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Anastasia M. Boles

University of Arkansas, William H. Bowen School of Law

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THE CULTURALLY PROFICIENT LAW PROFESSOR: BEGINNING THE JOURNEY

Anastasia M. Boles*

I. INTRODUCTION

Darlene, a black law student, sat in Constitutional Law listening while another student read from a case.¹ Although the case the student was reading used the word “Negro,” Darlene’s classmate substituted the word “African American.”² Darlene’s law professor, who apparently was a white woman, interrupted the student’s reading of the case. She explained that “at some point in time African Americans wanted to be called Negro because they felt the term African American was offensive.”³ Later in the class discussion, the professor said “black people play basketball and they’re really good at it because that’s their only way of getting out of the ghetto.”⁴ Darlene experienced “shock” by her professor’s engagement of racial stereotypes in the classroom despite her scholarly credentials.⁵ In response, Darlene, who was active in the Black Law Students’ Association, helped organize a student-faculty forum to discuss the Constitutional Law incident. The forum encouraged faculty members to seek opportunities to discuss race in the law school classroom in a culturally-sensitive way.⁶ However, she was frustrated when, at the forum, one of the professors suggested that students of color research all cases that present diverse issues for the professors’ review and reference.⁷ Darlene concluded with a sentiment that should have been obvious to the law professors at the student-faculty forum: “[T]hat’s not our job to do that. That’s the professor’s job!”⁸

In reflecting upon her professors’ treatment of race-related discussions in her law school courses, Darlene lamented that law professors tended toward two

* Assistant Professor, University of Arkansas, Little Rock, William H. Bowen School of Law; J.D. Columbia Law School, B.A. Stanford University. I am grateful to God and my supportive and amazing family, especially my husband, Edward Boles, our two sons, and my parents – Leonard and Annie Smith. I thank Professor Emeritus Adjoa Aiyetoro for her insight and activism; her recent retirement has left a void in the legal academy. Finally, thanks to the women of the Tenth Annual Lutie Lytle Black Women Law Faculty Writing Workshop, including to Leslie P. Culver for her helpful comments. This project was completed with the assistance of a grant from the University of Arkansas at Little Rock William H. Bowen School of Law.

1. DOROTHY H. EVENSEN & CARLA D. PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION 55 (2011). Evensen and Pratt conducted a three-part study of black upper level law students and recent law graduates; the study focused on the pipeline to law school and experience during law school. *Id.* at xxvii–xxx.

2. *Id.* at 55.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 55–56.

7. *Id.*

8. *Id.* at 56.

problematic approaches — discussing race incompetently or insensitively, or omitting and avoiding discussions of race altogether:

With faculty I think some of the things that happened was there was stuff that would be said in classes that just wasn't sensitive to other cultures. [Law faculty] expressed a lot of bias and prejudice in certain ways . . . it [] reinforced some of the stereotypes that come along with being an African American or black student. Another thing that professors would do in some classes was work very hard to ignore the racial content altogether . . . and make excuses or deny that [race] had anything to do with it . . . and if it was raised by a black student then all of a sudden the black student was being a troublemaker or always pulling the race card.⁹

Sadly, Darlene's classroom experience as a law student of color is far from atypical. Despite the formal obligation to diversity and inclusion by the American Bar Association's law school standards,¹⁰ both law students of color and law faculty of color may experience racial marginalization in legal education. Legal scholarship is replete with examples bolstering Darlene's observation that law students of color have a degraded law school experience, both inside and outside of the law school classroom, in comparison to their white counterparts.¹¹ Moreover, law faculty of color often bear a disproportionate share of the work, when compared to white faculty members, in efforts to make law school environments more inclusive.¹²

The marginalization and exclusion experienced by many law students of color runs counter to the Supreme Court's goals in *Grutter v. Bollinger*, which idealized an "inclusive" conception of legal education.¹³ *Grutter*, which affirmed the legitimacy of the affirmative action admissions policy at the University of Michigan

9. *Id.* at 106.

10. See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 205 (AM. BAR ASS'N 2016) (forbidding law schools from discriminating on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability); *Id.* at Standard 206 (requiring law schools to "demonstrate by concrete action a commitment to diversity and inclusion" by maintaining a diverse student body, faculty membership, and staff).

11. See EVENSEN & PRATT, *supra* note 1, at 55; see generally, Meera Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 86–109 (2011) (surveying empirical data on diverse law student experiences); Meera E. Deo et al., *Struggles and Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71 (2010); Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003); Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000); Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997) (describing some of the difficulties of being a black student at Columbia Law School).

12. See, e.g., Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 525–26 (2012) (finding that women and people of color report higher levels of committee work and service); Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 352 (1989) (finding that respondents in study of 106 professors reported "inordinate burdens of committee responsibility and student counseling" and felt pressured to champion issues of diversity and inclusion); Meera Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 992 (2015) (stating that disparate levels of service and student interactions can be burdensome and "overwhelming" for women professors and professors of color).

13. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

Law School, endorsed a structural diversity strategy to racial inclusion. The strategy aimed to achieve a “critical mass” of diverse students and law faculty.¹⁴ *Grutter* hypothesized that once structural diversity is achieved, legal education would reap benefits of this racial inclusion, such as “cross-racial understanding,” reduction of racial stereotyping, and classroom discussions that are “livelier, more spirited, and simply more enlightening and interesting.”¹⁵ The experiences of law students of color like Darlene, however, demonstrate that *Grutter*’s vision of racial inclusivity will require law schools to move beyond the inadequate strategy of structural diversity. Achieving *Grutter*’s ideation of racial inclusion will require law schools to invest in discovering and implementing effective strategies that shift the culture of legal education toward including, rather than marginalizing, diverse law students.¹⁶

To catalyze a cultural shift toward racial inclusion, law teachers must be individually empowered to leverage the benefits of student diversity in accord with *Grutter*’s vision. Prior scholarship argued that legal education can further goals of inclusion by adopting a paradigm of cultural proficiency.¹⁷ Dr. Kikanza Nuri-Robins and her colleagues define cultural proficiency as “the policies and practices of an organization or the values and behaviors of an individual that enable that agency or person to interact effectively in a diverse environment.”¹⁸ Cultural proficiency is an “inside-out approach” that, if adopted, can guide and empower a law professor to examine her own cultural background, privileges, and assumptions, dismantle her biases, and improve the quality of her teaching and student interactions.¹⁹ Reflecting on Darlene’s experience in Constitutional Law and the student-faculty forum that followed, the paradigm of cultural proficiency might have empowered Darlene’s law professors to begin creating the law school environment envisioned by *Grutter*. This

14. *Id.* at 311, 345. Professor Meera Deo has provided a useful definition of the term “critical mass” which is “the variable number or percentage of individuals from a particular group who must be present for their presence to be meaningful.” Deo et al., *supra* note 11, at 75.

15. *Grutter*, 539 U.S. at 321–22.

16. I use the umbrella term “diverse” law student to both embrace and to describe individuals or groups representing historically underrepresented groups in legal education, such as race, gender, sexual orientation, ethnicity, and national origin. Similarly, I use the term “person of color” to describe a racially diverse individual, and I will describe membership in a numerically or culturally dominant group in terms of “majority” membership.

17. See generally Anastasia Boles, *Seeking Inclusion From the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209 (2017) (analyzing the importance of a switch towards culturally proficient legal education for both educators and students).

18. NURI-ROBINS ET AL., CULTURALLY PROFICIENT INSTRUCTION: A GUIDE FOR PEOPLE WHO TEACH, xxiii-xxiv (3d. ed. 2012). “Cultural proficiency” refers to the body of work by Dr. Kikanza Nuri-Robins and her colleagues, but many labels currently exist for the paradigm of cultural proficiency that share common themes, such as “cultural competency” and “cultural sensibility.” See *id.*; see also Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL’Y 133, 170 (2004) (noting “similar threads” throughout the literature); Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 538 (2015) (defining “culturally sensible” lawyering).

19. See NURI-ROBINS ET AL., *supra* note 18, at 8; see also Boles, *supra* note 17, at 224 (describing that a law professor must first evaluate his or her own biases before providing culturally proficient teaching to students).

Article builds on prior work by examining threshold steps individual law faculty members can take to begin the journey of delivering culturally proficient instruction to law students and engaging in culturally proficient student interactions.

