

7-2022

What's (Race in) the Law Got to Do With It: Incorporating Race in Legal Curriculum

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CONNECTICUT LAW REVIEW

VOLUME 54

JULY 2022

NUMBER 4

Essay

What's (Race in) the Law Got to Do With It: Incorporating Race in Legal Curriculum

SONIA M. GIPSON RANKIN

Gen Z is defined as including persons born after 1996 and, in 2018, the first Gen Z would have been twenty-two years old, the historically traditional age that many complete undergraduate studies and enter law school. With Gen Z entering law schools, the legal academy has been wholeheartedly preparing for the arrival of the first truly digital native generation in a myriad of ways. However, law training has been slow to progress in addressing the unspoken complexities of context and unconscious bias in the classroom with this population. Today's Gen Z students were predominately raised in de facto segregated schools and communities reminiscent of the Silent Generation of those born between 1920s and 1940s. The legal academy now has a critical opportunity to educate future attorneys, legal scholars, executives, judges, and legislators through guided classroom discussions on systemic racism and unconscious bias beginning in their first year of law school. By embedding these conversations in legal education, students can shape their understanding of the cases they study and learn additional nuances to address in the law. Cognitive dissonance explains why conversations about race and discrimination require a purposeful focus. After helping students understand why they might have a visceral reaction to discussions about race, and helping them understand how to become receptive to new insights, the instructor can then introduce students to structural racialization and structural racism at a macro-level. This Essay outlines cognitive dissonance theory, color blindness ideology, and its relationship to racial inequality, while providing classroom techniques that encourage dialogue related to conversations on equity and race. These classroom strategies will help professors' awareness of equity in the legal profession and the justice system.

ESSAY CONTENTS

INTRODUCTION	925
I. COGNITIVE DISSONANCE AND RACE	928
A. CREATING A SHARED STARTING POINT	931
B. COGNITIVE DISSONANCE	934
C. RACIALIZED IDEOLOGY	936
II. TIPS FOR CLASSROOMS.....	940
A. WHAT LAW SCHOOLS ARE DOING ABOUT IMPLEMENTING RACE-RELATED DISCUSSIONS IN CURRICULUM AND CLASSROOMS	940
B. EXAMPLES OF RACIAL COGNITIVE DISSONANCE AND THE PRACTICE OF LAW	942
C. TEACHING GROWTH MINDSET AND COGNITIVE DISSONANCE ADAPTATION.....	947
D. SPEAKING ON INDIVIDUAL LIVED EXPERIENCES AND UNDERSTANDING YOURSELF	949
CONCLUSION	952



What's (Race in) the Law Got to Do With It: Incorporating Race in Legal Curriculum

SONIA M. GIPSON RANKIN *

INTRODUCTION

“What’s love got to do, got to do with it?

What’s love but a second-hand emotion?”¹

These lyrics are from Tina Turner’s award-winning song, “What’s Love Got to Do with It.”² As Ms. Turner sang, she questioned whether two distinct sentiments—physical attraction and love—could simultaneously coexist in an individual and not be in conflict. In the state of Oklahoma, a similar question has been asked and answered. In 2019, as Oklahoma acknowledged, mourned, and showed a repentant spirit related to the Tulsa Race Massacre of 1921, by acknowledging that “state academic standards required for the first time that Oklahoma history classes include in-depth lessons on the massacre, including the ‘emergence of “Black Wall Street” in the Greenwood District’ and the ‘causes of the Tulsa Race Riot and its continued social and economic impact.’”³ However, a mere two years later in 2021, Oklahoma Governor Kevin Stitt signed legislation banning the teaching of concepts that cause any

* Many thanks to Abby Booth and Joan Bosma, *Connecticut Law Review* Symposium Editors, for inviting me to participate in the *Connecticut Law Review* Symposium entitled “The Tulsa Race Massacre: What’s the Law Got to Do With It” on October 22, 2021. Thank you to my husband, Eric Rankin, for his support. My gratitude to Rodney Bowe and the Men of Color Initiative at the University of New Mexico for allowing me to develop this topic for them, and to Sherri Burr and Brian Pori who encouraged me to publish this work. I thank Nathalie Martin, Joshua Kastenberg, Marsha K. Hardeman, and Alfred Mathewson for their kind review, and I thank my research assistant, Zachary Grant, for his outstanding assistance. Finally, I thank Dean Eboni Nelson for her leadership at the University of Connecticut School of Law. This work is dedicated to my parents, David and Sheila Gipson, and, of course, Ms. Tina Turner.

¹ TINA TURNER, *What’s Love Got to Do with It*, on PRIVATE DANCER (Capitol Records Inc. 1984).

² “What’s Love Got to Do with It” peaked at No. 1 on the Billboard Hot 100 for three weeks. *Chart History: Tina Turner*, BILLBOARD, <https://www.billboard.com/artist/tina-turner/chart-history/hsi/> (last visited Jan. 17, 2022). It was the most popular single on Turner’s most successful solo album, *Private Dancer*, which sold over twenty million copies worldwide. *Tina Turner*, BRITANNICA, <https://www.britannica.com/biography/Tina-Turner> (last visited Jan. 17, 2022). In 1984, the song won the Grammy for Record of the Year. RECORDING ACAD. GRAMMY AWARDS, *1984 GRAMMY Winners: 27th Annual GRAMMY Awards*, <https://www.grammy.com/awards/27th-annual-grammy-awards> (last visited Jan. 17, 2022).

³ Tawnell D. Hobbs, *New Oklahoma Law Sparks Debate Over Teaching About Tulsa Massacre*, WALL ST. J. (May 29, 2021, 9:00 AM), <https://www.wsj.com/articles/new-law-threatens-lessons-about-tulsa-race-massacre-11622293201> (quoting OKLA. STATE DEP’T OF EDUC., OKLAHOMA ACADEMIC STANDARDS FOR SOCIAL STUDIES 45 (2019), <https://sde.ok.gov/documents/2019-05-22/social-studies-standards-2019>).

individual to “feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex” in response to the manufactured crisis of Critical Race Theory being taught in schools.⁴ How can a state memorialize the Massacre committed by United States citizens against United States citizens because of their race and simultaneously ban discussions on the systems that caused the Massacre to occur in the first place? Given the historic event in Oklahoma, how can educators be expected to discuss the past, present, and future of their communities without discussing the root racial ideology that drive the outcomes?

