹⁶ This approach limits the exposure to all forms of content, opinions, images, etc. and therefore potentially reinforces the ideas, notions, and viewpoints of the user, exacerbating our brain's natural tendency to categorize.⁹⁷ In other words, "social media curation allows us increasingly to indulge our biases, rather than challenge them, exclude viewpoints we don't agree with and live in a filter

⁹⁰ See generally *The Takeaway: Ten Years After the Death of Amadou Diallo Questions Still Persist*, WYNC STUDIOUS (Feb. 4, 2009), [<https://perma.cc/Q38M-2M3D>] (discussing the possibility of a different outcome had Mr. Diallo been an "unarmed white man?").

⁹¹ B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 287 (2006).

⁹² See JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS, 1 (2009), [<https://perma.cc/2ME8-XKXU>].

⁹³ *Id.*; see also *Primer on Implicit Bias*, in KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015 61,62 (2015), [<https://perma.cc/WFX5-YZWS>] [hereinafter KIRWAN INSTITUTE].

⁹⁴ KIRWAN INSTITUTE, *supra* note 93, at 62.

⁹⁵ See COMMON SENSE, WATCHING GENDER: HOW STEREOTYPES IN MOVES AND ON TV IMPACT KIDS' DEVELOPMENT 7–8 (2017), [<https://perma.cc/X2FK-QWBM>]; Heather E. Bullock et al, *Media Images of the Poor*, 57 J. OF SOC. ISSUES 230 (2001); Suzanne Jardim, *Recognizing Racist Stereotypes in the U.S. Media*, MEDIUM (July. 26, 2016) [<https://perma.cc/HFX9-2VN5>]; Nicole Rodgers & Rashad Robinson, *How the News Media Distorts Black Families*, WASH. POST (Dec. 29, 2017) [<https://perma.cc/S9B5-Y46A>].

⁹⁶ Nick Easen, *Is Social Media Strengthening Our Biases?*, RACONTEUR (Jan. 30, 2019), [<https://perma.cc/FJ2D-TEP2>] (noting that "[s]ocial media has transformed the nature of human interaction, but has simultaneously created homogeneous newsfeeds that reinforce our social and cultural biases").

⁹⁷ EASTON & ARMSTRONG, *supra* note 11, at 83–84.

bubble, logging into a so-called ‘daily me’, where the only echo is of voices that sound like us.”⁹⁸

When encountering conversations regarding social categories and stereotypes, it is very common to focus on race, gender and sexuality. However, the human brain categorizes on a much broader scale. Additional “categories” with respect to encounters with people are innumerable, including nationality, age, economic status, social status, language, skin color, disability, physical appearance, marital status, role in the family, birth order, immigration status, religion, access and weight – and the list goes on.⁹⁹ Stereotypes are information associated with social cognition, again, whether from outside sources or personal experiences.¹⁰⁰ They can be right or wrong; they can be positive (such as Asians are good at math and science¹⁰¹ or people who speak with a posh English accent are smart¹⁰²) or negative (people who speak with a Southern accent are unintelligent¹⁰³ or black men dressed in baggy pants are gang members¹⁰⁴).

Social categorization and stereotyping lead to assumptions about individuals—and bias.¹⁰⁵ A bias is “a preference or an aversion toward a per-

⁹⁸ Easen, *supra* note 96 (“We’re breeding ignorance in an age of enlightenment”) (quoting Stephen Frost).

⁹⁹ See, e.g., AM. BAR ASS’N COMM’N ON DISABILITY RTS., *Implicit Biases & People with Disabilities*, A.B.A. (Jan. 7, 2019), [<https://perma.cc/ZEF9-FS34>]. (explaining implicit biases about persons with disabilities).

¹⁰⁰ See KANG, *supra* note 92, at 1; KIRWAN INSTITUTE, *supra* note 93, at 4, 62.

¹⁰¹ KIRWAN INSTITUTE, *supra* 93, at 34; Joan C. Williams et al., *The Problem With ‘Asians Are Good at Science,’* ATLANTIC (Jan. 31, 2018), [<https://perma.cc/6VXJ-TNAZ>] (“It’s a familiar stereotype: Asian people are good at math and science. This belief has pervaded American pop culture and media for decades, perhaps best exemplified in a now-infamous 1987 *Time* magazine cover that showed six young students, sitting behind a computer and books, with the caption “Those Asian American Whiz Kids.”).

¹⁰² Kevin Bennett, *Why Do British Accents Sound Intelligent to Americans?*, PSYCHOL. TODAY (Sept. 9, 2016) [<https://perma.cc/JKS8-9DLG>]; see also Lance Workman, *How Outdated Stereotypes About British Accents Reinforce the Class Ceiling*, CONVERSATION (June 30, 2015, 1:16 AM), [<https://perma.cc/UEA9-XK9Y>].

¹⁰³ Taylor Phillips, *Put Your Money Where Your Mouth Is: The Effects of Southern vs. Standard Accent on Perceptions of Speakers*, 9 STAN. UNDERGRADUATE RES. J. 53, 56 (2010).

¹⁰⁴ Gene Demby, *Sagging Pants and the Long History of ‘Dangerous’ Street Fashion*, NPR (Sept. 11, 2014, 8:18 AM), [<https://perma.cc/59EY-47YF>]; Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES (Aug. 30, 2007) [<https://perma.cc/QXA4-M9N8>].

¹⁰⁵ Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), [<https://perma.cc/9UUR-62FR>] (explaining that “implicit bias is grounded in a basic human tendency to divide the social world into groups. In other words, what may appear as an example of tacit racism may actually be a manifestation of a broader propensity to think in terms of ‘us versus them’—a prejudice that can apply, say, to fans of a different sports

son” or a group of people based on social cognitions.¹⁰⁶ Bias links to behavior.¹⁰⁷ So, a preference or positive bias toward an individual or group may lead a person to treat the individual or group favorably; however, an aversion or negative bias may lead a person to engage in negative treatment. “This is the frightening point: Because [implicit bias is] an automatic and unconscious process, people who engage in this unthinking discrimination are not aware of the fact that they do it.”¹⁰⁸ Though implicit biases may not necessarily lead to explicit prejudice or discrimination, they may well predict discriminatory decision making or behaviors, which is critical when thinking about the practice of law.¹⁰⁹

By way of example, in 2015, Dolly Chugh, Katherine Milkman and Modupe Akinola published the results of a study examining race and gender disparities in the treatment of prospective doctoral students.¹¹⁰ The study involved sending identical emails, “written in impeccable English, varying only in the name of the student sender,” to “more than 6,500 randomly selected professors from 259 American universities” from a fictional prospective student seeking guidance about the university’s Ph.D. program.¹¹¹ The study found a clear response bias among faculty favoring

team.”; *see also* Saleem Reshamwala, *Peanut Butter Jelly and Racism*, N.Y. TIMES: WHO, ME? BIASED? (Dec. 16, 2016), [<https://perma.cc/FH9R-4Q5K>] (describing implicit bias in our society and strategies to de-bias).

¹⁰⁶ 1 RACHEL D. GODSIL ET AL., *THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE*, 10 (2014).

¹⁰⁷ *Id.* at 25.

¹⁰⁸ KIRWAN INSTITUTE, *supra* note 93, at 62 (alteration in original) (internal quotations omitted) (quoting Isabel Wilkerson, *No, You’re Not Imagining It*, ESSENCE, Sept. 2013, at 134).

¹⁰⁹ *See* Leesa Renee Hall, *Systemic Bias vs Implicit Bias: Why the Difference Matters When Reviewing the Report by the Ontario Human Rights Commission on Racial Profiling by the Toronto Police Services*, MEDIUM (Dec. 10, 2018), [<https://perma.cc/7NG3-YMQ9>] (“Systemic bias is prejudice, bigotry, or unfairness directed by health, educational, government, judicial, legal, religious, political, financial, media, or cultural institutions towards individuals of an oppressed or marginalized group.”); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 408 (2017), (“Systemic implicit bias, as we define it, refers to the way automatic racial bias may have become unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories (such as retribution or rehabilitation) and jurisprudential approaches to well-considered constitutional doctrines (such as Eighth Amendment excessiveness analysis).”); *Systemic Bias in Legal Profession Confirmed by New Report*, A.B.A. (Sept. 6, 2018), [<https://perma.cc/ZN3W-SQ5P>] (confirming systemic bias in the legal profession, which it defines as “widespread gender and racial bias [that] permeates hiring, promotion, assignments and compensation in the legal industry.”).

¹¹⁰ Dolly Chugh et al., *Professors Are Prejudiced, Too*, N.Y. TIMES (May 9, 2014), [<https://perma.cc/7HD2-W6BJ>].

¹¹¹ *Id.*

white males.¹¹² When sending the messages “from students with names like Meredith Roberts, Lamar Washington, Juanita Martinez, Raj Singh and Chang Huang”—names intended to trigger gender and race recognition— “[p]rofessors were more responsive to white male students than to female, black, Hispanic, Indian or Chinese students in almost every discipline and across all types of universities.”¹¹³

While no published studies exist evaluating implicit bias and legal educators, other studies reveal the entrenched bias and stereotypes within our legal profession.¹¹⁴ Leveraging the Implicit Association Test methodology created by Project Implicit, a non-profit organization founded in 1998 by three scientists interested in implicit social cognition,¹¹⁵ researchers tested whether law students harbor implicit gender biases related to legal careers and to leadership positions in the legal setting. The study found that law students hold implicit associations correlating men and judges and women and paralegals as well as associating men with the workplace and women

¹¹² *Id.*

¹¹³ *Id.*; see also Saleem Reshamwala, *Check Our Bias to Wreck Our Bias*, N.Y. TIMES: WHO, ME? BIASED? (interviewing Dolly Chugh, who summarizes the findings of the study by stating: “What we found that is if you were a white male you were far more likely to receive a response back than if you were all those other categories put together as a group”).

¹¹⁴ In another study, researchers sent fictitious resumes to over 300 law firms for a summer associate position. Lauren A. Rivera & András Tilcsik, *Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market*, 81 AM. SOC. REV. 1097, 1098 (2016). Though the fictional law students attended school at a second-tier law schools, the resumes reflected all applicants as in the top one percent of their class and on law review and as having identical (and impressive) work and academic achievements. *Id.* at 1103. The researchers inserted though subtle cues about gender (revising the applicant’s first name) and socioeconomic status (revising the applicant’s last name, extracurricular activities and awards). *Id.* at 1104. “For example, the lower-class applicant was listed as enjoying pick-up soccer and country music and volunteered as a mentor for fellow first-generation college students, while the upper-class applicant enjoyed sailing and classical music and volunteered as a generic student mentor.” JOAN C. WILLIAMS, *WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA* (2017). “The employers overwhelmingly favored the higher-class man: over 16% of his resumes resulted in a callback. Only about 1% of the lower-class man’s resumes did so, even though he was just as qualified.” *Id.*; see also Joshua Gowin, *The Neuroscience of Racial Bias*, PSYCHOL. TODAY (Aug. 20, 2012), [<https://perma.cc/SW7T-A2G7>]

(highlighting a study in which the researcher sent out resumes with “white-sounding” and “black-sounding” names, and found that the resumes with “white-sounding” names received more callbacks).