I previously argued that the paradigm of culturally proficient instruction has three powerful implications for legal education. First, law professors can use culturally proficient instruction to deconstruct the culture of marginalization in law schools and reconstruct a culture of racial inclusion.²⁰ A law professor can create inclusion by focusing first on examining his internally-held beliefs; this “inside-out” examination empowers external changes in student interactions, teaching, and all stakeholders in the law school. Second, culturally proficient instruction redistributes responsibility among all law faculty, not only law faculty of color, to create a culture of racial inclusion in the law school environment.²¹ Finally, using the cultural proficiency paradigm in legal education empowers law professors to teach cultural proficiency throughout the curriculum; moreover, as law teachers model cultural proficiency in engaging students, law students learn cultural proficiency skills in engaging one another and will continue to learn when they engage their future clients.²² Section II, therefore, briefly reintroduces the paradigm of culturally proficient instruction and its implications for legal education.²³

By focusing on threshold strategies in this Article, I mean to encourage law teachers to focus first on the important “inside out” endeavor of cultural transformation before making outward changes to their classroom environments. Section III builds upon the foundation of cultural proficiency to discuss three initial strategies for individual law faculty: (a) seeking training on cultural proficiency, (b) mitigating unconscious behaviors, and (c) recognizing and reducing microaggressions. Once a law teacher begins the work of becoming a culturally proficient instructor, the internal changes will begin to reflect outward in his student interactions and classroom instruction.²⁴

20. See Boles, *supra* note 17, at 263–65.

21. See *id.* at 265–66.

22. See *id.* at 266–68.

23. See *id.* (examining cultural proficiency as applied to legal education in more detail in prior work).

24. Future work will explore specific strategies law teachers can engage to cultivate a culturally proficient classroom environment using lessons from the growing body of literature on race-conscious pedagogy, critical race theory, and learning theory. See, e.g., Steven K. Homer, *Using Interculturally Aware Teaching-Methods (in Revisiting the Characteristics of Effective Education)*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 85–89 (2015); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange Making Up Is Hard To Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J. L. & GENDER 1 (2010); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 573 (1996); Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 BERKELEY LA RAZA L.J. 1 (2015); Aníbal Rosario-Lebrón, *If These Blackboards Could Talk: The Crit Classroom, A Battlefield*, 9 CHARLESTON L. REV. 305 (2015); Sheila I. Vélez Martínez, *Towards An Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585 (2015); Michael Hunter Schwartz, *Teaching Law by Design: How*

II. CULTURALLY PROFICIENT INSTRUCTION

Legal educators can leverage the tools of the cultural proficiency paradigm, discussed below, toward creating a racially-inclusive classroom. In *Grutter v. Bollinger*, a Supreme Court case upholding the use of affirmative action admissions programs at the University of Michigan Law School, the Supreme Court articulated a nascent conceptualization of a law school classroom enriched by the diversity of its students.²⁵ The *Grutter* court envisioned a classroom enriched by “enlightening” discussions that promoted cross-racial understanding instead of reifying racial stereotypes. However, as Darlene’s narrative above illustrates, law students of color often face isolation and marginalization in law school classrooms.

The cultural proficiency paradigm has powerful implications for legal education for several reasons. The first implication for legal education is one of deconstruction and reconstruction.²⁶ The cultural proficiency paradigm challenges legal educators to look inward at their own cultural compositions, beliefs, and practices, rather than focusing only on outward manifestations of those beliefs and practices.²⁷ Educator Kikanza Nuri-Robins and her colleagues explain:

Cultural Proficiency is an inside-out approach, which focuses first on the insiders of the school or organization, encouraging them to reflect on their own individual understandings and values. It thereby relieves those identified as outsiders, the members of excluded groups, from the responsibility of doing all the adapting.²⁸

Perhaps the most powerful part of the paradigm, the internal lens of cultural proficiency redirects attention from outward displays of bias and prejudice and can guide a willing law professor toward internal transformation.²⁹ Prof. Majorie Silver has suggested that the work of cultural proficiency for lawyers involves “a deliberate exploration of the deeply rooted cultural assumptions that claim us,” which itself mandates “an exploration of our own biases and stereotypes about individuals and groups different than ourselves.”³⁰

Thus, a law professor interested in culturally proficient instruction must take the crucial first step of focusing on “inside-out” change by identifying her own cultural values and associated biases.³¹ Unlike traditional diversity training programs, a culturally proficient educator is not expected to master an arbitrary

Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 SAN DIEGO L. REV. 347, 362–64 (2001); Spearlt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467 (2012).

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

26. See Boles, *supra* note 17, at 263–65.

27. See NURI-ROBINS ET AL., *supra* note 18, at 8.

28. *Id.*

29. See Boles, *supra* note 17, at 263.

30. Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 230 (2002).

31. See Armstrong & Wildman, *supra* note 24, at 658 (“Developing an ability to talk in the classroom . . . necessarily begins with faculty studying the issue for ourselves, in our own lives.”).

amount of abstract cultural information about diverse cultures or diverse students.³² Nor can the law professor be content to focus only on a small subset of skills related to cultural proficiency, like cross-cultural communication or *ad hoc* changes to teaching techniques. By engaging in the internal work that cultural proficiency requires, the law professor is empowered to change herself before catalyzing change in her classroom and law school.

The second implication of culturally proficient instruction is more even distribution of the responsibility for addressing diversity and inclusion issues. Culturally proficient instruction ensures that those issues are more evenly allocated among law faculty and law school administration.³³ Much scholarship has highlighted the heavy and unequal burden placed upon the shoulders of diverse law faculty.³⁴ The implementation of culturally proficient instruction has the potential to engage all the stakeholders in legal education.³⁵

The third implication of culturally proficient legal instruction is an enhanced legal education for law students. The adoption of the paradigm empowers law faculty to teach or “infuse” culturally proficient lawyering skills, the ability to interact effectively with clients from diverse backgrounds, in all aspects of the law school curriculum.³⁶ Teaching cultural proficiency lawyering skills in all aspects of the law school curriculum may help mitigate the oft-articulated concern by law professors about course coverage.³⁷ More importantly, social work professors Hartley and Petrucci argue that students are more likely to develop cultural proficiency skills (and overcome resistance to learning about topics such as racism and discrimination) when cultural proficiency content is emphasized and reinforced throughout the curriculum; isolated classes on “cultural diversity” topics can be ineffective in advancing cross-cultural understanding.³⁸ This section continues by briefly re-introducing the cultural proficiency paradigm as explained more fully in prior work.³⁹

A. The Cultural Proficiency Continuum

The Culturally Proficient Continuum is a useful tool for law professors seeking to develop culturally proficient instructional practices. The six points along the continuum “provide[] language for describing both unhealthy and healthy

32. See NURI-ROBINS ET AL., *supra* note 18, at 9.

33. Boles, *supra* note 17, at 265–66.

34. See, e.g., Delgado & Bell, *supra* note 12 (publishing a survey of 106 law professors of color who complained, *inter alia*, of “crushing loads of committee work and student counseling” and “severe or nearly intolerable” levels of job stress); Deo, *supra* note 12 (discussing a survey which revealed a higher level of work-related stress for law faculty women of color).

35. Boles, *supra* note 17, at 243 (“A true culturally proficient effort in legal education would be holistic and engage every stakeholder—the potential client of the law school graduate, current students, future students, faculty, staff members, administrators, and alumni.”).

36. *Id.* at 266–68.

37. Hartley & Petrucci, *supra* note 18, at 175–76.

38. *Id.* at 175 (citing Thomas R. Bidell et al., *Developing Conceptions of Racism Among Young White Adults in the Context of Cultural Diversity Coursework*, 1 J. ADULT DEV. 185, 188 (1994)).

39. See Boles, *supra* note 17, at 243–61.

policies, practices, values and behaviors.”⁴⁰ The descriptive points along the continuum are: (a) cultural destructiveness, (b) cultural incapacity or cultural intolerance, (c) cultural blindness or cultural reductionism, (d) cultural pre-competence, (e) cultural competence, and (f) cultural proficiency.⁴¹

The first point in the continuum, *cultural destructiveness*, is “any policy, practice, or behavior that effectively eliminates all vestiges of another people’s cultures.”⁴² Instructional practices that “eliminate historical accounts of [non-dominant] cultures from school curriculum [and] societal contributions of groups other than the dominant culture” are culturally destructive.⁴³ Social examples of cultural destructiveness include the American system of slavery and the Rwandan genocide.⁴⁴ Another example in the educational setting is the tendency of history textbooks to omit or downplay the enslavement of Africans or the subordination of Native Americans; the failure to link historical racism with modern racism is culturally destructive.⁴⁵ An example of cultural destructiveness in legal education is the formal and informal racial segregation of law schools into the 1980s.⁴⁶

Cultural incapacity (also called cultural intolerance) is the second point along the continuum.⁴⁷ At the point of cultural incapacity, the dominant culture is considered superior to others.⁴⁸ In a culturally intolerant educational setting, a law professor would “disempower” students with differing cultures by “tolerat[ing] differences without valuing diversity,” engaging cultural difference only on a token level, and “relating to [students] based on negative stereotypes.”⁴⁹ Darlene’s constitutional law professor, for example, engaged in cultural intolerance when she perpetuated negative racial stereotypes during the case discussion. Legal scholarship examining the experiences of law students of color offers additional examples of culturally incapacitated legal instruction; students often report law professors evidencing stereotyped thinking and law school administrations that superficially commit to diversity efforts.⁵⁰

The third point along the cultural proficiency continuum is *cultural reduction*, often called *cultural blindness*.⁵¹ “Cultural blindness is any policy,

40. RANDALL B. LINDSEY, KIKANZA NURI-ROBINS & RAYMOND D. TERRELL, CULTURAL PROFICIENCY: A MANUAL FOR SCHOOL LEADERS 111 (3d. 2009).

41. KIKANZA NURI-ROBINS & LEWIS BUNDY, FISH OUT OF WATER: MENTORING, MANAGING, AND SELF-MONITORING PEOPLE WHO DON’T FIT IN 38 (2016).

42. *Id.*

43. FRANKLIN CAMPBELL JONES, BRENDA CAMPBELL JONES & RANDALL LINDSEY, THE CULTURALLY PROFICIENT JOURNEY 23 (2010).

44. *See* NURI-ROBINS ET AL., *supra* note 18, at 79.

45. *Id.* at 80.