The subtitle of the 2021 *Connecticut Law Review* Symposium, “What’s the Law Got to Do With It?”⁵ provides insights into why cognitive dissonance has such an impact on discussing race in legal education. In the same way that Ms. Turner sang that love can be a second-hand emotion in relationship-building, race is often treated as a second-hand consideration in legal education and bar examinations. This discounting is impacting the future of the legal profession.

Born after 1996,⁶ Gen Z students currently represent a sizable portion of law school students.⁷ The legal academy has attempted to adjust for the arrival of Gen Z students in a myriad of ways. By the time Gen Z-ers enter the legal profession, e-filing, virtual hearings, and cloud computing will always have been the norm to which they are accustomed. For example, law schools have incorporated digital technology into their admissions process, curriculum, and bar exam preparation. Legal education has adopted better practices, as well, such as doctrinal classes incorporating clinical training and other experiential learning; flipped classes, mini-lectures, and group work; and formative assessments, including, inter alia, midterms, quizzes, multi-tasking activities, and oral and written feedback. However, it was not

⁴ OKLA. STAT. tit. 70, § 24-157(B)(1)(g) (2021). Governor Kevin Stitt signed this legislation on May 7, 2021, just weeks before the 100th commemoration of the Tulsa Race Massacre. Hobbs, *supra* note 3. A wave of similar legislation has appeared in “Republican-led states scrutinizing and seeking to reshape how teachers talk about race.” Hannah Knowles, *Critical Race Theory Ban Leads Oklahoma College to Cancel Class that Taught ‘White Privilege’*, WASH. POST (May 29, 2021, 8:00 AM), <https://www.washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/>.

⁵ Camille Chill, *Connecticut Law Review Symposium to Examine Tulsa Race Massacre*, UCONN TODAY (Oct. 12, 2021), <https://today.uconn.edu/2021/10/connecticut-law-review-symposium-to-examine-tulsa-race-massacre/>.

⁶ Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*, PEW RSCH. CTR. (May 14, 2020), <https://www.pewsocialtrends.org/essay/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far/>.

⁷ In 2018, the first Gen Z-er would have been twenty-two years old, which is the historically traditional age that many complete undergraduate studies and are then eligible to attend law school. *See supra* note 6 and accompanying text; *see also* Gabriel Kuris, *Advice for Older Law School Applicants to Consider*, U.S. NEWS (Jan. 27, 2020), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/advice-for-older-law-school-applicants-to-consider#:~:text=Although%20most%20applicants%20are%20under,those%20that%20law%20school%20provides> (“[M]ost [law school] applicants are under 25 . . . according to the Law School Admission Council.”).

until the murder of George Floyd that the academy turned its efforts to accomplish a long-needed reform: bias and equity education.

Despite the American Bar Association's (ABA) Goal III to "Eliminate Bias and Enhance Diversity" in the legal profession and the justice system,⁸ legal education has been slow to progress in addressing the unspoken complexities of context and unconscious bias in and beyond the classroom.⁹ Gen Z students were predominately raised in de facto segregated schools and communities reminiscent of those inhabited by the Silent Generation, born between 1928 and 1945.¹⁰ For many students, college and law school will present the first time they are educated in multicultural settings.¹¹ The legal academy has a critical opportunity to educate future attorneys, legal scholars, executives, judges, and legislators through guided classroom discussions on systemic racism and unconscious bias beginning in the first year of law school. By embedding these conversations in a law school education, students can shape their understanding of the cases they study and learn additional nuances to address in the law. Cognitive dissonance explains why conversations about race and discrimination require a purposeful focus.¹²

In this Essay, Part I describes cognitive dissonance theory, color blindness ideology, and the relationship of these theories to racial inequality. Part II outlines the knowledge, skills, and values students need to discuss racial inequality in law school classrooms. It also provides classroom techniques that encourage dialogue and address tensions related to difficult conversations, using implicit bias and microaggressions in the legal community as examples. This training can serve as teaching and modeling for students to lead peer conversations and support students' preparation for working with clients. Part III concludes that adding these skills and training to our curricula could lead to much-needed systemic change in the legal profession and in society.

⁸ *Goal III*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/ (last visited Mar. 8, 2022) (stating that the ABA House of Delegates adopted Goal III in 2008, when it reformed its goals and mission).

⁹ I am in my fourth year of teaching law full time. It has been rewarding to lead students through the study of law. However, it always surprises me to see blank faces when students are presented with the opportunity for critical legal discussions that derive from living in a multicultural society.

¹⁰ Parker & Igielnik, *supra* note 6. Because of the United States Supreme Court's retreat from standing and class action recognition, the re-segregation of schools has slowly occurred. *See generally* Allen v. Wright, 468 U.S. 737, 766 (1984) (finding that the parties lacked standing to sue where the policies of a government agency were alleged to inadequately prevent school segregation).

¹¹ *See infra* Part I.B.

¹² Julie A. Seaman, *Cognitive Dissonance in the Classroom: Rationale and Rationalization in the Law of Evidence*, 50 ST. LOUIS U. L.J. 1097, 1110–11 (2006).

I. COGNITIVE DISSONANCE AND RACE

When I teach my torts lecture on damages, I conclude with a query to my students: “How much is an eye worth?” Students report back with recommended compensatory and punitive damages estimates, having reviewed the value of an eyeball and focusing on life expectancy tables, work-life expectancy tables, average-wage tables, and previous tort awards. I then follow with the question: “How much is *your* eye worth?”¹³ This opens a conversation on the impact of race and gender on tort awards.¹⁴ I set the space with a few ground rules. First, what happens in our discussion stays in our discussion. We will learn how to dialogue with each other. And I let students know that they will not always be comfortable, but they should always feel safe. If they do not feel safe, I encourage them to come talk with me privately to better discuss their metacognitive development. I describe the intent of the discussion: (1) to outline the connection between cognitive dissonance theory, colorblindness ideology, and the relationship to racial inequality; (2) to develop the knowledge, skills, and confidence needed to successfully address racial controversies in the classroom; and (3) to practice classroom techniques that encourage dialogue and diffuse tensions related to difficult conversations, using implicit bias as an example. The reasons for these learning goals are to give students a concrete understanding of the scope of the conversation and to provide students with practical skills they can use in the profession. Professors should remind themselves of their students’ backgrounds before preparing a lecture on implicit bias. As professors are not monolithic, neither are our students and our role is to plant seeds for further exploration on the topic of structural racism.