¹¹⁵ See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); PROJECT IMPLICIT, [<https://perma.cc/2CWS-VTX7>] (last visited Apr. 10, 2020).

with the home and family.¹¹⁶ Studies further confirm gender bias surrounding courtroom decorum, style and persona¹¹⁷; while others highlight entrenched gender stereotypes, such as being mistaken for a secretary or paralegal, being called a term of “endearment,” or being treated in a condescending manner.¹¹⁸

¹¹⁶ Justice D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POLICY 1, 28–29 (2010); see also Ed Yong, *6-Year-Old Girls Already Have Gendered Beliefs About Intelligence*, ATLANTIC, (Jan. 26, 2017), [https://perma.cc/Q2S9-C4CE] (revealing the results of a study in which Lin Bian, a University of Illinois psychologist, read a story to children aged five to seven about a person who is “really, really smart” and then asked the children to match pictures of four unfamiliar adults—two men and two women—to attributes such as “smart” or “nice” and noting that “[t]he stereotype that brilliance and genius are male traits is common among adults. In various surveys, men rate their intelligence more favorably than women, and in a recent study of biology undergraduates, men overrated the abilities of male students above equally talented and outspoken women. But Bian’s study shows that the seeds of this pernicious bias are planted at a very early age. Even by the age of 6, boys and girls are already diverging in who they think is smart.”).

¹¹⁷ See DEF. RESEARCH INST., A CAREER IN THE COURTROOM: A DIFFERENT MODEL FOR THE SUCCESS OF WOMEN WHO TRY CASES 10–11 (2004) (revealing in a survey of the judiciary that several judges viewed women who raised their voice in the courtroom as “shrill,” while men were viewed as simply being aggressive, and noting that judges identified one of their biggest challenges was dealing with entrenched biases against women when they exhibit aggressive behavior); Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentations, Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 L. & HUM. BEHAV. 533, 549 (1996) (examining the effects of aggressive versus passive speech and finding that women were less successful than men when adopting an aggressive demeanor in securing a “not guilty” verdict from mock jurors for their client); see also Deborah L. Rhode & Barbara Kellerman, *The State of Play, in WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE* 1, 7–8 (Deborah L. Rhode & Barbara Kellerman eds., 2006) (noting that female litigators must strike a balance between societal stereotypes regarding feminine and masculine traits in order to be perceived favorably in the courtroom; for example, if she is soft-spoken and compassionate, she may be perceived as weak, but if she is too forceful or aggressive, she may be labeled as abrasive).

¹¹⁸ See DEF. RESEARCH INST., *supra* note 117, at 10–11 (reporting that 70.4% of survey participants experienced gender bias in the courtroom); Bibianne Fell, *Gender in the Courtroom: Part 1 – Is Lady Justice at a Disadvantage in the Courtroom?*, NITA, BLOG (Mar. 18, 2013), [https://perma.cc/T5PB-TFS7] (highlighting a 2005 survey by the State Bar of California Center for Access and Fairness that found that 54% of participating female attorneys in California reported experiencing gender bias in the courtroom and a 2004 survey by the Texas State Bar reporting that nine out of ten participating female attorneys report being the target of at least one incident of gender discrimination in the courtroom); see also Kat Macfarlane, *Motion to Dismiss: From Catcalls to Kisses, Gender Bias in the Courtroom*, OBSERVER (Jul. 10, 2013, 11:09 AM) [https://perma.cc/EJ6U-URP3] (“My adversaries, civil rights attorneys representing plaintiffs in federal court, were overwhelmingly male, and they loved to yell at me, both over the phone and in person. When they didn’t like my strategy, they called my motions ‘stupid.’ When I made a cogent argument that I refused to back down from, I was ‘too sensitive.’”); Elizabeth Olson, *Bar Association Considers Striking ‘Honeys’ From the Courtroom*, N.Y. TIMES (Aug. 4, 2016), [https://perma.cc/GH2F-U264]

With respect to implicit bias on the basis of race or ethnicity, another study revealed that potential jurors implicitly associate white males with traits commonly used to depict successful litigators, such as eloquent, charismatic, and verbal.¹¹⁹ The study examined whether bias (explicit or implicit) in favor of white lawyers and against Asian American lawyers would alter how people evaluate identical lawyering, simply because of the race or ethnicity of the lawyer.¹²⁰ The researchers intentionally did not examine the effect of race or ethnicity for women attorneys, noting:

Our strategy was not to ignore gender, but to control for it, based on past evidence showing that lawyers are expected to be men rather than women As such, we expected that implicit and explicit stereotypes about ideal lawyers would activate thoughts of White men more than Asian men, but would not much activate thoughts of women of either race.¹²¹

Recognizing that bias exists with the legal profession, it is important to understand why and how such bias manifests.

A. *How Does Bias Manifest?*

Humans are susceptible to multiple cognitive biases, systematic errors in thinking that affects decision-making and judgments. Within the context of giving feedback or evaluating performance, three cognitive biases rise to the forefront: confirmation bias, in-group bias and availability heuristic. Confirmation bias refers to the process of noticing or looking *only* for evidence that confirms our ideas and ultimately reinforces our original viewpoint.¹²²

When a human is confronted with a series of events or evidence, he or she will adopt a hypothesis to explain them. Confirmation bias is the tendency to seek out and attrib-

When Lori Rifkin asked the opposing lawyer to stop interrupting her while she questioned a potential witness, he replied: “Don’t raise your voice at me. It’s not becoming of a woman.” The remark drew a rebuke and [a \$250] fine in January [2016] from a federal magistrate who declared that the lawyer had “endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys.”

¹¹⁹ See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myths of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

¹²⁰ *Id.* at 912.

¹²¹ *Id.* at 893–94 (internal citations omitted).

¹²² See EASTON & ARMSTRONG, *supra* note 11, at 83.

ute weight to pieces of evidence that support the hypothesis and ignore evidence which disproves it. It also manifests itself in the tendency to interpret ambiguous evidence as supportive of one's own hypothesis.¹²³

A recent study examined how unconscious assumptions regarding gender affects people's abilities to recognize emerging leadership.¹²⁴ The study revealed that "[e]ven when a man and a woman were reading the same words off a script, only the man's leadership potential was recognized," confirming that "getting noticed as a leader in the workplace is more difficult for women than for men."¹²⁵ This is the confirmation bias cycle at work. When people are consistently exposed to leaders that fit a particular mold, they will continue to seek out or notice only those leaders who fit that same mold.¹²⁶ So, when evaluating the performance of a lawyer or law student, a supervisor's or faculty's preconceived notions will impact their evaluation. If, for example, a preconception exists that males are assertive, it will be easier for a supervisor or faculty to recall instances in which a male employee or student asserted themselves in a meeting. Conversely, a supervisor or faculty may easily forget instances in which a female employee or student similarly asserted herself by, for example, suggesting an effective strategy or navigating a tough client interaction.¹²⁷

While similar to confirmation bias, in-group bias is a manifestation of innate tribalistic tendencies that help forge tighter bonds among people within their "in-group."¹²⁸ The 1985 John Hughes film *The Breakfast Club* offers an interesting depiction of in-group bias, categorizing the five high

¹²³ *Confirmation Bias and the Law*, HOGAN LOVELLS (Feb. 2016), [<https://perma.cc/HU7S-SS75>]; see also Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (2014), [<https://perma.cc/FZK9-XPJ7>].

¹²⁴ Heather Murphy, *Picture a Leader. Is She a Woman?*, N.Y. TIMES (Mar. 16, 2018), [<https://perma.cc/2TE4-PGR4>] (citing Elizabeth J. McClean et al., *The Social Consequences of Voice: An Examination of Voice Type and Gender on Status and Subsequent Leader Emergence*, 61 ACAD. MGMT. J. (2018)).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ In one study, science professors widely view female undergraduates as less competent than male students with the same achievements and skills. See Kenneth Chang, *Bias Persist for Women of Science, a Study Finds*, N.Y. TIMES (Sept. 24, 2012), [<https://perma.cc/6RR5-GDB7>]. Consequently, the "professors were less likely to offer the women mentoring or a job." *Id.* "Female professors were just as biased against women students as their male colleagues." *Id.* (emphasis added).

¹²⁸ Kendra Cherry, *What Is the Ingroup Bias?*, EXPLORE PSYCHOL. [<https://perma.cc/P7J3-AC9S>] (last updated Feb. 7, 2018).

school students as “the criminal,” “the athlete,” “the basket case,” “the princess,” and “the brain.”¹²⁹ In-group bias performs the exact opposite function to those in the outside the group, generating suspicion, fear, and even disdain of outsiders.¹³⁰ Ultimately, in-group bias causes an overestimation of the abilities and value of the in-group.¹³¹ Within the educational or employment context, supervisors or faculty may gravitate to employees or students who remind them of themselves. “Favored” employees or students may receive more coaching and better reviews, and in the employment context, more opportunities for advancement. “[W]ith increased pressure to bill at the expense of mentoring and training, partners will tend to prefer and promote those associates they perceive, correctly or incorrectly, to be more like them and therefore more likely to learn faster.”¹³² But, in-group bias may disadvantage those in the group as well because failing to give them honest feedback or guidance may stunt their ability to grow and develop.¹³³

“The availability heuristic is a type of bias where people make a decision or a judgement based [on] ease of retrievability and recall. The idea is if a person can recall something quickly then it must be important.”¹³⁴ When making a decision, people therefore rely on immediate examples that come to a given person’s mind, undermining one’s ability to judge accurately magnitude and frequency.¹³⁵ A commonly cited example of the availabil-

¹²⁹ THE BREAKFAST CLUB (Universal Studios 1985).

¹³⁰ Cherry, *supra* note 128.

¹³¹ See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES., 143, 146–148 (2004).

¹³² Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2516 (2015).

¹³³ See Paola Cecchi-Dimeglio, *How Gender Bias Corrupts Performance Reviews, and What to do About It*, HARV. BUS. REV. (Apr. 12, 2017), [<https://perma.cc/3CDF-CHPE>].