46. *See Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR, LEGAL EDUC. & PROF’L DEV. 23 (1992).

47. NURI-ROBINS ET AL., *supra* note 18, at 83. Nuri-Robins and her colleagues use the terms “cultural incapacity” and “cultural intolerance” interchangeably. *See, e.g.*, NURI-ROBINS & BUNDY, *supra* note 41, at 41.

48. *See* NURI-ROBINS ET AL., *supra* note 18, at 83.

49. *See id.*

50. *See supra* note 11 and accompanying text.

51. *See* NURI-ROBINS & BUNDY, *supra* note 41, at 43. Dr. Nuri-Robins and her colleagues have adopted the term “cultural reduction” to address concerns that the phrase “cultural blindness” perpetuates

practice, or behavior that ignores existing cultural differences or that considers such differences inconsequential.”⁵² At the point of cultural reduction, well-intentioned law faculty members may argue they do not see “color” but only see “human beings.”⁵³ Despite the lack of intent to cause harm, cultural reduction is extremely destructive to an inclusive environment because it obscures the dominant group’s privileges and benefits, and it devalues the harm experienced by non-dominant groups.⁵⁴ In the law school classroom, which necessarily engages concepts such as neutrality and fairness, law students must be taught to move beyond a culturally blind perspective, which affirms whiteness as a norm, and recognize ways the dominant culture is, in fact, “covertly race-specific.”⁵⁵

Cultural pre-competence is when individuals and organizations begin to recognize the complexities of cross-cultural interaction and formulate strategies for leveraging those differences.⁵⁶ However, at the pre-competence stage, “responses are typically non-systemic and haphazard, often requiring little to no change in regular school or classroom operations to meet the cultural needs of students.”⁵⁷ Culturally-precompetent responses are often “superficial” and limited, such as celebrating diversity only through events like Black History Month dinners, without deeper inclusion of black students or the black community.⁵⁸

At the point of *cultural competence*, the Essential Elements of cultural proficiency, *supra*, are used as the standards for the policy, practice, or behavior.⁵⁹ A culturally competent law professor will seek “regular opportunities for students to contribute their knowledge, and perspectives” and will use that knowledge to structure the curriculum.⁶⁰ *Culturally proficient* behaviors are those that incorporate the Essential Elements consistently, necessitating “transformation of curriculum and pedagogical practices that place students’ cultural attributes at the center of classroom learning” and “integra[tion] of social justice and multiple perspectives. . . .”⁶¹

While the Cultural Proficiency Continuum is a powerful tool, it is important not to misuse the continuum by assigning artificial labels to individuals, organizations, policies, or behaviors. Organizational and individual culture is simply “too complex to be relegated to fixed points.”⁶² Instead, the continuum provides common assessment language; individual law professors can use the continuum to

ableism because it denigrates the physical condition of blindness. *Id.* This article will use the term cultural reduction while incorporating the wealth of literature about the deficiencies of “culturally blind” and “color blind” approaches.

52. NURI-ROBINS ET AL., *supra* note 18, at 87.

53. *Id.*

54. *Id.*

55. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995), reprinted in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 85, 87 (Richard Delgado & Stefanie, eds. 1997).

56. See NURI-ROBINS ET AL., *supra* note 18, at 90.

57. JONES ET AL., *supra* note 43, at 23.

58. See *id.*

59. See NURI-ROBINS ET AL., *supra* note 18, at 94.

60. See JONES ET AL., *supra* note 43, at 24.

61. *Id.*

62. NURI-ROBINS ET AL., *supra* note 18, at 79.

more fully understand how their internally-held beliefs manifest in behaviors and actions.⁶³ Nuri-Robins and her colleagues urge the importance of expecting the “fits and starts, great leaps forward, occasional slides backward, and jerky halfhearted movements ahead” that typify the journey toward culturally proficient instruction.⁶⁴

B. The Essential Elements and The Barriers

The essential elements of cultural proficiency provide a framework for law professors to embark on their journey toward cultural proficiency.⁶⁵ “The essential elements are an interdependent set of standards to guide being intentional in [the] journey to cultural proficiency.”⁶⁶ The five essential elements are: (1) assess culture, (2) value diversity, (3) manage the dynamics of difference,⁶⁷ (4) adapt to diversity, and (5) institutionalize cultural knowledge.⁶⁸ Law teachers can use the Essential Elements as a guide toward culturally proficient behaviors and practices.⁶⁹

The path toward cultural proficiency is not without challenges, and the journey toward culturally proficient instruction requires intentionality in addressing those challenges. The four barriers to culturally proficient instruction are: (1) resistance to change, (2) unawareness of the need to adapt, (3) the presumption of entitlement, and (4) systems of oppression and privilege.⁷⁰ While the barriers may seem societal or institutional, individual law professors can overcome the barriers with a combination of intention and skill.⁷¹

III. THRESHOLD STRATEGIES FOR THE CULTURALLY PROFICIENT LAW PROFESSOR

Using the tools of the cultural proficiency paradigm, this section offers three strategies for law professors interested in beginning the journey toward culturally proficient instruction: (1) seek training on culturally proficient instruction, (2)

63. For example, NURI-ROBINS ET AL., *supra* note 18, at 79, explains,

Each organization and instructor can usually be represented as a range of points on the continuum, points that vary with the situations in which they find themselves. While avoiding overall labels, use the continuum to study singular particular behaviors, or to begin conversations that analyze your organizational culture or your personal development. In doing so, use the range of points as starting places and benchmarks by which to assess progress and direction. Bear in mind that movement along the continuum may not be a fluid progression, continually gliding along in one direction toward Cultural Proficiency.

64. *Id.*

65. NURI-ROBINS ET AL., *supra* note 18, at 23.

66. LINDSEY, ROBINS & TERRELL, *supra* note 40, at 125.

67. NURI-ROBINS ET AL., *supra* note 18, at 7 (defining Management of the Dynamics of Difference as “learn[ing] to respond appropriately and effectively to the issues that arise in a diverse environment”).

68. LINDSEY, ROBINS & TERRELL, *supra* note 40, at 126 tbl.8.1.

69. *Id.* at 125.

70. *See id.* at 70 (describing systems of oppression, a sense of entitlement and privilege, and unawareness of the need to adapt as the barriers to cultural proficiency).

71. *Id.* at 69.

mitigate unconscious behavior affecting students, and (3) learn to recognize and reduce microaggressions. While each of these strategies are important, none are easily accomplished. Indeed, it is important to remember that the journey toward cultural proficiency is not a destination but “a life-long process” and commitment.⁷² These strategies are the first step in the journey toward culturally proficient instruction.

A. Seek Training on Culturally Proficient Legal Instruction

Peggy McIntosh observes that the majority of white faculty members are ill-trained in the basic concepts of culturally proficient instruction, such as assessing culture, valuing diversity, and adapting to diversity:

My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture. I was taught to see myself as an individual whose moral state depended on her individual moral will . . . whites are taught to think of their lives as morally neutral, normative, and average, and also ideal, so that when we work to benefit others, this is seen as work that will allow “them” to be more like “us.”⁷³

Indeed, most law professors were never trained in culturally proficient client representation skills, let alone to be culturally proficient educators.⁷⁴ Law professors interested in implementing culturally proficient legal instruction should seek training and resources on how to do so.

Law teachers interested in the journey of cultural proficiency have a variety of resources. An easy step toward learning how to be a culturally proficient educator is to first engage the literature on cultural proficiency.⁷⁵ Dr. Nuri-Robins has resource material available on her website.⁷⁶ Corwin Publishing, a frequent publisher of books related to cultural proficiency, also hosts conferences and online courses.⁷⁷ Other resources for culturally proficient instruction may include the law school or university diversity office, faculty development workshops, speaker series, or

72. NURI-ROBINS ET AL., *supra* note 18, at xxvii.

73. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE AND FREEDOM, July/Aug. 1989, at 10.

74. See Boles, *supra* note 17, at 224 (“Legal educators, even those with significant practice experience, are not trained to deliver culturally proficient client services, nor are legal educators trained in how to deliver culturally competent legal instruction to a diverse group of law students. The result is empty, abstract, and ill-educated efforts to meet a rather lofty and elusive goal.”); Dean Michael Hunter Schwartz & JB Smiley Jr., *What Do You Do When Nothing Seems to Work: An Evaluation and Suggested Approach to Addressing the Diversity Issue in the Legal Profession*, 49 ARK. LAW. 1, at 12, 13 (2014) (arguing that law professors need training on engaging cross-cultural issues in the classroom).

75. See, e.g., NURI-ROBINS ET AL., *supra* note 18.

76. THE ROBINS GROUP, <http://www.kikanzanurirobins.com> (last visited Nov. 20, 2017).

77. CORWIN, <http://www.corwin.com> (last visited Nov. 20, 2017).

outside consultants.⁷⁸ Notably, there is an increasing amount of scholarship on the intersection of cultural proficiency and legal education.⁷⁹

B. Mitigate Unconscious Racism

In 1987, Professor Charles Lawrence published his seminal article analyzing race in constitutional law doctrine.⁸⁰ Lawrence observed that the Supreme Court takes an unduly narrow focus in constitutional law cases. The Court requires intentional racism when, in reality, much of modern racism is what Lawrence called “unconscious racism.”⁸¹ Connecting advances in cognitive and social psychology with the pervasiveness of racial inequality, Lawrence argued that unconscious racism may explain why well-intentioned people nevertheless engaged in biased and racist decision-making and behaviors:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.⁸²

In the wake of Lawrence’s article, the fields of cognitive and social psychology have extensively explored the ways implicitly-held beliefs may manifest in biased actions and reactions.⁸³

78. See, e.g., Dowd, Nunn & Pendegast, *supra* note 11, at 43 (“[F]aculty would benefit from diversity training and study, to unearth both conscious and unconscious prejudices that serve as barriers to their students.”).