Reports over the past twenty years predicted that the United States would eventually become a “majority-minority” country, but the 2020 Census results show that the nation’s growth in racial and ethnic diversity is happening even faster than predicted.¹⁵ With the increased evolution of how race and ethnicity are measured in the United States, which includes allowing people to self-identify,¹⁶ the 2020 Census shows a more culturally,

¹³ See generally MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010) (recognizing “that tort claims themselves are not always neutral . . . [and] often have racial or gendered character”); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017) (addressing “deficiencies” in tort law’s damage calculations).

¹⁴ See Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 ST. JOHN’S J. LEGAL COMMENT. 667, 695–97 (2008) (providing an example of teaching race in antitrust).

¹⁵ Reid Wilson, *New Census Data to Show US Diversifying at Fastest Rate Ever*, HILL (Aug. 11, 2021, 1:21 PM), <https://thehill.com/homenews/state-watch/567383-new-census-data-to-show-us-diversifying-at-fastest-rate-ever>.

¹⁶ *U.S. Decennial Census Measurement of Race and Ethnicity Across the Decades: 1790–2020*, U.S. CENSUS BUREAU, <https://www.census.gov/library/visualizations/interactive/decennial-census-measurement-of-race-and-ethnicity-across-the-decades-1790-2020.html> (Oct. 14, 2021).

racially, and ethnically diverse America than in generations past. The U.S. Census Bureau's press release shows an 8.6% decrease in people who identified as "White only" since 2010.¹⁷ The "two or more races" population, which is also identified as a "multiracial population," had a 276% increase from 9 million people in 2010 to 33.8 million people in 2020.¹⁸

As is the case with the people in the 2020 Census data, it can be presumed by law schools that entering 1Ls will continue to be increasingly diverse.¹⁹ The ABA Annual Questionnaire Report for 2018 shows that 31.2% of entering 1Ls identified as a person from a historically excluded population²⁰ and that about half of all applicants were between twenty-two and twenty-four years old.²¹

There is a high probability that the "students of color"²² in law school classrooms attended K–12 schools which were predominately populated by other students of color. There is also a high probability that the white students attended schools that were largely populated by other white students. Over the last decade, there has been continuous reporting about the whitening of white neighborhoods. Schools that had a predominantly Black student body were losing white students, and schools that had a primarily white student population did not increase the number of students of color.²³

¹⁷ Press Release, U.S. Census Bureau, 2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.

¹⁸ *Id.* With respect to ethnicity, only the Hispanic/Latino population has been counted at this time, and it included 62.1 million people in 2020. *Id.* The Hispanic/Latino population "grew 23%, while the population that was not of Hispanic or Latino origin grew 4.3% since 2010." *Id.*

¹⁹ Though likely at a slower pace than societal changes.

²⁰ *Statistics*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/ (last visited Feb. 24, 2022) (hyperlinking *2020 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/ (Dec. 18, 2020)).

²¹ See KIM DUSTMAN & ANN GALLAGHER, LAW SCH. ADMISSION COUNCIL, ANALYSIS OF ABA LAW SCHOOL APPLICANTS BY AGE GROUP: 2011–2015 1 fig.1 (2017), <https://vdocuments.net/analysis-of-aba-law-school-applicants-by-age-group-2011-2015-age-the-following.html> (showing notable differences between categories). Caucasian/White and Asian applicants were generally younger than applicants in other race/ethnicity categories, and they had higher percentages in the twenty-five to twenty-six category and younger categories. *Id.* at 3 fig.3. American Indian, Black/African American, and Native Hawaiian/Other Pacific Islander categories had higher percentages of applicants over the age of thirty. *Id.*

²² A more accurate description would be students from historically excluded communities or calling each group by their public title: Black, Indigenous, Hispanic/Latino/Latina, or Asian American. See generally Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115 (2021).

²³ See generally RICHARD ROTHSTEIN, ECON. POL'Y INST., FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH (2013), <https://files.epi.org/2013/Unfinished-March-School-Segregation.pdf> (describing the steps taken to "legally" establish de facto segregation in public schools). See, e.g., Tanvi Misra, *The Stubborn Whiteness of White Neighborhoods*, BLOOMBERG (Dec. 14, 2016, 5:41 PM), <https://www.bloomberg.com/news/articles/2016-12-14/cities-get-more-diverse-but-white-neighborhoods-lag> (providing data about the lack of diversity in white neighborhoods); Beverly Daniel Tatum, Opinion, *Segregation Worse in Schools 60 Years After Brown v. Board of Education*, SEATTLE TIMES, <https://www.seattletimes.com/opinion/segregation-worse-in-schools>

The Othering & Belonging Institute at the University of California, Berkeley found that more than 80% of large metropolitan communities in the United States were more segregated in 2019 than in 1990 and that the most segregated regions were the Midwest, Mid-Atlantic, and West Coast, rather than the South, where the Civil Rights Movement was centered.²⁴ Thus, students have experienced segregated educational spaces. In addition, the curriculum they receive today reaffirms the same racially biased history lessons that their great grandparents received 100 years earlier.

The content students historically have learned across the country teaches extraordinarily little about the realities of racism related to the Civil War in the United States. The Southern Poverty Law Center uncovered startling information about the teaching and learning of such information in United States public education. While it is heartening that most teachers (71%) cover the economic motivations behind slavery, it is disappointing that just over half (52%) teach about the legal roots of slavery in the nation's founding documents, the diverse experiences of enslaved persons (55%), and the continuing legacy of slavery today (54%).²⁵ Only 8% of U.S. high school seniors could identify slavery as the central cause of the Civil War,²⁶ and very few high school seniors (12%) “could correctly answer that slavery was essential to driving the northern economy before the Civil War.”²⁷

-60-years-after-brown-v-board-of-education/ (Sept. 14, 2017, 3:06 PM) (showing how the number of intensely segregated schools increased after desegregation policies were curtailed); Alvin Chang, *White America Is Quietly Self-Segregating*, VOX, <https://www.vox.com/2017/1/18/14296126/white-segregated-suburb-neighborhood-cartoon> (Jul. 31, 2018, 8:26 AM) (“[D]ata shows that as minorities move into suburbs, white families are making small and personal decisions that add velocity to the momentum of discrimination.”).

²⁴ Stephen Menendian, Samir Gambhir & Arthur Gailles, *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, UNIV. OF CAL., BERKELEY: OTHERING & BELONGING INST., <https://belonging.berkeley.edu/roots-structural-racism> (June 30, 2021). The Othering & Belonging Institute, directed by John A. Powell, is a multidisciplinary research hub encompassing academia and community partners who “examine and remediate the processes of exclusion, marginalization, and structural inequality—what [they] call othering—in order to build a world based on inclusion, fairness, justice, and care for the earth—what [they] call belonging.” *Our Story*, UNIV. OF CAL., BERKELEY: OTHERING & BELONGING INST., <https://belonging.berkeley.edu/our-story> (last visited Feb. 3, 2022).