[I]t does your company no good when employees are overrated because of subjective biases, including leniency (for example, an employee dropped the ball, but “he had a lot on his plate”) and the “halo effect,” where one positive trait is assumed to be linked to others (“He inspires confidence, which goes a long way”).

Id.; EASTON & ARMSTRONG, *supra* note 11, at 5 (“Once we have made a judgment about a person, particularly about likeability, we let our overall impression influence how we evaluate that person’s specific traits. In the workplace, a manager’s positive reaction to a single characteristic can cause that manager to overlook other problems with an employee.”).

¹³⁴ Michael Gearon, *Cognitive Biases – Availability Heuristic*, MEDIUM (Nov. 4, 2018), [<https://perma.cc/FB3L-SKXK>].

¹³⁵ *Availability Heuristic*, DECISION LAB, [<https://perma.cc/W8YU-EQC3>] (last visited Apr. 10, 2020).

ity heuristic is Israeli psychologists Daniel Kahneman and Amos Tversky's experiment that asked people to judge whether several letters from the alphabet – K, L, N, R and V – appear more frequently as the first or third letter in English words.¹³⁶ “Because we can much more easily recall words such as kitchen, kangaroo and kale, we ignore the fact that there are actually about twice as many words with K in third place (e.g. ask).”¹³⁷ Relatedly, if a supervisor or law faculty calls to mind their vision of what a law student (or lawyer) looks or acts like, deviation from that vision may lead to more scrutiny or bias. As Melaku articulates:

There are certain unspoken rules of success in corporate America, not least of which is “looking the part.” That often means tailored suits, a certain range of coiffed hair styles, and other accoutrements or signals of success. In the legal field, a popular refrain directed at women and people of color is “You don't look like a lawyer.” It's the idea that the norms of success, ability, and competence are tied to looking a certain way—usually white and male.¹³⁸

As such, our brains wreak havoc on our ability to evaluate performance whether in the educational or employment context without bias.

B. How Bias Emerges When Giving Feedback

Bias in giving feedback or evaluating performance continues to undermine the ability of women and people of color to succeed and advance within the legal profession. “[W]hite men continue to enjoy both racial and gender privilege in the legal industry. This slows down the ability of organizations to create real change and leaves the burden on women and people of color to figure it out on their own.”¹³⁹

¹³⁶ *Id.*; see also Gearon, *supra* note 134.

¹³⁷ *Availability Heuristic*, *supra* note 135; Cass R. Sunstein & Richard Thaler, *The Two Friends Who Changed How We Think About How We Think*, *NEW YORKER* (Dec. 7, 2016), [<https://perma.cc/8TEP-6Q4Z>].

¹³⁸ Melaku, *supra* note 10. See also WILLIAMS ET AL., *supra* note 79, at 7 (finding “prove-it-again” bias in which “[m]en of color and women of all races receive clear messages that they do not fit with people's image of a lawyer” being mistaken for janitors, administrative staff or court personnel).

¹³⁹ Melaku, *supra* note 10.

1. Negative Feedback Bias

Women, especially, are subject to biased performance reviews, regardless of whether their supervisor is male or female.¹⁴⁰ Women are far more likely to receive critical, subjective or vague feedback, and their performance is less likely to be attributed to their abilities and skills.¹⁴¹ In an article entitled *Research: Vague Feedback is Holding Women Back*, Shelley Correll and Caroline Simard outline the results of their study that focused on addressing why women are not rising to executive ranks, despite the fact that corporations have invested heavily in programs to advance female leadership.¹⁴² Upon analyzing performance evaluations across three high-tech companies and a professional services firm, Correll and Simard found that women consistently received feedback that was less likely to connect their contributions to business outcomes.¹⁴³ Such “vague feedback lets women know they are generally doing a good job, but it does not identify which specific actions are valued or the positive impact of their accomplishments.”¹⁴⁴ Moreover, the study revealed that “vague feedback is correlated with lower performance review ratings for women – but not for men. In other words, vague feedback can specifically hold *women* back.”¹⁴⁵ When women received more specific feedback, it was either tied to their caregiving abilities, attributed their accomplishments to teamwork rather than

¹⁴⁰ See Paola Cecchi-Dimeglio & Kim Kleman, *How to React to a Biased Performance Review*, HARV. BUS. REV., HBR GUIDE FOR WOMEN AT WORK ch. 22 (2018).

¹⁴¹ *Id.* Likewise, the articulation of an individual’s performance in a letter of recommendation impacts the ability of women and people of color to advance in their chosen profession. A study of 886 letters of recommendation in fields of chemistry and biochemistry found that letters written on behalf of female and male applicants are more similar than different. See Toni Schmader, et al., *A Linguistic Comparison of Letters of Recommendation for Male and Female Chemistry and Biochemistry Job Applicants*, 57 SEX ROLES 509 (2007). However, letters written for men tended to incorporate more “standout adjectives,” such as “the *most* gifted,” “*best* qualified” or “*rising star*,” than those written for women. *Id.* at 6 (emphasis omitted). A related but earlier study also demonstrated that letters of recommendation for women as compared to men included language related to gender, doubt and “grindstone adjectives” such as “hardworking.” *Id.* at 7. (citing Frances Trix & Carolyn Psenka, *Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty*, 14 DISCOURSE AND SOC’Y 191–220 (2003)). “The researchers concluded that recommenders seemed to emphasize women’s strong work ethic and portray them in terms of their training and teaching, whereas the focus in men’s recommendations included greater confidence in their research and ability.” *Id.* at 3.

¹⁴² Shelley J. Correll & Caroline Simard, *Research: Vague Feedback Is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016), [<https://perma.cc/W9G6-NCF7>].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

leadership or “overly focused on their communication style.”¹⁴⁶ Such commentary also tended to be negative with statements such as “[h]er speaking style and approach can be off-putting to some people at times”—a comment that offers no solutions for improvement.¹⁴⁷ In fact, 76% of references to an employee being “too aggressive” occurred in evaluations of a female employee’s performance.¹⁴⁸

Communication style appears to be at the crux of feedback bias for women, illuminating the “double bind.”¹⁴⁹ “The female gender role is based on the stereotype that women are nice and kind and compassionate[.]”¹⁵⁰ Conversely, “in a leadership role, one is expected to take charge and sometimes at least to demonstrate toughness, make tough decisions, be very assertive in bringing an organization forward, sometimes fire people for cause, etc.”¹⁵¹ One commentator summarized the double blind dilemma:

So what's a woman to do? Be nice and kind and friendly, as our gender stereotypes about women require? Or be tough and decisive, as our stereotypes about leadership demand? To be one is to be seen as nice, but weak. To be the other is to be seen as competent, but unlikable.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Shelley Correll & Caroline Simard, *Research: Vague Feedback Is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016) [<https://perma.cc/W9G6-NCF7>].

¹⁴⁹ In her book, Sarah Cooper uses humor to demonstrate the “double bind” reality for women by providing examples of “threatening” and “non-threatening” ways in which women can communicate with their male colleagues. SARAH COOPER, *HOW TO BE SUCCESSFUL WITHOUT HURTING MEN’S FEELINGS: NON-THREATENING LEADERSHIP STRATEGIES FOR WOMEN* (2018). When setting a deadline, for example, an example of a threatening comment is “This has to be done by Monday”; whereas a non-threatening comment would be “What do you think about getting this done by Monday?”. *See also* Sarah Cooper, *9 Non-Threatening Leadership Strategies for Women*, COOPER REV. (2018), [<https://perma.cc/AY6R-SUC2>] (last visited Apr. 27, 2020). When someone steals a female’s idea, an example of a threatening response is “Yes that’s exactly what I just said[.]” *Id.* “Thank you for articulating that so clearly” however, would be a more non-threatening response. *Id.* Similarly, when a female emails a request to a male colleague, it is viewed as threatening when the request is framed as “Send me the presentation when it’s ready.” *Id.* But, if it is framed as “Hey Jake! ☺ Can I take a peek at your presentation when it’s ready? ☺ Thanks!! ☺☺!” it is viewed as a non-threatening request. *Id.*

¹⁵⁰ Shankar Vedantam et al., *Too Sweet, Or Too Shri!l? The Double Bind for Women*, NPR (Oct. 18, 2016, 12:00 AM) [<https://perma.cc/SH7Q-MJGT>].

¹⁵¹ *Id.*

¹⁵² *Id.* *See also* Silverman, *supra* note 79 (noting that a study evaluating hundreds of performance reviews found that:

Women are 2.5 times as likely to receive feedback about an aggressive communication style—“coming on too strong.”¹⁵³ It is a Catch-22. Women are seen as ineffective if they behave in a way that is viewed as “feminine”; for example, not taking charge at a meeting or showing emotion. But if they behave in ways that are deemed more “masculine,” such as appearing confident, competitive, decisive or confrontational, they are judged negatively.¹⁵⁴ The “double standard” puts women in an untenable position, forcing them to confront the fact that power and likeability are negatively correlated for women.¹⁵⁵

This double standard plays out in performance reviews, where women are criticized for the same attributes for which men receive praise. In one study, for example, reviewers made gender-based comments centered on the concept of “confidence in working with clients.”¹⁵⁶ The female’s review was negative: “Heidi seems to shrink when she’s around others, and especially around clients, she needs to be more self-confident.”¹⁵⁷ But when evaluating similar behavior by a male colleague, the review was given a positive spin: “Jim needs to develop his natural ability to work with people.”¹⁵⁸ Similarly, when focusing on “analysis paralysis,” the female employee’s review was harsh: “Simone seems paralyzed and confused when facing tight deadlines to make decisions.”¹⁵⁹ Whereas, the same behavior in a male colleague was viewed as careful thoughtfulness: “Cameron seems hesitant in

Women were described as “supportive,” “collaborative” and “helpful” nearly twice as often as men, and women’s reviews had more than twice the references to team accomplishments, rather than individual achievements. Men’s reviews contained twice as many words related to assertiveness, independence and self-confidence—words like “drive,” “transform,” “innovate” and “tackle.” Men also received three times as much feedback linked to a specific business outcome, and twice the number of references to their technical expertise”).

¹⁵³ Silverman, *supra* note 79.

¹⁵⁴ See BIENIAS ET AL., *supra* note 11, at 13 (noting that “a woman’s perceived competency drops by 35% when she is assertive or forceful . . .”).