79. Law librarian Annette Demers has published an excellent review of the scholarship related to cultural proficiency and the legal profession from 2000–2011. Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT’L J. LEGAL INFO. 22, 34–42 (2011); see also Boles, *supra* note 17; Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 186–87 (2014). For those professors interested in accessible self-paced resource materials, an important cultural proficiency training effort was the joint project, released in 2010, entitled Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System, which resulted from collaboration between the ABA Criminal Justice Section, Section of Individual Rights and Responsibilities, and the Council on Racial and Ethnic Justice. Importantly, the Building Community Trust project and its accompanying training module identify the overall paradigm of cultural proficiency as useful to addressing the challenges in the criminal justice system. While the Building Community Trust training module was developed to address disparities in the criminal justice system, the concepts are easily adaptable for use by legal educators. General information about the project can be found at www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html and training materials from the project are on file with the author.

80. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 *passim* (1987).

81. *Id.*

82. *Id.* at 322 (footnote omitted).

83. Since 2013, the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University has collected the latest empirical research on unconsciously motivated behaviors like implicit bias. See

Although unconsciously-motivated behaviors and responses are both unconscious and pervasive, they are still insidious in nature. While the human brain may naturally categorize social information, the resulting bias from the human brain should be viewed for what it is — a form of racism. Indeed, in a later article, Charles Lawrence cautions against the tendency to focus solely on the individual's "implicit" cognitive categorization process instead of the resulting biased behaviors that perpetuate systemic racism.⁸⁴ The risk is that bias gets "normalize[d]" because every human brain categorizes social information in a similar way; individuals may feel less inclined to take responsibility for taking on the project of changing their implicit attitudes.⁸⁵ The good news is that the cultural proficiency paradigm can guide legal educators in eradicating the problems of bias, racial anxiety, and stereotype threat in legal education.

Using the example of implicit bias as a start, the Cultural Proficiency Continuum illustrates a way to isolate and name biased behaviors. Explicit bias falls at the beginning of the continuum, at cultural destructiveness and cultural incapacity. Implicitly held biases fall further along the continuum, at cultural precompetence. In order to move along toward cultural competence and cultural proficiency, legal educators must engage in intentional actions to minimize bias.

Next, the five Essential Elements provide guidance on how to tackle bias. The first element, assessing culture, encourages educators to assess and challenge internal systems of culture and belief that may produce biased thoughts and actions. The second element, valuing diversity, requires educators to intentionally value a diverse educational environment instead of simply tolerating it. The third element, managing the dynamics of difference, urges educators to learn to respond appropriately to issues and opportunities created by a diverse educational environment. The fourth element, adapt to diversity, focuses on eradicating bias from the diverse environment by changing individual and institutional policies and practices that perpetuate bias. The fifth element, institutional cultural knowledge, recognizes that for bias-reducing strategies and lessons to be permanent, those strategies must be ingrained in the culture of the institution.

Finally, the barriers to cultural proficiency recognize the difficulties in minimizing bias in legal education. Faculty members may be resistant to change or may be unaware that their behaviors exhibit bias, which would reflect an unawareness of the need to adapt. Similarly, a legal educator may assume his beliefs

Implicit Bias Review, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, [hereinafter KIRWAN INST. (year)] <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/implicit-bias-review/> (last visited Nov. 15, 2017). The Kirwan Institute's annual reports are available online. *See id.*

84. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 942 (2008) ("I express my gratitude for this good work. However, I argue that, while this scholarship's focus on the mechanisms of cognitive categorization has taught us much about how implicit bias works, it may have also undermined my project by turning our attention away from the unique place that the ideology of white supremacy holds in our conscious and unconscious beliefs. I find this outcome unfortunate, if unintended, as the ubiquity and invidiousness of racism was the central lesson of my article. I further express my fear that cognitive psychology's focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy.").

85. *Id.* at 960–61.

are rooted in meritocracy instead of bias, which would reflect the presumption of entitlement. Finally, systems of oppression and privilege may obscure a professor's ability to perceive her own bias, much less change it.

Unconsciously-held beliefs about race may affect legal education, but culturally proficient law professors are equipped to prevent implicit assumptions and internal biases from adversely affecting legal education. The following section demonstrates ways that culturally proficient law professors can disrupt behavior based on implicit assumptions and still deliver cultural proficient instruction to all students. Specifically, this section examines three manifestations of unconscious racism – implicit bias, racial anxiety, and stereotype threat.⁸⁶

1. *Implicit Bias*

Over the last few decades, the field of social psychology has deeply explored the phenomenon of implicit bias. There are several instruments that purport to measure the level of implicit associations a person may harbor; the most famous is the Implicit Association Test (“IAT”).⁸⁷ The IAT is an online instrument hosted by researchers at Harvard Law School; it seeks to measure levels of implicit bias by measuring differential response times.⁸⁸ For example, in the IAT measuring race, a responder with an implicit bias against blacks will take longer to associate blacks with positive images or phrases.⁸⁹ Currently, there are IATs examining unconscious attitudes about a variety of categories including race, national origin, skin tone, gender, sexuality, obesity, and politics.⁹⁰ While there have been arguments that it is possible to influence the results of the IAT, or that IAT results are not definitive, many social psychologists agree that the IAT is both useful and predictive of bias-based behaviors.⁹¹

Through IAT-based research, researchers have discovered that most Americans have a preference for whites. In fact, eighty-eight percent of whites displayed an anti-black (or pro-white bias) compared to forty-eight percent of blacks.⁹² The tendency to prefer whites exists at some level across racial lines, and that suggests that there are large societal forces at work (such as structural racism

86. See generally RACHEL D. GODSIL ET AL., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE (2014) [hereinafter GODSIL ET AL., VOL. 1] <http://perception.org/wp-content/uploads/2014/11/Science-of-Equality.pdf> (surveying research on implicit bias, racial anxiety, and stereotype threat in education and health care); RACHEL D. GODSIL ET AL., THE SCIENCE OF EQUALITY, VOLUME 2: THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS (2016), [hereinafter GODSIL ET AL., VOL. 2] <https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf> (surveying research on the effects of implicit bias, racial anxiety, and stereotype threat on women and girls).

87. Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129–30 (2012).

88. *Id.* at 1130.

89. *Id.* at 1131.

90. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited Dec. 15, 2017).

91. Kang et al., *supra* note 87, at 1131.

92. Lawrence, *supra* note 91, at 957 (citing Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12).

and media-perpetuated stereotypes) reifying negative stereotypes about blacks to the extent that even some black people believe them.⁹³

Beliefs falling along the entire spectrum of biases can result in oppression of marginalized groups when combined with the power to do so; unconsciously-held biases can be as damaging as conscious ones.⁹⁴ Thus, a belief, whether conscious or unconscious, that women are intellectually inferior is a negatively biased belief about women. When that negative bias is combined with a power of subordination or oppression (e.g. the power to exclude women from law schools), it results in sexism. Similarly, racism is the bias against a person of color combined with the power to oppress or exclude that person; ableism is bias against persons with disabilities combined with the power to oppress disabled people.

Using the IAT, social psychologists can link implicit preferences to biased behaviors in people who hold relative power. For example, implicit bias research has illuminated ways job applicants are disadvantaged by employers' implicit bias against applicants based on obesity and pregnancy.⁹⁵ Researchers have also explored how implicit bias may cause differential decisions in criminal justice, health care, employment, education, and housing.⁹⁶ While a detailed examination of the scientific explanation for implicit bias is beyond the scope of this Article, it is useful to utilize some common definitions and understand, albeit at a summary level, the cognitive process that leads to the development of implicit bias.

The human brain naturally engages in a constant process of characterizing information.⁹⁷ The mental processes of a shopper walking through a grocery store will assist the shopper in making judgments about categories — fruit versus vegetables, meat versus grain, children versus adults, frozen versus room-temperature, shoppers versus employees. The resulting categories that the brain develops are called *schemas*.⁹⁸ The brain's categorization of information into schemas is a key part of human survival; schemas provide mental shortcuts that incorporate information learned from past experiences and allow us to assess and analyze new information.⁹⁹ Schemas are reinforced socially, such that certain images or descriptions will trigger similar schemas in a majority of people.¹⁰⁰ The image that jumps to mind when someone asks for a shape with four equal sides is a square, not a parallelogram.¹⁰¹

As with other types of information, the human brain categorizes social information as well. Thinking back to the grocery store example above, a few

93. KIRWAN INST. 2013, *supra* note 83, at 7–8.

94. LINDSEY, ROBINS & TERRELL, *supra* note 40, at 29 (2009) (describing link between negative beliefs about groups and power).

95. See J. Agerström & D.O. Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. OF APPLIED PSYCHOL. 790 (2011) (obesity); see also W.E. Morgan et al., *A field experiment: Reducing interpersonal discrimination toward pregnant job applicants*, 98 J. OF APPLIED PSYCHOL. 799 (2013) (pregnancy).