²⁵ S. POVERTY L. CTR., *TEACHING HARD HISTORY: AMERICAN SLAVERY 22–23* (2018), https://www.splcenter.org/sites/default/files/tt_hard_history_american_slavery.pdf. SPLC notes that these self-reported accounts do not measure the quality, substance, or extent of the coverage given to topics. *Id.*

²⁶ *See id.* at 22 (“Almost half of the respondents (48[%]) said tax protests were the cause; it is possible that they confused the Civil War with the Revolutionary War, but that is its own particular problem, given that all the other questions in the survey were about slavery in some form. That gap shows just how resistant students are to identifying slavery as the central cause of the Civil War.”).

²⁷ *Id.* at 17. There is a disconnect between professional historians and teachers in schools, as well as community attitudes about race. A survey of the most prominent scholars of United States history in the last century concluded that slavery was the central cause of the Civil War. Pulitzer Prize-winning journalist Nikole Hannah-Jones commemorated the 400th anniversary of the arrival of enslaved Africans to Virginia. Nikole Hannah-Jones, *The Idea of America*, N.Y. TIMES MAG.: 1619 PROJECT (Aug. 14,

With these realities permeating secondary education, how can law professors be prepared to discuss racial profiling or the Tulsa Race Massacre with students raised in homogeneous communities that have not had much interaction with other racial groups and have not learned about critical points in United States history? Professors should begin by discussing cognitive dissonance.

A. *Creating a Shared Starting Point*

“[W]hen you know better, you do better.”²⁸

Race and culture scholars, sociologists, and legal scholars have created, defined, and discussed rich, nuanced, and courageous definitions related to diversity, equity, inclusion, and justice. When law professors deliver this information, it is greeted by students with varying responses. It can be disconcerting for a professor and for students, especially since students either respond to the terms with derision or immediate acceptance, though none can articulate where their ideology originated. So, I start my lecture with humor and pop culture, poking fun at my own lived experience as a “Jersey Girl.” I ask, “I am from New Jersey. What TV show comes to mind?” Students regularly say *Jersey Shore*, *The Sopranos*, or *The Real Housewives of New Jersey*. I quip that I have yet to hear students state the highly acclaimed, well-regarded show *House*. *House* portrayed the most brilliant diagnosticians on the planet based in Princeton, New Jersey.²⁹ I

2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>. The seventeenth century set the foundation for the development of the nation, as well as the legal foundation for the South to one day secede from the Union. *Id.* Jill Lepore, Professor of American History at Harvard University, has documented the use of slavery as the foundation for the Constitution, the United States, and the Civil War. *See generally* JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES (2018). Scholars such as David Potter, Sean Wilentz, and C. Vann Woodward also capture this reality. *See generally* DAVID M. POTTER, THE IMPENDING CRISIS: 1848-1861 (Don E. Fehrenbacher ed., 1976); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 226 (2005); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 11-12 (2002). Additionally, MacArthur Fellow Ta-Nehisi Coates captured the history of the Civil War in much of his writing for *The Atlantic* and a much-followed Twitter discussion with President Trump’s Chief of Staff and retired four-star Marine General, John Kelly. Avery Anapol, *Ta-Nehisi Coates Responds to Kelly’s ‘Compromise’ Comments in Viral Twitter Thread*, HILL (Oct. 31, 2017, 9:12 AM), <https://thehill.com/blogs/ballot-box/357956-ta-nehisi-coates-responds-to-kellys-compromise-comments-in-viral-twitter>. One explanation for this disconnect is that federal courts have greenlit re-segregation, and attitudes of fairness and historic truth have fallen victim to approved cognitive dissonance.

²⁸ THE POWERFUL LESSON MAYA ANGELOU TAUGHT OPRAH (Oprah Winfrey Network broadcast Oct. 19, 2011), <https://www.oprah.com/oprahs-life/class/the-powerful-lesson-maya-angelou-taught-oprah-video> (quoting Dr. Maya Angelou).

²⁹ *House* aired on Fox from 2004 to 2012, starring Hugh Laurie, and was highly rated and received high critical acclaim. *See* Hugh Davies, *Dr. Laurie Has Viewers of US TV in Stitches*, TELEGRAPH (Nov. 20, 2004, 12:01 AM), <https://www.telegraph.co.uk/news/uknews/1477057/Dr-Laurie-has-viewers-of-US-TV-in-stitches.html>. The show had the second-highest average ranking for the first ten years of IMDb.com. Sophie Schillaci, *Johnny Depp, ‘The Dark Knight,’ ‘Lost’ Named to IMDb’s Top 10 of the Last Decade*,

follow by asking them the question, “Why?” Why do certain shows come to mind before others? I call this the *Inception-Blink* factor. *Inception* is a 2010 science fiction film by Christopher Nolan that presents the premise that there can be an idea embedded so deeply into a person that they cannot unpack its root foundation.³⁰ *Blink: The Power of Thinking Without Thinking* is a book by Malcolm Gladwell, published in 2005, about how people can make decisions in the blink of an eye, despite the vast amount of information they are sorting through in that millisecond to make their decisions.³¹ These two words tell the story about how people think.

Inception and *Blink* help explain why cognitive dissonance is so challenging for people to understand. People might think, “I know there is an idea in me, and I know it contradicts things I say that I believe. But I am not able to unpack where it comes from, and I do not feel I can change my split-second reactions in certain scenarios.” There is quite a bit of truth to this idea. The human brain receives and processes about eleven million pieces of information every second,³² though it can only consciously process ten to fifty bits, using cognitive shortcuts based on past knowledge to make assumptions about the next moment.³³ Additionally, the brain makes decisions up to ten seconds before a person realizes it,³⁴ suggesting that most of our “conscious” decisions are actually unconscious. We are searching for conclusions that are “familiar, safe, likeable, valuable, and logical.”³⁵

Discussions on race and equity begin with understanding one’s own perspectives and biases. Class matters. Poverty is a significant obstacle to success. Even so, within-class racial disparities remain. I believe race matters as all indicators of well-being show disparities by race within class

HOLLYWOOD REP. (Jan. 25, 2012, 1:58 PM), <https://www.hollywoodreporter.com/movies/movie-news/brad-pitt-johnny-depp-dark-knight-lost-imdb-top-10-284912>.