¹⁵⁵ WILLIAMS ET AL., *supra* note 79, at 8; see also Catherine McGregor, *You Can’t Change What You Can’t See*, Diversity and The Bar 80, 82 (Summer 2018), [<https://perma.cc/5UKJ-ATWP>] (finding that the pressure to behave in feminine ways and the backlash for masculine behaviors forces women to “walk a tightrope between exhibiting the kind of behavior expected of women and the kind of behavior expected of lawyers.”) (last visited Apr. 27, 2020).

¹⁵⁶ Cecchi-Dimeglio & Kleman, *supra* note 140.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

making decisions, yet he is able to work out multiple alternative solutions and determine the most suitable one.”¹⁶⁰

Relatedly, people of color are likewise systematically oppressed by bias in the evaluation process. In a study by a leadership consulting firm, sixty partners from twenty-two law firms were shown the same research memorandum allegedly from a third-year law student (in actuality, it was written with the help of five law firm partners from five different law firms).¹⁶¹ The reviewing partners were comprised of twenty-three women and thirty-seven men, and thirty-nine were of Caucasian descent and twenty-one represented various racial and ethnic minority groups.¹⁶² Half of the lawyers were told that the memorandum was written by an AfricanAmerican male student, while the other half were informed that the writer was a Caucasian male.¹⁶³ Purposefully, the memorandum contained twenty-two errors, seven of which were minor spelling or grammatical errors, six of which were substantive technical errors in writing, five of which were errors of fact and four of which were errors in analysis.¹⁶⁴ When scoring the memorandum on a five point scale, the lawyers awarded the Caucasian writer a score of 4.1, while the African-American writer was awarded a score of 3.2.¹⁶⁵ Moreover, when providing comments, “[t]he white [student] was praised for his potential and good analytical skills, while the black [student] was criticized as average at best and needing a lot of work.”¹⁶⁶

The study therefore confirmed that “[t]here are commonly held racial-ly-based perceptions about writing ability [disfavoring African Americans] that unconsciously impact our ability to objectively evaluate a lawyer’s writing.”¹⁶⁷ This is clear confirmation bias. “When expecting to find fewer errors, we find fewer errors. When expecting to find more errors, we find

¹⁶⁰ *Id.*

¹⁶¹ REEVES, *supra* note 123, at 3.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 4.

¹⁶⁶ Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, A.B.A. J., (Apr. 21, 2014, 12:09 PM), [<https://perma.cc/GV56-6CG8>]; (last visited Apr. 27, 2020); *see also* REEVES, *supra* note 123, at 4 (showing the comments that the partners left on the work, divided by the fictional student’s race).

¹⁶⁷ REEVES, *supra* note 123, at 6.

more errors.”¹⁶⁸ Interestingly, the study found no significant correlation between a partner’s gender or race or ethnicity and the errors found between the two memorandums; however, female partners tended to find more errors across the board and wrote longer narratives when providing feedback than their male counterparts.¹⁶⁹

2. Protective Hesitation, Racial Anxiety, & Positive Feedback Bias

Though not as pervasive as implicit bias, racial anxiety is likewise playing a role in dampening diversity in the legal profession. Racial anxiety commonly surfaces in cross-racial and cross-cultural interactions.¹⁷⁰ It is an unconscious anxiety that typically manifests as physical responses of discomfort, such as nervousness, decreased eye contact or awkwardness, preventing the person experiencing racial anxiety from fully engaging in the interaction.¹⁷¹

In a recent study, researchers explored a correlation between implicit racial bias and racial anxiety by instructors and educational performance.¹⁷² As part of the study, the instructors, all of whom were Caucasian, were first assessed for explicit and implicit racial bias.¹⁷³ After dividing the participants, undergraduates who were a racially mixed group of black and white students, into instructor-learner pairs, the instructors taught and discussed the lesson with their assigned learner.¹⁷⁴ Following the lesson, the learner took a test.¹⁷⁵ The researchers evaluated the instructors on physical or behavioral signs of racial anxiety and rated the instructional quality of the lesson.¹⁷⁶ The study found that instructors with higher levels of implicit racial bias exhibited more signs of anxiety and delivered lower quality instruction

¹⁶⁸ *Id.* at 5 (explaining that the study did not ask the partners for edits or comments related to the formatting of the memorandum; nevertheless, of the forty-one comments received on formatting, 71% of them were directed at the African-American student).

¹⁶⁹ *Id.*

¹⁷⁰ GODSIL ET AL., *supra* note 106, at 10.

¹⁷¹ *Id.* at 27.

¹⁷² Drew S. Jacoby-Senghor, et al., *A Lesson in Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. EXPERIMENTAL SOC. PSYCHOL. 50–51 (2016) [hereinafter *A Lesson in Bias*].

¹⁷³ *Id.* at 51.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

to black learners.¹⁷⁷ Relatedly, the black learners scored lower on the exam than their white counterparts.¹⁷⁸ The study concluded that for instructors with high levels of implicit racial bias, racial anxiety in teaching black students interfered with their ability to teach effectively, translating to a performance difference of “over a full letter grade” between black learners and white learners.¹⁷⁹ Such detrimental results, the researchers hypothesized, could be compounded in more complex or challenging learning environments.¹⁸⁰

Similarly, racial anxiety may impede the ability of supervisors or faculty to provide effective and meaningful feedback and mentorship. If a supervisor or faculty member experiences racial anxiety when interacting with a differently raced employee or student, the supervisor or professor is less able to engage the employee or student, build rapport and provide fair and frank feedback. “Compounding the problem is the possibility that the student [or employee] of color may also be experiencing racial anxiety, decreasing the student of color’s [or employee of color’s] ability to ask questions, absorb information, and develop professional and mentoring relationships.”¹⁸¹

Within the feedback context, an unfortunate response to racial anxiety is the avoidance phenomenon or the tendency to under-diagnose performance. In a 2012 study, researchers found that public school teachers were wary of critiquing minority students; thereby engaging in positive feedback bias ultimately undermining minority students’ academic achievement.¹⁸² “[W]hen the feedback is inaccurate, it doesn’t provide a valid fix as to where a student is actually performing. Then they don’t know where they need to best direct their efforts. It’s like having a biased compass.”¹⁸³

Such a phenomenon has been coined by Professor David A. Thomas as “protective hesitation”—the failure to give feedback due to fear of being

¹⁷⁷ *Id.* at 52–53.

¹⁷⁸ *A Lesson in Bias*, *supra* note 172, at 52.

¹⁷⁹ *Id.* at 53.

¹⁸⁰ *Id.*

¹⁸¹ Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 164 (2018).

¹⁸² See Kent Harper, et al., *Students’ Race and Teachers’ Social Support Affect the Positive Feedback Bias in Public Schools*, 104 J. EDUC. PSYCHOL. 1149 (2012).

¹⁸³ Brian Resnick, *When Teachers Overcompensate for Racial Prejudice*, ATLANTIC (May 10, 2012), [<https://perma.cc/U8EL-J772>].

perceived as racist or sexist.”¹⁸⁴ The natural tendency then is to give the most helpful feedback to those who are like us or who are in our inner circle.¹⁸⁵ Giving truly direct feedback to those who we do not relate to or who come from a different background and speaking openly and honestly in cross-cultural or cross-racial interactions proves uncomfortable and difficult. In the professional context, “[e]xecutives have the greatest challenges giving feedback to diversity candidates coming up the line. White males are good at talking to and advising other white males—but are afraid when it comes to giving candid feedback to women or people of colour.”¹⁸⁶

This fear—no matter how irrational—may result in a “failure to warn.”¹⁸⁷ In a series of studies, non-black undergraduate students were trained to advise their peers on academic issues and were asked to evaluate and give advice to a hypothetical student.¹⁸⁸ The proposed course of study was difficult—it was comprised of nineteen units, when the recommended number was fifteen, and several difficult classes like calculus, chemistry and computer science.¹⁸⁹ Race was the only difference between the hypothetical students.¹⁹⁰ The researchers found that the peer advisor participants were more willing to encourage and endorse the course plan if the advisee was black, suggesting that the participants did not provide honest feedback to the black advisee for fear of being perceived as racially biased.¹⁹¹ The researchers explain that the peer advisor’s failure to warn of the difficulty of the course load is exceedingly problematic: “Failure to warn, we propose, is especially pernicious and invisible when it takes the form of approving nods, or worse, silence, where alarm and concern would be warranted. It is equivalent to approving someone’s proposal to climb Mount Everest in sandals with a friendly pat on the back.”¹⁹² Racial anxiety coupled with

¹⁸⁴ Laura Montgomery, *How to Overcome Hidden Biases and Give Valuable Feedback*, ECONOMIST, [<https://perma.cc/K7W3-44UG>] (last visited Apr. 27, 2020).

¹⁸⁵ *See id.*

¹⁸⁶ *Id.* (quoting Susan Stehlik of the NYU Stern School of Business).

¹⁸⁷ *See* Jennifer Randall Crosby & Benoit Monin, *Failure to Warn: How Student Race Affects Warnings of Potential Academic Difficulty*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 663, 663–64 (2006).

¹⁸⁸ *Id.* at 665.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 666.

¹⁹² *Id.* at 663. *See* Alyssa Croft & Toni Schmader, *The Feedback Withholding Bias: Minority Students Do Not Receive Critical Feedback From Evaluators Concerned About Appearing Racist*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1139, 1139 (2012) (“Research has demonstrated the ways in

positive feedback bias and protective hesitation is therefore an impediment to increasing diversity in the legal profession.

3. Stereotype Threat

Unconscious fear that one's performance will confirm a negative stereotype about a group to which one belongs – referred to as stereotype threat – likewise impedes one from performing well.¹⁹³

For example, a student taking an exam and experiencing stereotype threat will need to split their attention between performing the task—taking the exam—and anxiety about confirming a negative stereotype. Dealing with that anxiety, be it physiological, cognitive, or affective, depletes the mental resources the student can use to take the exam.¹⁹⁴

which overly negative feedback can lead to mistrust and disengagement among minority students but, on the other hand, the deliberate withholding of criticism is likely to come at a cost to learning.” (citations omitted).

¹⁹³ GODSIL ET AL., *supra* note 106, at 11. Relatedly, gender or racial stereotyping with evaluation or feedback affects how women and people of color evaluate themselves. See Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RES. ORGANIZATIONAL BEHAV. 113, 120 (2012).

Research has verified that women approach male gender-typed tasks with less confidence and more trepidation than do men, and that without being given reason to think otherwise, their sense of competence on such tasks is low. In one study it was shown that women's self-ratings of expected task competence did not at all differ from self-ratings of individuals who had actually received negative feedback about their task ability; the only situation in which women's self-ratings equaled men's was when they had received direct and credible positive feedback about their ability.