96. See KIRWAN INST. 2016, *supra* note 83, at 19.

97. Jerry Kang, *Implicit Bias: A Primer for Courts* (August 2009), <http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/> (last visited Nov. 15, 2017).

98. *Id.*

99. *Id.*

100. Kang, *supra* note 97, at 1.

101. Kang, *supra* note 97, at 1.

schemas related to people — age (children versus adults) and employment status (grocery store employee versus shopper). Walking through the grocery store, the shopper's brain is categorizing and forming schemas about others in the store and assigning other categories — gender, race, height, weight, and hundreds of others. These types of schemas that focus on social categories are called *social cognitions*.¹⁰² In other words, a social cognition is simply the results of the human brain's natural categorization process. Social cognitions begin forming in early childhood and continue throughout a person's life.¹⁰³ Furthermore, social cognitions can be supported with both first-hand and second-hand information; as a person ages, social cognitions solidify and become more permanent.¹⁰⁴

Stereotypes are information that is associated with a social cognition.¹⁰⁵ Stereotypes can be positive or negative.¹⁰⁶ As with social cognitions, information leading to stereotyping begins in early childhood and can come from firsthand experiences and second-hand information. Stereotypes, however, have more power to change over time as society changes.¹⁰⁷

Finally, a *bias* is a positive or negative preference for a group of people based on social cognitions.¹⁰⁸ Bias links to behavior, so a positive bias toward a group may lead a person to treat members of that group favorably while a negative bias against a group may incline a person toward negative treatment. As levels of explicit bias have arguably decreased in the United States, the level of implicit bias remains pervasive.¹⁰⁹

Researchers have examined the myriad ways educators may exhibit bias against marginalized student populations.¹¹⁰ While there are no published studies of implicit bias and legal educators, studies from other educational settings can guide legal educators in identifying implicit bias and crafting culturally proficient responses.¹¹¹ For example, in 2015, researchers Katherine Milkman, Modupe Akinola, and Dolly Chugh published the results of a study examining race and gender disparities in the treatment of prospective doctoral students.¹¹² The study involved a randomly-selected group of 6,548 faculty members associated with 6,300 doctoral programs.¹¹³ The researchers sent identically-worded emails to each faculty member

102. *Id.*

103. See KIRWAN INST. 2013, *supra* note 83, at 7.

104. *Id.* at 8.

105. Kang, *supra* note 87, at 1128.

106. Kang, *supra* note 97, at 1–2; KIRWAN INST. 2013, *supra* note 83, at 11.

107. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 74–77 (2016).

108. See Kang, *supra* note 97, at 1–2.

109. See BANAJI ET AL., *supra* note 107, at 47.

110. See GODSIL ET AL., VOL. 1, *supra* note 86 at 34–40; KIRWAN INST. 2016, *supra* note 83, at 34–40.

111. For example, surveys of law student experiences signal the operation of implicit bias in law school classrooms. See Leslie P. Culver, *White Doors, Black Footsteps: Leveraging “White Privilege” to Benefit Law Students of Color*, 21 J. OF GENDER, RACE & JUST. (forthcoming).

112. Katherine L. Milkman, Modupe Akinola, & Dolly Chugh, *What Happens Before? A Field Experiment Exploring how Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCHOL. 1678, 1678 (2015).

113. *Id.* at 1683.

requesting a ten-minute meeting to learn about doctoral and research opportunities.¹¹⁴ The only difference in the emails was the perceived race and gender of the prospective student; the researchers used hypothetical names intended to trigger gender recognition (male versus female) and race recognition (white, black, Hispanic, Indian, and Chinese).¹¹⁵ The researchers found that faculty had a response bias that favored white males; that is, white men were more likely than any other group (based on race and gender) to receive a response.¹¹⁶

Despite the lack of specific research on implicit bias and law professors, a recent study involving law firm partners has important implications for legal education. In 2014, consultant Dr. Arin Reeves released a study examining implicit confirmation bias in law firms.¹¹⁷ The study suggests that supervisory lawyers tend to rate the written work of junior white lawyers higher than junior black lawyers.¹¹⁸

Reeves worked with partners from different large law firms to develop a legal memorandum from a hypothetical third-year associate named “Thomas Meyer” who graduated from New York University School of Law.¹¹⁹ The researchers inserted twenty-two different errors into the legal memorandum – seven minor grammatical errors, six technical writing errors, five errors of fact, and four analytical errors.¹²⁰ Sixty law firm partners from twenty-two different firms received the materials including the legal memorandum and research materials used to draft the memorandum.¹²¹ The only difference was based on race—half of the partners received information that “Thomas Meyer” was white, and half were told “Thomas Meyer” was black.¹²²

The partners in the study were told they were participating in a study about the “writing competencies of young attorneys” and were asked to edit the memorandum for all factual, technical, and substantive errors.¹²³ Then, the partners were to rate the memorandum on a scale of 1 (“extremely poorly written”) to 5 (“extremely well written”).¹²⁴ The memorandum from the white male fictitious associate averaged a score of 4.1 out of 5, while the black male associate averaged a score of only 3.2 out of 5.¹²⁵ The partners also found more of the errors in the black associate’s memorandum versus the white associate’s memorandum.¹²⁶ Again, other

114. *Id.* at 1683–84.

115. *Id.* at 1683. For example, in a test for race and gender recognition, “Brad Anderson” was assumed to be a White male, “Latoya Brown” a Black female, “Carlos Lopez” a Hispanic male, “Indira Shah” an Indian female, and “Chang Huang” a Chinese male. *Id.* at 1684 tbl.1.

116. Milkman et al., *supra* note 112, at 1678.

117. ARIN REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2015), <http://nextions.com/portfolio-posts/written-in-black-and-white-yellow-paper-series/> (last visited Jan. 29, 2018).

118. *Id.* at 4–5.

119. *Id.* at 2.

120. *Id.*

121. *Id.* Of the sixty partners in the study, there were twenty-three women and thirty-seven men; twenty-one of the partners were considered racial or ethnically diverse while thirty-nine were white. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 3.

126. *Id.*

than the indication that the associate was African American, the legal memoranda, materials, and credentials were the same.

The participants also made qualitative comments on the quality of the memorandum. Reeves found that the comments for the white male associate were consistently more positive, such as, he “has potential” and demonstrates “good analytical skills.”¹²⁷ On the other hand, the comments on the black associate were disparaging, such as “can’t believe he went to NYU” or “average at best.”¹²⁸ Importantly, the race or gender of the partner did not affect the number of errors found or the ratings.¹²⁹ Reeves concluded that confirmation bias explained the results of the study; the law firm partners found more errors in the black associate’s memorandum because they unconsciously expected a black associate to write poorly.¹³⁰

The inference from the science on implicit bias summarized above is that there is every reason to conclude implicit bias is operating in legal education. Implicit bias on the part of legal educators has the potential to cause differential treatment at every level of the law school experience—from recruitment and admission to student interaction and evaluation. Even in a class utilizing anonymous grading, there are dozens of faculty-student interactions during a law student’s tenure that may be degraded by implicit bias, including class discussions, feedback on papers, feedback on practice exams, office hour visits, email communications, letter of recommendation requests, and review of final examination performance. In addition to degraded classroom experiences and faculty interactions, implicit bias may cause a variety of negative physical and mental health effects in students.¹³¹

It is, however, not enough to simply be aware of the potential for implicit bias to impede a law professor’s ability to treat all students fairly. Culturally proficient legal instruction requires a move beyond awareness to active mitigation. Thus, culturally proficient law professors should proactively engage these methods to reduce implicit racial bias. The good news is that research suggests that implicit racial associations are malleable and can be changed.¹³² Social psychologists have begun to explore pathways to mitigate implicit bias.

Mitigation strategies tend to fall into three categories: education, cross-cultural exposure, and intentional behavioral changes.¹³³ In terms of education, law professors can seek education on implicit bias generally and how implicit bias may be affecting their teaching. A great first step is to take the IAT and understand the results. Law professors could also seek training to reduce their implicit bias.¹³⁴

127. *Id.*

128. *Id.*

129. *See id.* at 4.

130. *Id.*

131. NURI-ROBINS ET AL., *supra* note 41, at 59 (citing KIRWAN INST. 2014, *supra* note 83).

132. KIRWAN INST. 2016, *supra* note 83, at 43–47 (discussing recent research).

133. KIRWAN INST. 2015, *supra* note 83; KIRWAN INST. 2016., *supra* note 83; GODSIL ET AL., VOL. 2, *supra* note 86, at 44–47.