³⁰ INCEPTION (Warner Bros. Pictures & Legendary Entertainment 2010).

³¹ See generally MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005). And as I continue to evolve my work, I will look to incorporate examples that relate to Gen Z and Gen Alpha (the next identified generation). Joe Pinsker, *Oh No, They’ve Come Up with Another Generation Label*, ATLANTIC (Feb. 21, 2020), <https://www.theatlantic.com/family/archive/2020/02/generation-after-gen-z-named-alpha/606862/>.

³² TOR NØRRETRANDERS, THE USER ILLUSION: CUTTING CONSCIOUSNESS DOWN TO SIZE 126, 242 (1991).

³³ *Id.* at 242; Richard L. Byyny, *Cognitive Bias: Recognizing and Managing Our Unconscious Biases*, PHAROS, Winter 2017, at 2, 2. Other social psychologists conclude that the human unconscious brain sorts through millions of pieces of information at any given moment; but, at the conscious level, the brain can process only between five to nine pieces of information at a time. See generally George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCH. REV. 81 (1956) (“There is an upper limit on our capacity to process information on simultaneously interacting elements with reliable accuracy and with validity.”).

³⁴ Kerri Smith, *Brain Makes Decisions Before You Even Know It*, NATURE (Apr. 11, 2008), <https://doi.org/10.1038/news.2008.751>.

³⁵ Megan Bedford, *Unconscious Bias in Healthcare*, QUALITY INTERACTIONS (Mar. 15, 2018, 11:49 AM), <https://www.qualityinteractions.com/blog/unconscious-bias-in-healthcare>.

groupings.³⁶ Place matters as access to resources is connected to physical locations (rural, urban, suburban), and these spaces may be “racialized.” Additionally, every person should have a voice in matters that affect them. Race, class, and place can impact the way people experience life, and one’s own race, class, and place can influence how individuals lead their lives.³⁷ Dr. Maya Angelou’s quote³⁸ is true: humans are built with a capacity to adapt, since these are lifelong explorations. When beginning a difficult conversation, it is important to acknowledge one’s own biases. It is positive modeling for students to observe their professors showing vulnerability and a growth mindset towards their own racial-awareness journey.

After this discussion, I introduce basic terms and concepts. I simplify my use of terms to offer a shared starting point before delving into teaching cognitive dissonance. For example, I define race as “[a] socially constructed characterization of individuals based on skin color, culture, etc.”³⁹ I define stereotypes as overgeneralizations about the appearance, behavior, or other characteristics of all members of a category.⁴⁰ Though bias and prejudice can have much more nuanced definitions, I present them as “differential

³⁶ See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 218, 220 (1993) (“On almost any measure of social and economic well-being, blacks and Puerto Ricans come out near the bottom.”); Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1211 (2004) (“Sociological research reveals that poor persons of color, unlike poor whites, tend to live in areas of concentrated poverty, where they lack access to important social resources, such as adequate education, housing, and employment opportunities.”).

³⁷ See generally JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* (2003).

³⁸ See THE POWERFUL LESSON MAYA ANGELOU TAUGHT OPRAH, *supra* note 28 (“[W]hen you know better, you do better.”).

³⁹ *The Equity Committee*, FAM. DEV. CTR., <https://www.thefamilydevelopmentcenter.com/the-equity-committee> (last visited Feb. 19, 2022); see also Todd Beer, *The Social Construction of Race: Fuzzy Boundaries*, SOC’Y PAGES: SOCIO. TOOLBOX (Sept. 10, 2020), <https://thesocietypages.org/toolbox/the-social-construction-of-race-fuzzy-boundaries> (“Racial categories are not fixed, innate, or rooted in biological categories. . . . [R]acial categories are a product of the social context and an expression of power. . . . [It] is an ascribed status, meaning that it is applied or given to a person by others.”)

⁴⁰ See Kimberly Holt Barrett & William H. George, *Judicial Colorblindness, Race Neutrality, and Modern Racism: How Psychologists Can Help the Courts Understand Race Matters*, in *RACE, CULTURE, PSYCHOLOGY, & LAW* 31, 39 (Kimberly Holt Barrett & William H. George eds., 2005) (“The impact of stereotypes on unconscious processes reveals that there are aspects of prejudice and discriminatory actions that may take place beyond the conscious knowledge of the individual who harbors the stereotypes.”); see also Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”*: *A Call for Self-Reflection*, 15 NEV. L.J. 930, 939 (2014) (“[S]tereotypes are associations between concepts . . . and attributes . . . [that] are automatically accessed in the presence of objects. . . . Even absent a conscious bias[,] . . . everyone perceives, processes, remembers, and synthesizes information about people through the lens of these stereotypes[,] . . . [which] can facilitate the rapid categorization of people and allow us to ‘save cognitive resources.’ However, researchers explain that ‘the price we pay for such efficiency is bias in our perceptions and judgments’”) (footnotes omitted). Professor Gary Blasi also noted, two decades ago, the importance of understanding how stereotypes work in the legal profession because “science suggests that there are, indeed, few advocacy situations where stereotypes are not at work.” Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1241 (2002).

assumptions about the abilities, motives, and intentions of others according to” some characteristic.⁴¹ And I present racism as “a system of structuring opportunity and assigning value based on [how we look] (‘race’), that: unfairly disadvantages some individuals and communities[;] unfairly advantages other individuals and communities[;] [and] undermines realization of the full potential of the whole society through the waste of human resources.”⁴² Bias is further understood as a preference in favor of or in opposition to a thing, person, or group compared with another,⁴³ and unconscious or implicit bias points to “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”⁴⁴

It is important to explain how racism is a part of and apart from general discrimination. Racism is a type of discrimination, and racism is based on a particular type of bigotry, finding itself as a type of group bias that can become institutionalized.⁴⁵ This institutionalization can occur in our laws, schools, places of worship, and social customs.⁴⁶ Scholars argue that only a group with power can impose racist beliefs on our whole society and that the function of racism is to increase that group’s privileges, power, and wealth.⁴⁷ Thus, racism boils down to two elements: *power* as exemplified through politics and *wealth* as defined through economics. Additionally, epidemiologist Dr. Camara Phyllis Jones’ influential work, *Levels of Racism: A Theoretic Framework and a Gardener’s Tale*, identifies and defines racism on three levels: institutional, personally mediated, and internalized.⁴⁸ By starting with this shared foundation of terms, students are then able to transition to cognitive science explanations.