¹⁹⁴ Boles, *supra* note 181, at 165.

When people are aware of a negative stereotype about their group, their attention is split between the test at hand and worries about being seen stereotypically. Anxiety about confirming negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotion regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance.

GODSIL ET AL., *supra* note 106 at 32 (citing Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440 (2003)).

In his groundbreaking research, Dr. Claude Steele argues that stereotype threat may explain much of the achievement gaps in education along gender and racial lines.¹⁹⁵ In an early study exploring “ability-relevant stereotype threat” or “fear of confirming a stereotype that one’s group is less able than other groups to perform a valued activity,”¹⁹⁶ Dr. Steele and Joshua Aronson administered a series of standardized questions to black and white undergraduate students.¹⁹⁷ When black students were told the questions measured “intellectual ability”—potentially eliciting fear of confirming the negative stereotype that black people are less intelligent than white people—the students performed significantly worse than their white peers.¹⁹⁸ However, when black students were told the questions were a “problem-solving” exercise (where there was reduced fear of confirming a negative stereotype), there was little gap between the performance of black and white students.¹⁹⁹

Researchers have found similar results with different groups who may experience ability-related stereotypes.²⁰⁰ In another study, researchers gave a math test to men and women – women who were top performers in math.²⁰¹ Prior to taking the exam, half the women were informed that the tests showed gender differences, while the other half were informed that the test found no differentiation based on gender.²⁰² The former group performed significantly worse than their male counterparts, where the latter group performed equal to the men.²⁰³ “Importantly, ability-relevant stereotype threat is not only experienced by women and people of color; white college students in an athletic golf simulation performed worse when primed with a negative stereotype about white athletes (that whites lack

¹⁹⁵ See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 810 (1995).

¹⁹⁶ GODSIL ET AL., *supra* note 106, at 31.

¹⁹⁷ Steele & Aronson, *supra* note 195, at 799.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 799–800.

²⁰⁰ GODSIL ET AL., *supra* note 106, at 31–32. See also Ryan P. Brown & Eric Anthony Day, *The Difference Isn’t Black and White: Stereotype Threat and the Race Gap on Raven’s Advanced Progressive Matrices*, 91 J. APPLIED PSYCHOL. 979, 979–980 (2006) (surveying empirical studies).

²⁰¹ *Stereotype Threat Widens Achievement Gap*, AM. PSYCHOL. ASS’N, (July 15, 2006), [<https://perma.cc/KU6L-36P5>] (last visited Apr. 27, 2020).

²⁰² *Id.*

²⁰³ *Id.*

natural athletic ability).²⁰⁴ Regardless, the mental load associated with stereotype threat to monitor and manage how one is perceived and to implement strategies to outmaneuver the bias takes away from creative thinking and productivity.²⁰⁵ The manifestation of such bias – whether negative or positive feedback bias, protective hesitation or racial anxiety or stereotype threat – has and continues to have a negative impact on the demographic formulation and resulting diversity of the legal profession.

IV. THE VISIBLE VS. THE INVISIBLE

In her recently published book entitled *You Don't Look Like a Lawyer: Black Women and Systemic Gendered Racism*, Melaku argues that the terms of employment for women and people of color often include an “invisible labor clause.”²⁰⁶ Such a clause requires women and minorities to “perform added, unacknowledged, and uncompensated labor and to pay additional ‘taxes’ for their inclusion in these social and professional spaces that would otherwise view these professionals’ inherent differences as obstacles to their career advancement.”²⁰⁷ It also requires the “labor of invisibility,” which “includes the need to work longer or harder to get noticed and the pressure to be flawless, because the stereotypical assumption of incompetence leaves little to no margin for error.”²⁰⁸

In the context of giving feedback or evaluating performance, however, we “see” women and people of color. White men are the “norm”—the expected professional or leader—and therefore their sex and race are invisible. Women and people of color though cannot “hide,” and by virtue of being “visible,” feedback and evaluation is biased, impeding their progress or advancement. As noted for example in Ashleigh Shelby Rosette and Robert Livingston’s study, black women leaders in particular were punished more

²⁰⁴ Boles, *supra* note 181, at 166 (citing Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213, 1213 (1999)).

²⁰⁵ See Silverman, *supra* note 79 (“[T]o outmaneuver those biases, women may spend more effort than men monitoring how they are perceived—and that can take time away from getting work done.”).

²⁰⁶ TSEDALE M. MELAKU, *YOU DON’T LOOK LIKE A LAWYER: BLACK WOMEN AND SYSTEMIC GENDERED RACISM* 16–18 (2019).

²⁰⁷ Melaku, *supra* note 10.

²⁰⁸ *Id.*; see also WILLIAMS ET AL., *supra* note 79, at 7–8 (finding a “prove-it-again” bias in which “[w]omen of color, white women, and men of color reported that they have to go ‘above and beyond’ to get the same recognition and respect as their colleagues” and “tight-rope bias” in which women of all races reported doing more higher loads of non-career enhancing “office housework” or administrative tasks, such as taking notes).

harshly than their white counterparts for making a mistake.²⁰⁹ As Melaku acknowledges, many of the women she interviewed as part of her research “felt that they were unable to recover from marginal errors that were often deemed fatal to their advancement.”²¹⁰

It is therefore critical to remove, as much as practical, feedback bias from the legal profession. Though the below strategies apply equally within either the educational or employment context, this Article grounds its discussion in the educational context. The reason for doing so is that law school is the starting point for an individual’s legal career and therefore bias in feedback or evaluation of performance in law school will impact an individual through the individual’s law school career and as the individual enters the profession.

A. The Law School Context

The rules governing law schools provide some basis for requiring the integration of implicit bias awareness and education, but do not go far enough. Under Standard 302 of the ABA’s Standards and Rules of Procedures for Approval of Law Schools:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

²⁰⁹ Ashleigh Shelby Rosette & Robert W. Livingston, *Failure Is Not an Option for Black Women: Effects of Organizational Performance on Leaders With Single Versus Dual-Subordinate Identities*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1162, 1166 (2012).

Black women executives may have to work exceptionally hard to minimize mistakes made on the job as their penalty for doing so may be greater than consequences experienced by White women and Black men. Given that atypical leaders, in general, are often expected to fail and are frequently evaluated more negatively when they make mistakes, Black women may have to be exceptionally diligent when managing subpar outcomes. That is, they should take special care when organizational goals are not met (perhaps due to conditions beyond their control) to clearly communicate the circumstances to management, their peers, and even their subordinates.

Id. (internal citations omitted).

²¹⁰ Melaku, *supra* note 10.

- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for the competent and ethical participation as a member of the legal profession.²¹¹

Interpretation 302-1 provides additional guidance regarding Standard 302(d), stating that “other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”²¹² As a result, law schools may, but are not required to, ensure that their law students receive cultural competency education prior to graduation.

This optional versus mandatory approach is incongruous with the ABA’s mandate under Goal III to “[e]liminate bias in the legal profession and the justice system.”²¹³ Education on bias—both explicit and implicit—and ways in which to de-bias²¹⁴ are critical to ensuring that we, as lawyers

²¹¹ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–2020, at 15 (Erin Ruchwein ed., 2019), [<https://perma.cc/9ECY-3348>] [hereinafter ABA STANDARDS].

²¹² *Id.* at 16.

²¹³ *ABA Mission and Goals*, A.B.A., [<https://perma.cc/JN92-D3NZ>] (last visited Apr. 27, 2020).

²¹⁴ A variety of different strategies exist for attempting to de-bias, including (i) educating oneself on becoming more self-aware and mindful; (ii) exposing oneself to a variety of individuals from diverse backgrounds and social groups to break down any stereotypes or preconceived notions about those individuals; (iii) attempting to step into the shoes of individuals from diverse backgrounds and social groups to see the world from their perspective; (iv) undertaking a self-audit of one’s social networks and social media choices; and (v) changing one’s approach to the way one interacts with people by reducing one’s cognitive load and consciously thinking through why one is making certain decisions or reacting a certain way towards certain individuals. See generally Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW (Kimberly Holt Barnett & William H. George eds., 2005) (articulating five habits for developing cross-cultural competence, which include analyzing similarities and difference between the lawyer and the client (Habit 1: Degrees of Separation and Connection); evaluating how those similarities and differences affect the interactions between the client, the lawyer, opposing parties and the judge or jury (Habit 2: Rings in Motion); identifying multiple interpretations of one’s client’s behavior (Habit 3: Parallel Universes); engaging in “mindful communication where the lawyer remains cognitively aware of the communication process and avoids using routine response to clients” (Habit 4: Red Flags and Remedies); and proactively and addressing factors, in addition to bias and stereotypes, that may negatively influence the lawyer-client relationship (Habit 5: The Camel’s Back)); see generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (describing “the Habits” lawyers can use to develop cross-cultural competence); Cultural Competence and Public

and legal professionals, are able to eradicate, to the extent possible, discrimination and prejudice from our profession. And, such education should begin when an individual matriculates into a law school.

It is incumbent on the ABA to propose to the House of Delegates a revision to the accreditation standards that adds a new paragraph to Standard 302. Such a provision would require law schools to establish learning outcomes that include competency in the knowledge and understanding of behaviors, attitudes and policies that enable the legal profession to work (or prevent the legal profession from working) effectively in cross-cultural situations. In other words, the requirement would obligate law schools to ensure that law students develop “the ability to adapt, work and manage successfully in new and unfamiliar cultural settings”²¹⁵ and to create effective working relationships with clients from different backgrounds or social groups.²¹⁶

But, how can faculty credibly teach law students to recognize and confront implicit bias both within the legal profession and within themselves when faculty themselves are perpetuating bias in the manner in which they are teaching? Two standards arguably support the need for focused attention on removing feedback bias from the multi-faceted opportunities for evaluating the performance of law students. Standard 205(b) requires that “[a] law school shall foster and maintain equality of opportunity for students . . . without discrimination or segregation on the basis of race, color,

Defense Michigan Workgroup, *Beyond Diversity: The Role of Cultural Competence in an Effective Michigan Public Defense Systems*, CAMPAIGN FOR JUST. 1, 6 (2011) (“As noted in the American Bar Association Criminal Justice Section’s ‘Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System’ model curriculum and instructional manual’s introduction, ‘Judicial, prosecutorial, and defense agencies across the country face significant challenges as they strive to effectively serve their increasing diverse communities. One of the keys to successfully navigating these challenges is cultural competence—the ability to interact effectively with people of different cultures.’”).

²¹⁵ Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty*, OR. ST. B. BULL. (Jan. 2009), [<https://perma.cc/CS87-CF2Z>] (last visited Apr. 27, 2020).