134. There are also several training efforts that focus specifically on implicit bias. For example, the ABA Section of Litigation’s Task Force on Implicit Bias recently launched a website offering resources for the legal community as part of their Implicit Bias Initiative. The Task Force produced an educational video entitled *The Neuroscience of Implicit Bias* and assembled a “toolbox” with a 90-minute presentation

Second, legal educators can implement exposure techniques that have been found to reduce implicit bias, such as seeking out positive images that counter negative stereotypes and engaging in exercises where the professor takes the perspective of a person of color.¹³⁵ Third, since implicit biases are heightened when there is cognitive overload, a common recommendation is to “stare not blink” or “think slow.”¹³⁶ “Thinking slow” means to reduce the number of cognitive tasks in situations where bias may be present and to work through responses more slowly.¹³⁷ This implies law professors may make simple behavioral changes to mitigate implicit bias, such as using blind grading, checklists, and rubrics.¹³⁸

2. *Racial Anxiety*

Culturally proficient law professors also work to mitigate racial anxiety. Racial anxiety is the unconscious anxiety commonly experienced in cross-racial and cross-cultural interactions.¹³⁹ Racial anxiety is distinct from the “racial threat” that whites may experience in fearing the loss of privileges and resources associated with being a member of a dominant social group.¹⁴⁰ In the psychological context, a person experiencing racial anxiety in a cross-racial interaction is unconsciously uncomfortable with that interaction and is unable to fully engage in the interaction due to the racial anxiety.¹⁴¹ While racial anxiety is common, it is not as pervasive as implicit bias; not everyone engaged in a cross-racial interaction will experience racial anxiety.¹⁴²

Although much less studied than implicit bias, researchers have discovered that racial anxiety is evidenced by physical manifestations such as decreased eye contact, nervousness, discomfort, awkwardness, and stiffness.¹⁴³ While people of color may experience racial anxiety in cross-cultural interactions due to fear of experiencing racism, whites in cross-cultural interactions may experience racial anxiety due to fear of being labeled a racist or fear of being met with hostility.¹⁴⁴

and facilitator resources. The materials are available at: <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Dec. 9, 2017).

135. Rachel D. Godsil, *Breaking the Cycle: Implicit Bias, Racial Anxiety, and Stereotype Threat*, 24 POVERTY & RACE RES. ACTION COUNCIL 1, 8 (Jan./Feb. 2015).

136. AM. BAR ASS'N SECTION OF LITIGATION, IMPLICIT BIAS & DEBIASING 25, <https://www.americanbar.org/content/dam/aba/administrative/litigation/implicit-bias/IB-toolbox.ppt> (last visited Nov. 15, 2017).

137. *Id.*; GODSIL ET AL., VOL. 2, *supra* note 86, at 47.

138. Godsil, *supra* note 135, at 8 (implicit bias may be mitigated by “engaging in mindful, deliberate processing. . . .”); *see* Lory Barsdate Easton & Stephen V. Armstrong, *Giving Feedback Across Difference: How to Minimize Implicit Bias (and Maximize Your Team’s Legal Talent)*, 58 No. 9 DRI FOR DEF. 80 (2016) (discussing ways to develop objective criteria).

139. Godsil, *supra* note 135, at 2.

140. *Id.*

141. *Cf.* Drew S. Jacoby, Stacey Sinclair & J. Nicole Shelton, *A Lesson in Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. OF EXPERIMENTAL SOC. PSYCHOL. 51 (2016).

142. GODSIL ET AL., VOL. 1, *supra* note 86, at 28.

143. Godsil, *supra* note 135, at 2; Jacoby et al., *supra* note 141, at 51.

144. Godsil, *supra* note 135, at 2; GODSIL ET AL., VOL. 1, *supra* note 86, at 28 (“Some may find it surprising that whites may experience ‘racial anxiety’ given the continued dominance of whites generally—

Racial anxiety increases if the white person involved is more implicitly or explicitly biased. Godsil and her colleagues observed that “prejudiced whites were actually likely to spend more cognitive resources trying to make the interaction go smoothly.”¹⁴⁵ If both parties to a cross-cultural interaction experience racial anxiety, a “negative feedback loop” can occur where “both parties’ fears seem to be confirmed by the behavior of the other.”¹⁴⁶ Another pernicious harm of racial anxiety is the cycling of negative feelings: the racially anxious person experiences unconscious anxiety during diverse interactions, the racial anxiety reinforces and entrenches negative feelings about other groups, and the person is less motivated to seek out cross-racial interactions in the future.¹⁴⁷ “In sum, racial anxiety begets more racial anxiety.”¹⁴⁸

Racial anxiety is particularly problematic because it deprives the interpersonal interaction (be it faculty-student or some other permutation) of the full attention and energy of the interaction’s participants. For example, psychologists Jacoby-Senghor, Sinclair, and Shelton recently published a study exploring a correlation between instructor racial anxiety, implicit racial bias, and learner test performance in undergraduate students.¹⁴⁹ During the study, the researchers divided undergraduate students into instructor-learner pairs.¹⁵⁰ The “instructors,” who were always white, were assessed for both explicit and implicit bias.¹⁵¹ The “learners” were a mix of black and white participants.¹⁵² After preparing a brief lesson, the instructors taught and discussed the lesson with the assigned learner.¹⁵³ Each lesson was videotaped, and the researchers assessed each instructor for behavioral signs of anxiety.¹⁵⁴ The researchers also rated the instructional quality of each lesson.¹⁵⁵ Finally, the learners then took a test on the lesson.¹⁵⁶

The researchers found that instructors with higher levels of implicit racial bias delivered lower quality instruction to black learners; the black learners scored lower on the test of the lesson when compared to white learners.¹⁵⁷ Notably, the low quality nature of the instruction impacted white students as well; white learners who subsequently watched videotapes of the lessons scored lower when the original lesson was given to a black learner than when the original lesson was given to a white learner.¹⁵⁸ The psychologists also observed that instructors with higher levels of

but in light of the importance of the prevailing social norm of egalitarianism, many whites truly fear being perceived as racist.”).

145. GODSIL ET AL., VOL. 1, *supra* note 86, at 28.

146. Godsil, *supra* note 135, at 2.

147. GODSIL ET AL., VOL. 1, *supra* note 86, at 29.

148. *Id.* at 30.

149. Jacoby et al., *supra* note 141.

150. *Id.* at 51.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 52.

158. *Id.*

implicit racial bias exhibited more signs of anxiety.¹⁵⁹ In explaining their findings, the researchers concluded that, for the instructors with high levels of implicit racial bias, anxiety in teaching to a black learner interfered with the ability to teach effectively.¹⁶⁰ In analyzing the difference in performance between the black-learner lessons and the white-learner lessons, the researchers translated the difference to “over a full letter grade.” They hypothesized that the effect of implicit racial bias in instructors could be compounded in more complex and difficult learning environments.¹⁶¹

Jacoby-Senghor, Sinclair, and Shelton’s finding that racial anxiety may degrade instruction and conversation in cross-racial interactions has powerful implications for legal education. A faculty member experiencing racial anxiety when dealing with a differently-raced student is literally, albeit unconsciously, distracted from the substance of that interaction. For example, imagine a white law professor and student of color meeting in office hours for the first time in the white law professor’s office. If the law professor is experiencing unconscious racial anxiety during the conversation, the faculty member is less able to engage the student, build rapport, answer questions, and appear friendly. At that moment, the student of color is being disadvantaged compared to a similarly situated white student. Compounding the problem is the possibility that the student of color may also be experiencing racial anxiety, decreasing the student of color’s ability to ask questions, absorb information, and develop professional and mentoring relationships.

Similar to the strategies to combat implicit bias, there are concrete strategies a law professor can employ to reduce racial anxiety. The basic strategy, called “intergroup contact” is the simple idea that increased contact with others from different cultural backgrounds decreases racial anxiety.¹⁶² Godsil and her colleagues explain that “[p]eople need to feel a connection to others outside of their group; once people feel connected, their racial anxiety decreases and so does their bias.”¹⁶³ Increasing inter-group interactions, having cross-racial friendships, and even hearing, secondhand, about positive inter-group interactions can help reduce racial anxiety.¹⁶⁴ Moreover, the benefits of inter-group interactions can happen very quickly. For example, psychologists Page-Gould, Mendoza-Denton, and Troop found that, for cross-racial strangers meeting for the first time, racial anxiety decreases significantly in the second meeting and nearly disappears by the third.¹⁶⁵ Thus, law professors seeking to minimize racial anxiety, both in themselves and for their students, should seek out opportunities to interact with differently-raced students; suggestions for increasing cross-cultural interactions include attending a variety of student events and encouraging attendance at office hours.

159. *Id.* at 52–53.

160. *Id.*

161. *Id.*

162. GODSIL ET AL., VOL. 1, *supra* note 86, at 49.

163. *Id.*

164. *Id.* at 49–50.

165. Elizabeth Page-Gould, Rodolfo Mendoza-Denton & Linda R. Tropp, *With a Little Help From My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts through Cross-Group Friendship*, 95 J. OF PERSONALITY & SOC. PSYCHOL. 1080, 1080–94 (2008).

3. Stereotype Threat

Stereotype threat occurs when a person unconsciously fears his performance will confirm a negative stereotype about a group to which he belongs.¹⁶⁶ The consensus in the rich research about stereotype threat is that the anxiety about performing poorly distracts from performance.¹⁶⁷ 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.¹⁶⁸ Dealing with that anxiety, be it physiological, cognitive, or affective, depletes the mental resources the student can use to take the exam.¹⁶⁹ There are two main types of stereotype threat, and the culturally proficient law professor should be aware of both—ability-relevant stereotype threat and character-relevant stereotype threat.¹⁷⁰

Ability-relevant stereotype threat is “fear of confirming a stereotype that one’s group is less able than other groups to perform a valued activity.”¹⁷¹ Claude Steele, a pioneer in the research on ability-relevant stereotype threat, argues that stereotype threat may explain much of the racial and gender achievement gaps in education.¹⁷² In an early study exploring ability-related stereotype threat, Steele and Aronson administered a series of standardized questions to black and white undergraduate students.¹⁷³ When black students were told the questions measured “intellectual ability” (thus triggering fear of confirming a negative stereotype about black students), the students performed significantly worse than their white peers.¹⁷⁴ However, when black students were told the questions were a “problem-solving” exercise (where there was no fear of confirming a negative stereotype), there was little gap between black and white students.¹⁷⁵

Researchers have found similar results with different groups who may experience ability-related stereotypes such as women in science and mathematics,

166. GODSIL ET AL., VOL. 1, *supra* note 86, at 31.

167. *Id.* at 32 (citing Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. OF PERSONALITY & SOC. PSYCHOL. 440–52 (2003)); *see generally*, CLAUDE M. STEELE, WHISTLING VIVALDI (1st ed. 2010).