B. Cognitive Dissonance

One reason that it can be difficult to teach and address implicit bias in the classroom is that students (and professors) must learn that their purported

⁴¹ Camara Phyllis Jones, *Action and Allegories*, in *RACISM: SCIENCE & TOOLS FOR THE PUBLIC HEALTH PROFESSIONAL* 223, 233–34 (Chandra L. Ford et al. eds., 2019).

⁴² Camara Phyllis Jones, *Confronting Institutionalized Racism*, 50 *PHYLON* 7, 10 (2002).

⁴³ See, e.g., *Diversity, Equity & Inclusivity: Bias*, SANTA MONICA COLL., <https://www.smc.edu/administration/human-resources/diversity-equity-inclusivity/bias.php#:~:text=Bias%20is%20a%20prejudice%20in,have%20negative%20or%20positive%20consequences> (last visited Mar. 10, 2022) (outlining different types of bias).

⁴⁴ CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015* 62 (2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.

⁴⁵ *Racism, Bias, and Discrimination Resources*, AM. PSYCH. ASS’N, <https://www.apa.org/topics/racism-bias-discrimination> (last visited Mar. 10, 2022).

⁴⁶ *Id.*

⁴⁷ Eduardo Bonillo-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 *AM. SOCIO. REV.* 465, 466, 470 (1996).

⁴⁸ Camara Phyllis Jones, *Levels of Racism: A Theoretic Framework and a Gardener’s Tale*, 90 *AM. J. PUB. HEALTH* 1212, 1212 (2000).

attitudes on cultural, racial, or gender differences do not always align with their behavior and actions. Understanding cognitive dissonance helps start the conversation.

The human brain is amazing. Every instance of new information causes the brain to perceive information, process it, and determine if it should keep, discard, or ponder the new data point.⁴⁹ Most of the information we receive is categorized and processed without our conscious understanding.⁵⁰ The more we are bombarded with exaggerated or false information, the more our brains begin to develop inaccurate, distorted, or overgeneralized ideas.⁵¹

Dr. Robert N. Moles, a British legal scholar and former lecturer at Queen's University of Belfast, United Kingdom, is known for his work on miscarriages of justice.⁵² He notes that dissonance occurs when an individual presents two psychological ideas that appear contradictory.⁵³ He defines cognition as "a piece of knowledge" that "may relate to attitudes, beliefs or knowledge about the world," and he describes dissonance as "aris[ing] when a person has two psychological representations which are inconsistent with each other."⁵⁴ The dissonance produces a feeling of discomfort that leads to an alteration in one of the attitudes, beliefs, or behaviors in order to reduce discomfort and to restore balance.⁵⁵ Cognitive dissonance theory suggests that, as humans, we have an inner drive to hold all our attitudes and beliefs in harmony and thus avoid disharmony.⁵⁶ Psychologist Leon Festinger and

⁴⁹ Howard C. Cromwell et al., *Sensory Gating: A Translational Effort From Basic to Clinical Science*, 39 CLINICAL EEG & NEUROSCI. 69, 69 (2008) ("The ability of the [central nervous system] to inhibit or suppress the response to incoming irrelevant sensory input is a fundamental protective mechanism that prevents the flooding of higher cortical centers with irrelevant information."); see also PAUL THAGARD, *THE BRAIN AND THE MEANING OF LIFE* 46–50 (2010). Dr. Thagard describes the brain as "a bunch of jamming jazz musicians whose coordinated playing emerges from their dynamic interactions," pulling together perception, learning, inference, and language. *Id.* at 46; See also E. Scott Fruehwald, *Bringing Legal Education Reform into the First Year: A New Type of Torts Text*, 50 J. MARSHALL L. REV. 713, 716 (2017) (explaining the neurobiology of learning).

⁵⁰ HUGO MERCIER & DAN SPERBER, *THE ENIGMA OF REASON* 6 (2017).

⁵¹ ROBIN A. WRIGHT, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, RACE MATTERS . . . AND SO DOES GENDER: AN INTERSECTIONAL EXAMINATION OF IMPLICIT BIAS IN OHIO SCHOOL DISCIPLINE DISPARITIES 5 (2016), <http://www.kirwaninstitute.osu.edu/implicit-bias-training/resources/race-matters.pdf>. Cognitive scientists Hugo Mercier and Dan Sperber argue that human reasoning evolved to help people fulfill social functions such as large group cooperation and communication with others, which often do not require people to rely on truth and which allow people to slip into cognitive biases like confirmation bias, where one looks for information that confirms previously held beliefs. MERCIER & SPERBER, *supra* note 50, at 8, 218; see also Steve Rathje, *Why People Ignore Facts*, PSYCH. TODAY (Oct. 25, 2018), <https://www.psychologytoday.com/us/blog/words-matter/201810/why-people-ignore-facts> ("When it comes to reasoning, identity trumps truth.").

⁵² *Dr. Robert Nelson Moles – Curriculum Vitae*, NETWORKED KNOWLEDGE, <http://netk.net.au/Molescv.asp> (last visited Feb. 17, 2022).

⁵³ Robert N. Moles, *Leon Festinger's Theory of Cognitive Dissonance*, NETWORKED KNOWLEDGE, <http://netk.net.au/Psychology/Psychology8.pdf> (last visited Feb. 17, 2022).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

later researchers show that when people are presented with new information, they look for current understandings by rejecting, explaining away, avoiding the latest information, or convincing themselves that there is no conflict.⁵⁷ An example is smoking tobacco. People who smoke (behavior) are aware that smoking can cause cancer (cognition), yet they continue to smoke. These people are described as being in a state of cognitive dissonance.⁵⁸

Dissonance occurs because new information about racial inequalities or injustices can be contrary to memories and experiences created with people who are dear to us. Family traditions, holiday practices, favorite books, movies, and jokes can have histories rooted in racism, and it is uncomfortable to think that family and friends would be the suppliers of racist ideologies. Moles argues that this cognitive dissonance has a profound impact on judicial decision-making related to miscarriages of justice.⁵⁹ After students explore the concept of cognitive dissonance, they are then ready to unpack the ideology that has guided their understanding.