²¹⁶ The manner in which law schools undertake to comply with this requirement will of course vary across law schools; however, law schools may choose to develop a series of courses addressing cultural competence, infuse cultural competence into existing courses and clinics or develop a mandatory seminar, akin to the mandatory ethics courses at many law schools. See e.g., Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140, 149–56 (2014) (proposing the basic structure of a seminar on cultural competence and the incorporation of Professors Susan Bryant and Jean Koh Peters’ Five Habits); Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, 89 MICH. B. J., 16, 18 (2010), (describing a scenario in which faculty could incorporate cultural competency training into a doctrinal course by noting “contracts professors could encourage students to consider whether the ‘meeting of the minds’ and ‘contract formation’ analyses change when there are parties of different cultures.”).

religion, national origin, gender, sexual orientation, age, or disability.”²¹⁷ Moreover, Standard 206(a) mandates that “a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities.”²¹⁸ While acknowledging that “[t]he forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified,” Interpretation 206-2 provides additional guidance: “[C]ommitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these [students] . . . and programs that assist in meeting the academic . . . needs of many of these students and that create a favorable environment for students from underrepresented groups.”²¹⁹

Historically, law schools have grounded their compliance with promoting diversity and creating a favorable environment for students of underrepresented groups in its use of anonymous grading of law school examinations.²²⁰ Interestingly, the prevalence of blind grading has been linked to the proliferation of race-based affirmative action programs in law school admissions, which began in the 1970s.²²¹ Some legal historians also suggest that it was instituted less to prevent discrimination against underrepresented groups, but rather to forestall supporters of affirmative action from favoring minority students.²²²

This history illustrates that purposeful or subconscious bias need not be driven by animus, but also can stem from positive feelings that an evaluator has towards an individual or group. Indeed, blind grading of exams . . . may be just as important in preventing evaluators from rewarding “favorites” as it is in precluding evaluators from disfavoring undervalued or disliked persons or groups.²²³

²¹⁷ ABA STANDARDS, *supra* note 211, at 11.

²¹⁸ *Id.* at 13.

²¹⁹ *Id.*

²²⁰ Vikram Amar, *Why “Blind” Grading Prevalent at Law Schools Should Be Exported to Other Parts of Education*, ABOVE THE LAW (Feb. 4, 2019, 1:11PM) [<https://perma.cc/X4S8-P785>] (last visited Apr. 27, 2020).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

Nevertheless, the anonymous grading system has been law schools' long-standing protection against unconscious bias creeping into the evaluation of student performance and a student's ultimate course grade. This protection carried greater weight when each law class was assessed by only one anonymous exam at the end of the semester. Today, a law school's program of legal education must include writing courses (Standard 303(a)(2))²²⁴ and experiential courses (Standards 303(a)(3) and 304),²²⁵ both of which incorporate non-anonymous grading, and must utilize both summative assessment and formative assessment (Standard 314),²²⁶ which may not necessarily be an exam and may not be graded anonymously. Moreover, even in doctrinal courses graded exclusively with anonymous exams, faculty have many other opportunities to provide feedback or an evaluation of a student's performance – such as a faculty's reaction or response to in-class questioning or the incorporation of “participation” credit – that may lend itself to feedback bias. So, how do faculty (and employers) diminish feedback bias?

B. Making the Visible Invisible, and the Invisible Visible . . . De-Biasing

When embarking on a path to de-bias, as a starting point, motivation to be fair makes a difference.²²⁷ Practicing specific strategies to avoid stereotypical or prejudicial responses alters implicit biases.²²⁸ It is therefore critical to become more mindful of one's implicit biases. Though not a perfect test, evidence suggests the implicit biases measured by the Implicit Association Test (IAT) can predict socially relevant behaviors. As such, one way to reveal potential implicit biases is to take one or more of the fourteen IATs offered by Project Implicit, which examines implicit attitudes and stereotypes on a variety of topics, including race, weight, disability, gender, skin-tone, sexuality, age, religion and even presidential candidates.²²⁹ In addition, faculty (and supervisors) can diminish feedback bias by implementing a few best practices into the manner in which they evaluate students (and employees).

²²⁴ ABA STANDARDS, *supra* note 211, at 16.

²²⁵ *Id.* at 16–17.

²²⁶ *Id.* at 23.

²²⁷ See GODSIL ET AL., *supra* note 106, at 47; KANG, *supra* note 92, at 5.

²²⁸ See Boles, *supra* note 181, at 148 (encouraging law faculty to become culturally proficient instructors by seeking training on cultural proficiency, mitigating implicit bias and reducing microaggressions).

²²⁹ PROJECT IMPLICIT, *supra* note 115.

1. Leverage Blind Evaluation

Incorporating, as much as possible, anonymous grading and evaluation into courses is an ideal strategy.²³⁰ In his humorous but realistic essay entitled *Ten Myths About Law School Grading*, Professor Daniel L. Keating acknowledged frankly that:

There are a number of reasons that law professors cherish anonymous grading as much as law students do. . . . [M]ost of us professors would not trust ourselves, despite our best intentions, to be completely objective if we knew the identity of the person whose exam we were assessing. Given that some exams will inevitably deserve low grades, it would be hard in a non-anonymous system to give low grades knowingly to identifiable students we like. Anonymous grading assures that our subconscious biases will play no part in the score that we give.²³¹

For traditional doctrinal courses, most non-exam assignments involve written (or rather typed) responses to the same prompts, questions or problem sets. Even within certain simulation or practicum courses (courses that leverage mock scenarios to teach lawyering skills)²³² or clinical courses,²³³ assignments are based on a mock case, prompt or scenario, which do not require the submission by students of unique projects. Grading such

²³⁰ Vikram David Amar, *Why "Blind" Grading Makes Good Sense, and Should Be Used More Extensively Outside of the Context of Law School Exams*, VERDICT (Jan. 17, 2014), [<https://perma.cc/GD34-8FGH>] (last visited Apr. 27, 2020). Also, as a means of promoting diversity within the legal profession, anonymous grading has the additional benefit of importing credibility to the process. *Id.* So, when a faculty member endorses a student for employment or writes a letter of recommendation discussing the student's performance, the expression of support is granted a heightened sense of credibility when the course or particular assignments or exams are grading on an anonymous basis. "Consider, for example, students whose parents are prominent alums or donors, or students of color at a school whose faculty is known for supporting diversity. Absent success on blindly graded exams, these students' excellent performances may get discounted by outside evaluators." *Id.*

²³¹ Daniel L. Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L. Q. 171, 173 (1998) (footnote omitted).

²³² See ABA STANDARDS, *supra* note 211, at 17 ("A simulation course provides substantial experience not involving an actual client, that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.").

²³³ See *id.* (articulating that "[a] law clinic provides substantial experience that involves advising or representing one or more actual clients or serving as a third-party neutral," and requiring that law clinics include "a classroom instructional component").

assignments on an anonymous basis will help make great strides to removing bias from the evaluation process.²³⁴

C. Incorporate Objectivity (Neutral Metrics)

When there are no clear markers for success, no grading rubrics or competency methodology and no objective measurements of performance, the process of evaluation may be tainted by bias. It is therefore important for faculty (and employers) to negate this trigger by developing grading rubrics (or a competency-based evaluation structure).²³⁵

When developing grading rubrics, it is critical to remain as objective as possible and define neutral metrics for success. In doing so, separating “style” from “skills” is important. The goal is to reward accomplishment or demonstration of a skill, rather than rewarding mimic-behavior (students who look and sound just like the faculty member or the faculty member’s “in-group”).²³⁶

Though as noted above it is ideal to incorporate anonymous grading for written assignments, it is still important – whether grading anonymously or non-anonymously – to develop a grading rubric that hones in on the particular skill being taught and evaluated. Below is a sample of a grading

²³⁴ As an example of instituting blind grading or evaluation within an institutional context, *The New York Times* video series entitled *Who, Me? Biased?* highlights the audition process for orchestras. Reshamwala, *supra* note 105. Because orchestras were heavily male-dominated, bias existed in the audition selection process. *Id.* In response, orchestras put up a screen to attempt to hide the gender of the individual auditioning. *Id.* At first, placing screen between the musician and the selection committee did not alter much the percentage of men and women hired by orchestras. *Id.* That is until it became apparent that before some of the auditions, there was a “click, click, clicking” sound of high heels. *Id.* And, as such, some select committee members were influenced—albeit unconsciously—when they knew (or believed) the individual auditioning was female. *Id.* Once orchestras asked those auditioning to remove their shoes, however, the percentage of men and women hired became almost equal. Reshamwala, *supra* note 105. See also Curt Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*, *GUARDIAN* (Oct. 14, 2013 7:00 PM) [<https://perma.cc/NV7R-4RA3>] (“It would be hard to deny that there was such a bias in the composition of orchestras. As late as 1970, the top five orchestras in the U.S. had fewer than 5% women. It wasn’t until 1980 that any of these top orchestras had 10% female musicians.”). (last visited Apr. 27, 2020).

²³⁵ See Cecchi-Dimeglio, *supra* note 133 (noting that “annual evaluations *are* often subjective, which opens the door to gender bias (“Tom is more comfortable and independent than Carolyn in handling the client’s concerns”) and confirmation bias (“I knew she’d struggle with that project”), among other things”); Correll & Simard, *supra* note 142 (“Before you begin evaluations, either written or verbal, outline the specific criteria you are employing to evaluate individuals. Articulate the specific results or behaviors that would demonstrate mastery. Use the same criteria for all employees at this level.”).