168. GODSIL ET AL., VOL. 1, *supra* note 86, at 32.

169. *See also* GODSIL ET AL., VOL. 1, *supra* note 86, at 32 (“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.”).

170. GODSIL ET AL., VOL. 1, *supra* note 86, at 31.

171. *Id.*

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

173. *Id.* at 799.

174. *Id.* at 800.

175. *Id.*

those in poverty, and other racial groups.¹⁷⁶ 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 natural athletic ability).¹⁷⁷

Character-relevant stereotype threat concerns the fear that one is not “adhering to prevailing morals or norms.”¹⁷⁸ For whites, character-relevant stereotype threat can be triggered by a fear of avoiding actual racist behavior as well as a fear of being perceived as racist.¹⁷⁹ A recent study exploring character-relevant stereotype threat in whites asked white participants to discuss personal views on a racially charged topic, i.e., racial profiling by police, with a black conversation partner. The study found that white participants, who were risking being perceived as racist, physically distanced themselves from their black conversation partners.¹⁸⁰ However, the white participants did not distance themselves in the conversations with black partners when assigned a position on racial profiling; there was no risk of being considered prejudice because the participants were not discussing their own views.¹⁸¹ One participant articulated that he felt “awkward” in talking with a black partner about racial profiling; another participant noted a need to “be careful” in making his remarks.¹⁸²

In the context of education, white educators experiencing character-relevant stereotype threat may have lower expectations of students of color, or they may give inaccurately positive feedback to a student of color due to fear of being considered racist.¹⁸³ Similarly, the fear of being perceived as racist may result in what Crosby and Monin call a “failure to warn.”¹⁸⁴ In a series of studies involving non-black undergraduate students trained to advise their peers on academic issues, participants were asked to evaluate and give advice to a hypothetical student interested in studying medicine.¹⁸⁵ 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, computer science, and an intensive humanities survey course.¹⁸⁶ Race was the only difference between the hypothetical students.¹⁸⁷

176. See GODSIL ET AL., VOL. 1, *supra* note 86, 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. OF APPLIED PSYCHOL. 979, 979–980 (2006) (surveying empirical studies).

177. See Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. OF PERSONALITY & SOC. PSYCHOL. 1213, 1213 (1999).

178. GODSIL ET AL., VOL. 1, *supra* note 86, at 32.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See Kent D. Harber et al., *Students' Race and Teachers' Social Support Affect the Positive Feedback Bias in Public Schools*, 104 J. OF EDUC. PSYCHOL. 1149, 1149–61 (2012); Kent D. Harber et al., *The Positive Feedback Bias as a Response to Self-Image Threat*, 49 BRITISH J. OF SOC. PSYCHOL. 207, 212–16 (2010).

184. Jennifer Randall Crosby & Benoît Monin, *Failure to Warn: How Student Race Affects Warnings of Potential Academic Difficulty*, 43 J. OF EXPERIMENTAL PSYCHOL. 663, 663–70 (2007).

185. Crosby & Monin, *supra* note 184, at 665.

186. *Id.*

187. *Id.*

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.¹⁸⁸ Crosby and Monin explain 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.¹⁸⁹

As with implicit bias and racial anxiety, law professors should move beyond awareness toward mitigating stereotype threat.¹⁹⁰ One culturally proficient mitigation strategy for the individual law professor is that of "wise criticism"—educators deliver honest feedback as a result of "high expectations" combined with "confidence that the individual is capable of meeting those expectations."¹⁹¹ Law students can sense when a law professor has lowered expectations for students of color due to negative racial stereotypes.¹⁹² Lowered expectations degrade trust between the law student and professor, and they amplify the harmful effects of ability-relevant stereotype threat.¹⁹³ Expressing high expectations for student performance, together with "a strong belie[f] in the capabilities of their students," can incentive students of color to overcome stereotype threat.¹⁹⁴ Steele theorizes wise criticism is effective because it "resolve[s] . . . interpretative quandary," students do not have to guess whether feedback is based upon negative racial stereotypes.¹⁹⁵

Godsil and her colleagues believe that wise criticism will also assist faculty members in reducing character-relevant stereotype threat:

188. *See id.* at 666.

189. *Id.* at 663.

190. Since this Article focuses on strategies that individual law professor can employ, systemic and institution-level responses are beyond the scope of the project. There are many systemic mitigation strategies recommended by the literature. *See, e.g.,* Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQUESNE L. REV. 163 (2015) (discussing strategies to mitigate stereotype threat in law school academic support programs).

191. GODSIL ET AL., VOL. 1, *supra* note 86, at 52; *see also* Yeager et al., *Breaking the Cycle of Mistrust: Wise Interventions to Provide Critical Feedback Across the Racial Divide*, 143 J. EXPERIMENTAL PSYCHOL. 804, 810 (2013) (stating that instructors employing wise criticism techniques improved essay resubmission rate of black students from 17% to 71%).

192. Darling-Hammond & Holmquist, *supra* note 24, at 23.

193. *Id.* at 23–24 (stating that lowered expectations can lead to "self-handicapping, challenge avoidance, self-suppression and disidentification or disengagement with the task or the context in which the task is to be performed" (citing Kenneth Tyler & Christina Tyler, *Stereotype Threat* (Dec. 23 2009)); STEELE, *supra* note 167, at 162–63 (describing distrust students of color may have about feedback and utility of wise feedback).

194. Darling-Hammond & Holmquist, *supra* note 24, at 24 (citing MICHAEL HUNTER SCHWARTZ ET AL., *WHAT THE BEST LAW TEACHERS DO* 22 (2013)).

195. STEELE, *supra* note 167, at 163.

[I]f a white [professor] knows that she is doing right by her students . . . 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.¹⁹⁶

C. Recognize and Reduce Microaggressions

Macroaggressions and microaggressions are outward manifestations of the biased belief systems discussed above. Macroaggressions are “obviously wrong and offensive” behaviors and practices, while microaggressions are more “isolated” and less obviously questionable.¹⁹⁷ While there are plenty of instances of macroaggressions in the academic environment, which are clearly offensive, microaggressions are difficult to combat because a microaggressor may deny any wrongdoing, and may even believe she has done nothing objectionable.¹⁹⁸

Microaggressions can be difficult to discern and interpret for both the target and the microaggressor, and this is part of the danger. When a microaggressor comments “I don’t see color,” the hidden message is “I do not recognize your unique cultural experience and background,” not “I am not racist.”¹⁹⁹ When a person of color is mistaken for a service worker, the hidden message is “people of color are usually servants to Whites who do not occupy managerial or professional positions,” not “I made an honest mistake.”²⁰⁰ Microaggressions can be outwardly derogatory, such as when Darlene’s constitutional law professor associated black Americans with “the ghetto.”²⁰¹ Microaggressions can also be cloaked as compliments. For example, commenting with surprise that a black student is articulate may actually communicate a negative stereotype: “Most Black people cannot speak properly.”²⁰² There are three general categories of microaggressions: (1) microinsults, a verbal communication that evidences cultural insensitivity; (2) microinvalidations, communication that negates the experience of a person of color; and (3) microassaults, conscious derogations like avoidant behavior or name-calling.²⁰³ For the general purpose of discussion in this Article, I will use the term “microaggression” to refer to all three categories.

Because a microaggression may seem trivial, the target is often perceived as over-sensitive for complaining about the conduct.²⁰⁴ Nuri-Robins and Bundy explain that those experiencing microaggressions are expected to “forgive and

196. GODSIL ET AL., VOL. 1, *supra* note 86, at 53.

197. LINDSEY, ROBINS & TERRELL *supra* note 40, at 113.

198. NURI-ROBINS ET AL., *supra* note 18, at 57.

199. DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER AND SEXUAL ORIENTATION 32 (2010).

200. *Id.* at 33.

201. Evensen & Pratt, *supra* note 1, at 55.

202. *See e.g.*, SUE, *supra* note 199, at 32; *see also id.* at 54 (describing the stress and conflict created by microaggressions that contain “double messages.”).

203. *See* SUE, *supra* note 199, at 29.