C. *Racialized Ideology*

The term “ideology” can be obfuscated in discussions about race, but it serves as the basis for cognitive dissonance within these discussions. Racialized ideology helps us to rationalize and organize particular social interests. Racist ideologies provide language about culture, race, and even gender differences, as well as an idea about what is normal racial ideology.⁶⁰

⁵⁷ LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2–3 (1957). Jonas T. Kaplan, Sarah I. Gimbel, and Sam Harris found that when people were presented with statements contradicting their political beliefs, their brain activity was similar to how it would be if they were facing imminent threats of physical danger. Jonas T. Kaplan, Sarah I. Gimbel & Sam Harris, *Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence*, 6 SCI. REPS., Dec. 23, 2016, at 1, 5–8, <https://doi.org/10.1038/srep39589>. Other studies show that looking at photographs of politicians we oppose activates the part of the brain that “may generate a more subtle feeling of ‘distaste.’” Jonas T. Kaplan, Joshua Freedman & Marco Iacoboni, *Us Versus Them: Political Attitudes and Party Affiliation Influence Neural Response to Faces of Presidential Candidates*, 45 NEUROPSYCHOLOGIA 55, 61 (2007). Frantz Fanon has often been attributed with this quote related to cognitive dissonance:

Sometimes people hold a core belief that is very strong. When they are presented with evidence that works against that belief, the new evidence cannot be accepted. It would create a feeling that is extremely uncomfortable, called cognitive dissonance. And because it is so important to protect the core belief, they will rationalize, ignore and even deny anything that doesn't fit in with the core belief.

JENNY RITCHIE & MERE SKERRETT, EARLY CHILDHOOD EDUCATION IN AOTEAROA NEW ZEALAND: HISTORY, PEDAGOGY, AND LIBERATION 13 (2013).

⁵⁸ Saul McLeod, *Cognitive Dissonance*, SIMPLY PSYCH. (Feb. 5, 2018), <https://www.simplypsychology.org/cognitive-dissonance.html>.

⁵⁹ Moles, *supra* note 53.

⁶⁰ See Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOCIO. 649, 661 (2006) (analyzing structural racism). Guess states that:

Professor Laura E. Gómez, critical race law scholar, describes these ideas in her seminal work, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, in which she notes that “racial ideology is an essential part of exploring how race and law co-construct each other in ongoing ways.”⁶¹ Students in law school need the opportunity to evaluate case law and statutes⁶² with the following metacognitive questions about the judge who drafted the decision or the legislator who crafted the statute: What was their racial ideology? When they looked at the parties or their constituents, how did they view their worth? Simply, the student should query into the mindset of the judge, then ask how the judge asked and answered this question: Who are these people, and how should they be treated?

[T]he superordinate group, in order to maintain the advantages of its constructed status, must also maintain and sustain the racial ideology of the mass culture, an ideology which “validates” the superordinate group’s position of dominance in the first instance. So, the structural properties of “race,” racialization, racism, white-skin privilege, and asymmetric relations become transformed into structural principles of social organization which constitute the social system of American “race” relations.

Id.; see also Ashley (“Woody”) Doane, *Beyond Color-Blindness: (Re) Theorizing Racial Ideology*, 60 SOCIO. PERSPS. 975, 980 (2017) (discussing, as an example, the racial ideology of color-blindness as “a racial ideology that defended white supremacy while maintaining the ‘nonracist’ presentation that was now socially and politically necessary . . . produc[ing] . . . ‘racism without racists.’”).

⁶¹ Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 501 (2010) (emphasizing that scholars and educators would benefit from unpacking the rise of colorblind ideology because it is deeply rooted in the law and embraced in society at large). Recall the clamoring by media outlets of the “post-racial” political era of America that was being established with the election of President Barack Obama. See, e.g., Daniel Schorr, *A New, ‘Post-Racial’ Political Era in America*, NPR: ALL THINGS CONSIDERED (Jan. 28, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=18489466> (wondering “whether the U.S. is entering a new, ‘post-racial’ political era”); Shelby Steele, Opinion, *Obama’s Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008, 3:00 AM), <https://www.latimes.com/opinion/opinion-la/la-oe-steele5-2008nov05-story.html> (noting the impact of President Obama’s election on race relations); Michael C. Dawson & Lawrence D. Bobo, *One Year Later and the Myth of a Post-Racial Society*, 6 DU BOIS REV. 247 (2009) (looking back on President Obama’s first year in office related to post-racial society claims).

⁶² See Michael T. Gibson, *A Critique of Best Practices in Legal Education: Five Things All Law Professors Should Know*, 42 U. BALT. L. REV. 1, 29 (“[S]tudents have to determine what values that precedent protects, identify its consequences, and critique its weaknesses . . .”). Professor Gibson defines this as Level 6 of Bloom’s Taxonomy, based on Benjamin Bloom’s original taxonomy. *Id.*; TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK 1 COGNITIVE DOMAIN 185–87 (Benjamin S. Bloom et al. eds., 1956). I, however, use the revised Bloom’s Taxonomy from 2001 by Anderson and Krathwohl to change Levels 5 and 6 from Synthesis and Evaluation to Evaluate and Create, respectively. See generally David R. Krathwohl & Lorin W. Anderson, *Merlin C. Wittrock and the Revision of Bloom’s Taxonomy*, 45 EDUC. PSYCH. 64 (2010).

Early framing of modern racial stereotypes began at the formation of the United States.⁶³ In the United States, people were marked by enslavement,⁶⁴ exploitation,⁶⁵ conquest,⁶⁶ exclusion,⁶⁷ and assimilation.⁶⁸ Though many of these codifications in the law would later be repealed, the impact of the initial legislation lingers in society. It begs the question of which came first: the stereotypes or the laws that documented the stereotypes?⁶⁹

In 1896, Justice Marshall Harlan displayed cognitive dissonance in his dissent of *Plessy v. Ferguson*:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.⁷⁰

⁶³ See JOE R. FEAGIN & KIMBERLEY DUCEY, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (4th ed. 2019) (providing a foundation for exploring how racial frameworks would be codified into the United States Constitution and statutes); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (3d ed. 2015) (exploring the social, cultural, political, and economic rationales behind the legal foundation of the casebooks that address the various racial and ethnic categories in Chapters 2 through 6).

⁶⁴ See 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 170 (William Waller Hening ed., 1823) (showing the codification of enslavement in the Virginia Slave Codes of 1662); see also *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (“[T]hey had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

⁶⁵ See Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830) (repealed 1980) (demonstrating the codification of exploitation in the removal of Native Americans from Georgia).

⁶⁶ See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo] (demonstrating the codification of conquest).

⁶⁷ See Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943) (demonstrating the codification of exclusion); see also, e.g., *United States v. Thind*, 261 U.S. 204, 210 (1923) (“[F]ree white persons’ are . . . interpreted in accordance with the understanding of the common man.”).