²³⁶ Cherry, *supra* note 128.

rubric that targets the specific skills necessary to demonstrate analytical ability in a brief writing assignment.²³⁷

LEGAL RESEARCH & WRITING II: APPELLATE BRIEF RUBRIC				
	HIGHLY PROFICIENT	PROFICIENT	ACCEPTABLE	UNSATISFACTORY
OVERALL CONTENT & ANALYSIS	<p>Uses most effective authorities for each issue, sub-issue and roadmap; includes reasoning, holding, and trigger facts; includes policy as appropriate; authorities used to explain the points that are made; adverse authority is noted and distinguished.</p> <p>Shows how the sub-issues and issues relate to the whole argument; analysis within argument and sub-issues thoroughly explains and advocates, and shows how the authorities and client's facts relate.</p> <p>Shows how facts relate to underlying purpose and policy goals of authorities</p>	<p>Meets almost all of the highly proficient criteria, but has a few portions where cases are not synthesized, policy is not related to argument, or facts are not completely analogized or distinguished from authorities.</p>	<p>Some sections of argument may lack using authorities to fully develop or explain the arguments being made; adverse authority is included.</p> <p>Some of the portions may explain or apply the law superficially; counter arguments may be weakly refuted; may lack showing how the issues relate to each other.</p>	<p>Minimally effective authorities used; some issues may use ineffective authorities; authorities may be included but not with sufficient detail and depth to explain the arguments; minimal use of authorities may include inaccuracies; adverse authority is not included.</p> <p>Minimally uses the authorities to make arguments; minimally refutes counter-arguments; in several sections fails to show how the authorities and facts work together to make the argument; key parts of the authorities or the facts underlying the policy are missing.</p>

Similarly, for experiential courses, when evaluating a student-unique skill—such as performance in court, interactions with clients, or negotia-

²³⁷ Tienielle Fordyce-Ruff & Jason Dykstra, Legal Research & Writing II: Appellate Brief Rubric (on file with author).

tion with opposing parties—it is even more important to develop a clear, unambiguous grading rubric (an example is below).²³⁸ One approach for developing such a rubric is using the first-class session to identify the skills or traits critical for success in the relevant clinic, simulation or externship placement. Upon agreeing upon the specific benchmark for success (not the overall perception of quality), faculty can use these metrics as the foundation for grading the course or evaluating student performance, a foundation built through student support and understanding.

HOUSING CLINIC: FIELDWORK SKILLS ASSESSMENT				
	HIGHLY PROFICIENT	PROFICIENT	ACCEPTABLE	UNSATISFACTORY
CLIENT & CASE MANAGEMENT	Consistently: <ul style="list-style-type: none"> – keeps clients informed of developments in the case, – sets realistic expectations for clients re timing of work product/resolution of matter, – checks in each day for telephone and e-mail messages, mail, notes, etc., – allocates time, effort and other resources necessary to carry out tasks in a timely and professional manner, and – communicates as needed with client, opposing counsel, third parties (e.g. case man- 	Meets almost all of the highly proficient criteria, but does not consistently perform and/or consistently demonstrate at a high level all client/case management skills.	Consistently performs and/or demonstrates at a high level some but not all client/case management skills.	Does not consistently perform or demonstrate at a high level client/case management skills.

²³⁸ Latonia Haney Keith, Housing Clinic: Fieldwork Skills Assessment (on file with author).

	<p>agers, housing providers or other sources of information), clinic faculty, courts, etc., AND</p> <p>Consistently performs or demonstrates at a high level the following:</p> <ul style="list-style-type: none"> – advising clients of options available for dealing with problem, – counseling clients on the relative strengths and drawbacks of the various options, – securing clients' direction as to how to proceed with the case and/or permission to enter into negotiations. 			
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In light of the ABA's requirement that law schools adhere to sound academic standards, including ensuring regular classroom attendance by students,²³⁹ and as faculty are understandably keen to engage with students in a meaningful dialogue as part of law school pedagogy (and ensure they are prepared for class),²⁴⁰ faculty often incorporate "participation" as part of their course grade. Evaluation of participation is inherently subjective and is the perfect realm for biases to manifest. "A multiplicity of American

²³⁹ See ABA STANDARDS, *supra* note 211, at 20 ("A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance.").

²⁴⁰ See Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113–14 (1999).

studies have identified that participating in law class discussions can be alienating, intimidating and stressful for some law students, and may be especially so for women, and students from minority backgrounds.”²⁴¹ As such, it is quite possible that granting credit for participation will rest on volume, rather than quality, of a student’s classroom contributions. Or even arguably worse, evaluation of participation may incorporate the faculty member’s “perception” of a quality answer—rather than a truly quality answer. Despite the true content of the answer, faculty may deem an answer as a “high quality” response based on whether the faculty member “likes” the student (in-group bias) or perceives the student as “intelligent” or “persuasive” (confirmation bias), or whether the students “looks” or “sounds” like the faculty member’s version of a smart law student (availability heuristic)—all of which is tied to biases (especially race and gender). As a means of removing this bias overlay to a performance-based assessment grading system, faculty should consider removing participation credit from their course grades or restructuring credit for participation such that it becomes an objective standard. If faculty are concerned about whether students completed the reading perhaps leverage an objective pop-quiz, or if faculty utilize the Socratic method, so long as the student responds (rather than stating “I’m not prepared”) and engages—even if minimally—students get “credit” for that day.

1. Avoid the Ambiguity Trigger (Ensure Specificity)

When giving feedback either verbally or in writing, grounding that feedback in specific evidence of the student’s actual performance will help eliminate bias. To demonstrate with clarity the evaluative point being made, it is important to avoid using vague comments, such as your writing “needs better organization”²⁴² or “you could be more professional”²⁴³ or “your replies to partners about client matters are often not on point.”²⁴⁴ Such comments leave students quizzical, asking (or silently pondering) “what

²⁴¹ Anna Huggins & Alex Steel, *The Relationship Between Class Participation and Law Students’ Learning, Engagement and Stress: Do Demographics Matter?*, in 1 PROMOTING LAW STUDENT AND LAWYER WELL-BEING IN AUSTRALIA AND BEYOND 67, in (Rachael Field et al. eds., 2016).

²⁴² Susan Barber, *Making the Most of Your Writing Feedback*, EDUTOPIA (Sept. 29, 2017), [https://perma.cc/43JZ-V7LV]; (last visited Apr. 27, 2020). See also Bryan Goodwin & Kirsten Miller, *Research Says / Good Feedback Is Targeted, Specific, Timely*, 70 EDUC. LEADERSHIP 82 (2012), [https://perma.cc/LUV4-Q4BE] (last visited Apr. 27, 2020).

²⁴³ See, e.g., *When it Comes to Performance Reviews, Ditch the Labels*, RAMPE CONSULTING (May 14, 2018), [https://perma.cc/2LVW-LHRV] (last visited Apr. 27, 2020) (explaining how managers or supervisors can improve reviews by avoiding labels and instead providing clear expectations with unambiguous language).

²⁴⁴ Cecchi-Dimeglio, *supra* note 133.

would make my writing clearer,” “what is your definition of ‘professional,’” or “what does ‘not on point’ refer to”? Instead, by focusing on specific behaviors that provide clear direction for correction, such as “failed to proofread, missed three deadlines, did not consider potential extension of related doctrine in this case,” the feedback is concrete and less based on subjective analysis.²⁴⁵ It also helps the evaluator provide direction on how to improve. For example, “you have missed important opportunities to provide clear and concise information, such as X. I have some thoughts on how you could prevent that from happening again, such as Y.”²⁴⁶ In other words, specificity is key. Also, it is helpful to steer clear of using general terms, such as “careless, disorganized, thin analysis.”²⁴⁷ And, it is important to scrub trigger words, such as “abrasive,”²⁴⁸ “outspoken,” “not a team player,” and “a self-promoter,” and avoid “language that might reinforce or reflect stereotypes about a group’s strengths (‘she is doing very well for someone just back from maternity leave’).”²⁴⁹ Moreover, avoiding attributing a student’s contributions to external factors or “luck”²⁵⁰ or lumping two students’ contributions together will likewise tamp down bias.²⁵¹

2. Reduce Your Cognitive Load

Implicit bias is heightened when there is cognitive overload.²⁵² So, another best practice is to attempt to change one’s approach to interacting with students (or employees) and people generally. By “thinking slow” or “staring not blinking,” faculty (or supervisors) can force themselves to re-

²⁴⁵ Easton & Armstrong, *supra* note 11, at 89 (internal quotations removed).

²⁴⁶ Cecchi-Dimeglio, *supra* note 133.

²⁴⁷ Easton & Armstrong, *supra* note 11, at 89 (internal quotations removed).

²⁴⁸ See Bienias et al., *supra* note 11, at 20 (highlighting a study conducted by linguist Kieran Snyder, who evaluated almost 248 performance reviews from 28 companies and found that the word “abrasive” was repeatedly used in reviews to describe women, but never for men).

²⁴⁹ Easton & Armstrong, *supra* note 11, at 89.

²⁵⁰ See SUSAN GOLOMBOK, GENDER DEVELOPMENT 182 (1994); Leslie Bradshaw, *Why Luck Has Nothing To Do With It*, FORBES (Nov. 8, 2011, 11:10 AM), [<https://perma.cc/QCZ5-DVKQ>] (last visited Apr. 27, 2020).

²⁵¹ See Cecchi-Dimeglio, *supra* note 133 (noting that women often do not receive due credit for their work, particularly when utilizing their strengths of “collaborative and participatory styles”); Heilman, *supra* note 193, at 120 (“[W]omen working with men on male gender-typed tasks not only are credited less for joint successes but also are blamed more for joint failures.”); Silverman, *supra* note 79 (highlight that women’s “accomplishments are more likely than men’s to be seen as the result of team, rather than individual efforts”).

²⁵² Cecchi-Dimeglio, *supra* note 133 (“The annual performance review already has many strikes against it. Harried managers end up recalling high and low points on the fly; employees often get unclear direction.”).

duce their cognitive load and really think through why they are making certain decisions or reacting a certain way towards their students (or employees).²⁵³ In a study conducted by Oxford researchers, Caucasian participants received a single dose of propranolol, a beta-blocker, in a randomized, double-blind, parallel group, placebo-controlled design.²⁵⁴ As propranolol significantly lowered participants' heart rate, thereby reducing stress and anxiety, when the participants complete the Racial Implicit Association Test, they exhibited a reduction in implicit racial bias.²⁵⁵ As such, by practicing mindfulness and stress relief before interacting with or giving a student (or employee) feedback, and by avoiding giving feedback in a bad mood, by simply taking a pause—faculty (or supervisors) can increase positive emotions, recognize their biases, and reduce their anxiety (including racial anxiety), allowing faculty (and supervisors) to enter a space where they can move beyond their biases.²⁵⁶

3. Counteract “Fear of Threat” Trigger

Developing personal relationships negates “protective hesitation” and tamps down “racial anxiety.” It is therefore helpful to discern intentionally each student’s communication style and that faculty openly acknowledge their own communication proclivities. In commenting on why the progress of minorities is slow within the Fortune® 500, Stuart Alderoty, general counsel of financial holding company CIT, noted that the legal profession needs to address three fundamental issues: implicit bias, the lack of mentors and the pipeline problem.²⁵⁷ After acknowledging that “[t]here is a fair amount of implicit bias among the profession,” Alderoty stated: “There is a lack of mentors and role models for people of color who want to become lawyers. It’s a very formidable profession from outside looking in. If you don’t have a mentor even as a student, how do you conceptualize the idea [of becoming a lawyer]?”²⁵⁸ As such, taking on a mentoring approach with

²⁵³ See GODSILET AL., *supra* note 106, at 47; Easton & Armstrong, *supra* note 11, at 5, 13.