204. LINDSEY, ROBINS & TERRELL *supra* note 40, at 113.

forget” the incident.²⁰⁵ A recent video by Fusion Comedy simplified the concept of microaggressions with the following analogy: microaggressions are like annoying mosquito bites, except some people are “bitten” by microaggressions a lot more than others.²⁰⁶ For people who experience microaggressions frequently, it goes beyond being annoying like an isolated mosquito bite; experiencing frequent microaggressions becomes very painful.²⁰⁷ Psychologist Derald Sue explains, “[e]ach small race-related slight, hurt, invalidation, insult and indignity rubs salt into the wounds of marginalized groups in our society.”²⁰⁸

In fact, research suggests that the cumulative experience of microaggressions can negatively impact people of color biologically, cognitively, emotionally, and behaviorally.²⁰⁹ Sue theorizes that microaggressional exposure may cause increased heart rate and blood pressure and, over time, may increase the risk of diseases such as coronary heart disease, diabetes, and hypertension in people of color.²¹⁰ People of color exposed to repeated microaggressions may also be at increased risk for lowered self-esteem, an increased risk of depression, and heightened anxiety.²¹¹

Another detrimental consequence of exposure to microaggressions is what Sue calls “cognitive disruption.”²¹² Since microaggressions can be vague and subtle, the target must expend mental energy interpreting the microaggressor’s action. That may impair the target’s ability to solve other cognitive tasks.²¹³ In 2007, psychologists Salvatore and Shelton published a study examining how microaggressions may disproportionately disrupt cognition based on race.²¹⁴ In the study, subjects were given fictitious hiring materials and asked to evaluate the related hiring decisions.²¹⁵ In the “neutral” hiring condition, there was no apparent discrepancy between the race of the candidate and subsequent hiring decision. In the “ambiguous” condition, which simulated microaggressional behavior, a less qualified candidate was hired over an obviously more qualified candidate of a different race; the hiring officer’s comments in the ambiguous condition were neutral, so it was not obvious that bias was at work.²¹⁶ In the “blatant-prejudice” condition, the less qualified candidate was hired and the hiring officer made biased remarks on the more qualified candidate (such as “too many minority organizations” on the candidate’s resume, or “typical white prep-school kid”).²¹⁷ Each study

205. NURI-ROBINS & BUNDY, *supra* note 41, at 57 (“Micro-aggressions are often treated as isolated incidents, jokes, or insensitive remarks that should be forgiven and forgotten.”).

206. Fusion Comedy, *How Microaggressions Are Like Mosquito Bites*, YOUTUBE (November 13, 2017), <https://youtu.be/hDd3bzA7450> (last visited Jan. 29, 2018).

207. *Id.*

208. SUE, *supra* note 199, at 95.

209. *Id.* at 97.

210. *Id.* at 98.

211. *Id.* at 98–100.

212. *Id.* at 101.

213. *See id.* at 101 (citing Jessica Salvatore & J. Nicole Shelton, *Cognitive Costs of Exposure to Racial Prejudice*, 18:9 PSYCHOL. SCI. 810, 810–15 (2007)).

214. Salvatore & Shelton, *supra* note 213.

215. *Id.* at 812.

216. *Id.* at 812–13.

217. *Id.* at 813.

participant then took the “Stroop” color-word test, an accepted measure of cognitive impairment.²¹⁸ While white participants experienced more cognitive disruption in the “blatant-prejudice” condition, the cognitive impairment of black participants was more pronounced in the “ambiguous” condition.²¹⁹ Salvatore and Shelton theorized that while the black participants were better equipped (compared to white participants) to respond to blatant prejudice, ambiguous forms of prejudice disrupted cognition.²²⁰

Legal scholarship has also explored the ways macroaggressions and microaggressions affect legal education.²²¹ In a recent article exploring the experiences of academically-dismissed students of color, Assistant Dean for Academic Services Erin Lain interviewed several students who described experiencing microaggressions from law professors.²²² One student, who was the only Latino student in his legal writing class, describes his interactions with his professor:

The way she worded things, she was like you need to learn how to write, your English is not that good when it comes to law writing. I was like . . . get a little better selection with your words. I think I still have her emails saved. The month before school was over, she basically sent me a reminder, sending my grade back, and she said “No matter what you learn and where you go, you should learn to write in English well.”²²³

Lain observed that the student “experienced a lot of frustration” and was “very demoralized” over time because of “what he perceived as differential treatment” from the legal writing professor.²²⁴ Notably, the student hesitated in describing his experience during the interview due to concerns about being considered oversensitive; he did not want his experiences to be dismissed as another student of color being “upset” or “biased” and wanted to ensure “his feelings would be taken seriously.”²²⁵ While it may have been true that this student’s writing needed improvement, the tenor of his legal writing professor’s comments communicated a

218. *Id.* at 813.

219. *Id.* at 814.

220. *Id.*

221. See, e.g., Jodie-Marie Masley, *Testimony of Chrystal Blossom James*, 12 BERKELEY LA RAZA L. J. 433 (2001) (describing testimony of witness for Intervening Defendants in trial of *Grutter v. Bollinger*); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 448 n.121 (2014) (discussing student complaints of microaggressions at UCLA School of Law and Harvard Law School); Janee T. Prince, “*Can I Touch Your Hair?*” *Exploring Double Binds and the Black Tax in Law School*, 20 U. PA. J. L. & SOC. CHANGE 29 (2016) (discussing law school experiences of black women law students).

222. Erin Lain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal*, 45 J. L. & EDUC. 279 (2016).

223. *Id.* at 315.

224. *Id.*

225. *Id.* at 314. The legal writing classroom may be a particularly useful place to begin implementing culturally proficient instruction. See Johanna K.P. Dennis, *Ensuring A Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 TEX. WESLEYAN L. REV. 613 (2010).

negative stereotype about the ability of Latinos to speak English. The feedback he received was therefore hurtful rather than constructive.

As with bias, legal educators can reduce macroaggressions and microaggressions in teaching by using the tenets of culturally proficient instruction. The paradigm delineates a process for addressing macroaggressions and microaggressions.

The Cultural Proficiency Continuum is helpful with macroaggressions and microaggressions, as it is with bias, to isolate and identify behavior patterns. In fact, macroaggressive and microaggressive behaviors map on to the Continuum at the same points as do explicit biases and implicitly held biases. For example, macroaggressions are considered culturally destructive or culturally incapacitated behaviors, and they fall at the beginning of the Continuum. In contrast, microaggressions fall further along the Continuum at Cultural precompetence. Moving toward culturally competent and culturally proficient instruction requires a law professor to mitigate macroaggressions and microaggressions in his teaching. Lindsey, Robins, and Terrell explain the utility of the Cultural Proficiency Continuum in identifying macroaggressive and microaggressive behavior:²²⁶

Culturally proficient leaders are able to identify macro- and microaggressive behaviors and practices, and they use the Continuum to provide perspective for examining policies, practices, and procedures in a school by giving reference points and a common language for describing historical or current situations. It is easy to assign a point on the Cultural Proficiency Continuum to events that have resulted in people being murdered, maimed, or exploited by dominant and destructive groups. Identifying how students' opportunities have been preempted, denied, limited, or enhanced, however, may be more difficult to categorize.²²⁷

Thus, Lindsey, Robins, and Terrell have found the Continuum particularly useful in naming microaggressions, which tend to be harder for the most well-intentioned educator to identify.

The culturally proficient law professor seeking to reduce macroaggressions and microaggressions can then leverage the five Essential Elements. By assessing culture in the first element, law professors have the tools to examine the beliefs producing the underlying conduct before it manifests into a macroaggression or microaggression. In learning to value diversity through the second element, a law professor must intentionally align her behavior with her inner belief that cultural difference among her students enriches the learning environment. The third element, managing the dynamics of difference, requires a law professor to navigate a diverse environment effectively, in a culturally proficient way, instead of ineffectively, which would produce macroaggressions and microaggressions. Adapting to diversity, in the fourth element, mitigates macroaggressions and microaggressions because educators scrutinize and change offending policies and practices. By institutionalizing cultural knowledge, the lessons and knowledge acquired about

226. LINDSEY, ROBINS & TERRELL, *supra* note 40, at 113.

227. *Id.* at 114.

mitigation of macroaggressions and microaggressions is instilled in the culture of the law school and exists independent of changing administration.

Finally, the barriers to Cultural Proficiency recognize the difficulties in combating macroaggressions and microaggressions in legal education. Indeed, the barriers are particularly useful in identifying challenges to changing behavior. For example, well-intentioned law professors may behave in ways that can still be considered microaggressions. Law faculty may resist change because they hesitate to acknowledge that their behavior constitutes a microaggression. Microaggressions are highly situational—they can be both “ambiguous and contextualized.”²²⁸ Behaviors or statements that are appropriate in one environment may not be appropriate in another environment.²²⁹ Not understanding the need to adapt to dynamic diverse environments is therefore a second barrier to culturally proficient instruction. A law professor that explicitly or implicitly favors one type of student over others based on perceived merit (instead of acknowledging his own internally-held beliefs rooted in bias), is prevented from delivering culturally proficient instruction by the presumption of entitlement. Finally, systems of oppression and privilege may limit the way law professors perceive and label their macroaggressive and microaggressive behavior as it does with biased belief systems.

CONCLUSION

Bringing a cultural proficiency paradigm into legal education empowers law professors and administrators to transform laws schools into culturally proficient spaces. While earlier scholarship advocated the need for adoption of a cultural proficiency paradigm in legal education, this Article took the next step in examining the threshold steps a law professor can take toward culturally proficient instruction. Structural diversity is not enough to effect cultural change in the hallways of legal education; law professors must take up the charge to deliver culturally proficient instruction to their students.

228. *See id.* at 113.

229. *Id.*