²⁵⁴ Sylvia Terbeck et al., *Propranolol Reduces Implicit Negative Racial Bias*, 222 PSYCHOPHARMACOLOGY 419

(Feb. 28, 2012), [<https://perma.cc/G4EL-3RFM>] (Feb. 28, 2012).

²⁵⁵ *Id.*; see also Gowin, *supra* note 114.

²⁵⁶ See GODSILET AL., *supra* note 106, at 47; Easton & Armstrong, *supra* note 11, at 84.

²⁵⁷ MCCA’s 18th Annual Survey, *supra* note 22, at 13.

²⁵⁸ *Id.*; see also Bienias et al., *supra* note 11, at 13 (highlighting that mentorship relationships with partners are “crucial at virtually all stages of a law firm career, from work assignments to evaluation, compensation, promotion, and succession.”).

all students (and employees) helps faculty (and supervisors) avoid letting fear restrict quality feedback.

4. Embrace “Wise Criticism”

“Law students can sense when a law professor has lowered expectations for students of color due to negative racial stereotypes. Lowered expectations degrade trust between the law student and professor.”²⁵⁹ It is therefore important to maintain “high expectations” for all students (or employees).²⁶⁰ And, when giving feedback, it is likewise critical to exude confidence that a student (or employee) is capable of meeting those expectations and then deliver honest feedback. Doing so will help prevent the adverse effects of stereotype threat and protective hesitation.

For instance, if a white person in a position of authority knows that she is doing right by her students . . . or employees, she is likely to feel more confident and less anxious in the interaction and may therefore be less likely to engage in distancing or avoidant behavior and better able to have perspective on the situation rather than feel threatened by it.²⁶¹

5. Adopt a Growth Mindset & Avoid Empty Flattery

Another strategy to avoid reliance on bias and potentially eliciting stereotype threat is to frame all feedback using a “growth mindset.”²⁶² Carol Dweck coined the term “growth mindset” over 30 years ago, and it represents the idea that abilities (or intelligence) can be developed and im-

²⁵⁹ Boles, *supra* note 181, at 167.

²⁶⁰ *See* GODSILE ET AL., *supra* note 106, at 52.

The wise criticism (or high standards) intervention has been tested in other contexts, including criticism of middle school essays. In this experiment, when students received a note on a paper which read, “I’m giving you these comments so you have feedback on your essay,” 17% of black students chose to revise and resubmit their essay a week later. When the note read, “I’m giving you these comments because I have high standards and I know that you can meet them” – thereby disambiguating the reason for the critical feedback – 71% of black students revised and resubmitted their essay.

Id. (citations omitted).

²⁶¹ *Id.* at 53.

²⁶² *Id.* at 54.

proved.²⁶³ “Lawyering involves skills that can be learned and enhanced through practice.”²⁶⁴ And therefore, it is ideal to “[c]onvey the message that legal ability, including analytical ability, is not fixed—it can be expanded, with hard work and guidance.”²⁶⁵ When positive feedback is specific and negative feedback is framed constructively with an eye towards improvement, the feedback is credible and effective. Moreover, feedback that is needlessly flattering or unnecessarily detrimental calls into question whether the feedback is an honest evaluation of the student’s (or employee’s) performance or whether it is the result of bias or racial anxiety. “The traditional feedback sandwich (compliment, critique, compliment) is generally confusing and ineffective.”²⁶⁶

6. Engage in Empathy & Perspective-Taking

Exposure is critical.²⁶⁷ Purposefully seeking more contact with a variety of individuals more readily breaks down any stereotypes or preconceived notions about those individuals. As such, employing a reflective and perspective-taking strategy is key. Stepping into the shoes of a student (or an employee) and viewing the world from their perspective,²⁶⁸ or reflecting on one’s own development and the type of feedback one desired or received as part of their education or employment trajectory helps better understand how to relate to a student (or an employee).²⁶⁹ Taking such a reflective,

²⁶³ *Decades of Scientific Research that Started a Growth Mindset Revolution: Dr. Dweck’s Research into Growth Mindset Changed Education Forever*, MINDSET WORKS, [https://perma.cc/RSD5-JBSC] (last visited Apr. 27, 2020).

²⁶⁴ Easton & Armstrong, *supra* note 11, at 89.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 90.

²⁶⁷ See Reshamwala, *supra* note 105 (encouraging individuals to de-bias by completing a self-audit to detect implicit bias by asking a friend to observe their behavior or by taking stock of the cultural groups their friends either fall into or self-identify with).

²⁶⁸ See Diana Burgess et al., *Reducing Racial Bias Among Health Care Providers: Lessons from Social-Cognitive Psychology*, 22 J. GEN. INTERNAL MED. 882 (2007), [https://perma.cc/YU99-A8HD] (last visited Apr. 27, 2020).

²⁶⁹ As a respondent to the 2018 Inclusion Index survey noted:

[It would be great to have, for example,] more encouragement of senior attorneys (particularly rainmakers and those in leadership positions) to adapt styles/ communications to diverse associate pools. For example, actively soliciting input from associates who, culturally, are accustomed to “speaking only when spoken to” when it comes to interacting with authority figures.

MCCA & RUSSELL REYNOLDS ASSOCIATES, *supra* note 77, at 2.

empathetic approach may thereby lead to a more positive, meaningful interaction and reduce bias and anxiety associated with providing feedback.²⁷⁰

Most often, the reason people avoid these conversations is you don't have a real, authentic relationship with that person. You make incorrect assumptions about others, about their abilities and motivations, if you don't enter into an open conversation with the people who aren't like you. These kinds of open, authentic relationships—combined with a clear, specific set of evaluation criteria and a systematic effort to tie feedback to business goals and outcomes—are key to facilitating equal access to leadership.²⁷¹

7. Incorporate a Broader Group of Reviewers

When feasible, a helpful approach to reduce one's own bias is to incorporate peer review of a student's performance into the evaluation of the student's overall course grade. Doing so allows faculty (or supervisor) to evaluate the student's (or employee's) performance in different contexts as each appraiser provides input and expresses preference for different styles. "As the seminal work of Alice Eagly at Northwestern University has demonstrated, there are differences in leadership styles among gender. Her work . . . has revealed that women's leadership styles are less hierarchical and more cooperative, participatory, and collaborative than their male counterparts."²⁷² Incorporating the perspectives of others as part of the evaluation may help mitigate one's subjective bias and recognize the value of the student's (or employee's) approach by virtue of viewing the student (or employee) through other's eyes.²⁷³

8. Adjust the Frequency of Evaluation

And, finally, a key strategy to diminishing feedback bias is to provide contemporaneous feedback as frequently as possible. It is important to re-

²⁷⁰ GODSIL ET AL., *supra* note 106, at 46–47, 49–50.

²⁷¹ Montgomery, *supra* note 184 (internal quotations removed).

²⁷² Cecchi-Dimeglio, *supra* note 133.

²⁷³ It is important though to be cautious of a "groupthink" mentality. Knowledge of another faculty member's or student's (or lawyer's) experience with a student (or employee) may trigger confirmation bias, or an early misstep may trigger anchoring (a bias in which "[p]eople tend to rely too heavily on the first piece of information available when evaluating later information"). Easton & Armstrong, *supra* note 11, at 84.

member that the closer the feedback to the task performed, the more the student (or employee) will learn and grow.²⁷⁴

[S]ilence can be misinterpreted, especially by those who may not be confident of their place in a firm [or their status in law school]. And difficult feedback doesn't get easier to deliver as it gets stale. Keep notes in anticipation of periodic formal reviews, so that you are not forced to rely solely on memory and generalized impressions months later. And make time for project de-briefs and other in-person meetings—don't limit your feedback to the infrequent, formal evaluation system [or the revelation of the final course grade].²⁷⁵

As such, by coupling objective criteria with more frequent, real-time reviews, it is possible to remove one's subjective bias.

V. CONCLUSION

Notwithstanding, the legal profession has long articulated a goal of hiring and promoting diverse talent, but progress has been slow.²⁷⁶ Diminished hiring rates, low promotion rates and high attrition rates for women and people of color have perpetuated a homogeneous profession, especially within the leadership ranks. Women and people of color are at once visible and invisible. Their visibility breeds acts of bias and discrimination, while their invisibility breeds exploitation and neglect. By virtue of being “visible,” women and diverse attorneys do not fit the traditional framework of a lawyer – a white male – and therefore are subjected to confirmation bias, in-group bias and the availability heuristic. Patterns of racial and gender discrimination include “obstacles in law firm recruitment, mentoring and support, and advancement; obstacles in [] performance reviews and assignments; and obstacles in everyday interracial interactions in regard to inclusivity within the firms.”²⁷⁷ Simultaneously, by virtue of being “invisible,” diverse attorneys are expected to be “worker bees” who keep their heads down, work hard, avoid confrontation and the limelight and do not com-

²⁷⁴ Cecchi-Dimeglio, *supra* note 133 (highlighting that “real-time reviews give examples of effective (or ineffective) behavior and convey information on what the individual must start, stop, or continue doing”).

²⁷⁵ Easton & Armstrong, *supra* note 11, at 89.

²⁷⁶ See NAT'L ASS'N OF WOMEN LAW., *supra* note 12, at 12.

²⁷⁷ MELAKU, *supra* note 206, at xiv.

plain. Moreover, diverse lawyers must navigate white and male-dominated institutional spaces flawlessly.²⁷⁸

An essential component of this phenomenon is feedback bias. When evaluating performance, bias continues to undermine the ability of women and people of color to succeed and advance within the legal profession. The failure to confront and mitigate bias when providing feedback, mentorship and guidance to lawyers and law students is thereby hampering diversity. It is therefore critical to eliminate, as much as practical, feedback bias from the profession. Implementing strategies such as developing neutral metrics for evaluation, infusing specificity, adopting a growth mindset, and reducing one's cognitive load will, if implemented, allow all lawyers and law students to receive feedback that is credible and effective. In turn, by creating a more culturally competent profession,²⁷⁹ women and people of color can break through the historical ceiling, which is viewed as being a system dominated by elite white males. In sum, "[w]e all have biases. Now it's time to interrupt them."²⁸⁰

²⁷⁸ See WILLIAMS ET AL., *supra* note 79, at 12; MELAKU, *supra* note 206, at xiv, 3.

²⁷⁹ See generally Boles, *supra* note 181.

²⁸⁰ WILLIAMS ET AL., *supra* note 79, at 12.