⁶⁸ See Virginia Racial Integrity Act of 1924, VA. CODE ANN. §§ 20-50 to -60 (1924), *invalidated by Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (demonstrating the codification of assimilation).

⁶⁹ There are several sources that serve as the root of prejudice in the United States, including biological sources, social sources, and historic and cultural sources. See generally 2 THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION: ETHNICITY AND MULTIRACIAL IDENTITY (Jean Lau Chin ed., 2004). Historical and cultural sources point out that prejudice is learned in the same way that other attitudes and values are adopted, primarily through association, reinforcement, and modelling. *Id.* The codification of laws helps to ensure the cycle continues.

⁷⁰ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). It is not clear if Justice Harlan intended “the white race” to mean Anglo-Saxon Germanic people or all Europeans. During this period in the United States, whites did not connote our modern scope of whites including eastern and southern Europeans, nor people from the Near East nor Mediterranean. See generally KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS & WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1999); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE*

On its surface, these words gave encouragement to the idea of a colorblind America. In 1995, Supreme Court Justice Antonin Scalia said words that would bolster and buoy the courts and communities towards colorblindness for a generation: “In the eyes of the government, we are just one race here. It is American.”⁷¹ But, as Justice Harlan continued in *Plessy*:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.⁷²

Justice Harlan, in just a few paragraphs, teetered between neo-liberal idealism and White supremacy—two ideas that are inherently not in harmony with each other. All of this considered, it is not difficult to see the source of our students’ cognitive dissonance over race. These students were reared as third-generation civil rights movement heirs. They inherited a United States where de jure segregation has been illegal since their grandparents were children; where minimizing racial distinctions was the polite thing to do; and where Reverend Dr. Martin Luther King, Jr.’s birthday has been a federally recognized holiday since the generation before theirs. They have been taught by society it is racist to articulate that they were thinking about a person’s race.

All of these statements, however, must coexist with uncomfortable facts about reality. The students’ childhoods were more segregated than their great grandparents who lived under both de jure and de facto segregation. Moreover, all data indicate that many of these students have received a very warped understanding of the United States’ racial history. They have also been told to treat everyone as equal, but they have watched their parents, teachers, law enforcement, music, media, and social media show that people do not just have different lived experiences, but they have (or do not have) opportunity that is related to a racial reality they cannot control. This further masks discussions on race, ethnicity, and culture as a central aspect of development, identity, cognition, behavior, socioeconomic status, social

JOURNEY FROM ELLIS ISLAND TO THE SUBURBS n.39 (2006); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1239 (2019).

⁷¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

⁷² *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). This ideology will be captured in the creation of whiteness through legal whiteness, as in *In re Rodriguez*, 81 F. 337, 341 (W.D. Tex. May 3, 1897); scientific evidence, as in *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. Apr. 29, 1878) and *Ozawa v. United States*, 260 U.S. 178, 198 (1922); and, finally, by common knowledge, as in *United States v. Thind*, 261 U.S. 204, 209 (1923) (determining that whiteness is “to be interpreted in accordance with the understanding of the common man”).

relationships, worldview, and lived experience.⁷³ This juxtaposition of statements about equality and hard facts demonstrating inequality results in the brain's neurons constantly failing to make proper connections. Too many disconnects occur, and the brain, searching for harmony, decides it is best to just avoid such conversations and thoughts. But people can change. Part II of this Essay suggests some ways in which we can address these disconnects.

II. TIPS FOR CLASSROOMS

People can change. Dr. Mahzarin R. Banaji, one of the original founders of Project Implicit,⁷⁴ and Dr. Tessa E.S. Charlesworth created the Implicit Association Test (IAT) from Harvard University.⁷⁵ They recently published an encouraging update to their 2007 study regarding trends discovered from IAT tests results. Their work, *Patterns of Implicit and Explicit Attitudes IV: Change and Stability from 2007–2020*, observed changing trends in how people think about implicit bias.⁷⁶ There was a 64% drop in anti-gay bias between 2007 and 2020.⁷⁷ These changes happened in people across all segments, but people who identified as young and liberal changed faster.⁷⁸ Although Banaji and Charlesworth noted explicit attitude decreases in race by significant numbers (98%),⁷⁹ implicit race and skin-tone bias decreased by a much smaller percentage, 26% and 25% respectively.⁸⁰ This data shows that public disdain by race decreased, but deeply engrained racial bias persisted. In light of this reality, this Part suggests three steps that faculty can use to actively make their classrooms more inclusive.

A. *What Law Schools Are Doing About Implementing Race-Related Discussions in Curriculum and Classrooms*

Recent changes in the United States have had some impact on the academy. In 2008, the ABA established Goal III: To Eliminate Bias and Enhance Diversity.⁸¹ The objectives of this goal were to “[p]romote full and

⁷³ Holt Barrett & George, *supra* note 40, at 31, 34.

⁷⁴ PROJECT IMPLICIT, <https://www.projectimplicit.net/> (last visited Feb. 4, 2022).

⁷⁵ *Preliminary Information*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Feb. 4, 2022).

⁷⁶ The scholars used over 7.8 million implicit and explicit attitude tests toward six social groups to review long-term attitude trends. Tessa E. S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes IV: Change and Stability from 2007-2020 2* (2021) (forthcoming) (on file with author).

⁷⁷ There is room to explore how the study will be adjusted to note the increased interest about bias toward the transgender community.

⁷⁸ Charlesworth & Banaji, *supra* note 76 at 2.

⁷⁹ *Id.* at 42.

⁸⁰ *Id.* at 22. Seeing an impact related to the 2016 United States election, the authors noted an uptick in bias related to race bias, skin-tone bias, disability bias, and body weight bias around January 2017, though the uptick only lasted about a year and returned to baseline by January 2018. *Id.* at 28.

⁸¹ *Goal III*, *supra* note 8.

equal participation in the association, our profession, and the justice system by all persons” and to “[e]liminate bias in the legal profession and the Justice System.”⁸² The ABA does a thorough job of collecting the demographic diversity of its leadership and its members,⁸³ and must hasten its efforts to educate about structural racism. It is time to expand the work in law schools towards achieving a recent ABA goal related to curriculum in law schools and the academy.⁸⁴

On February 14, 2022, the ABA’s Section on Legal Education and Admissions to the Bar adopted a revision to Standard 303(c), which “A law school shall provide education to law students on bias, cross-cultural competency, and racism (1) at the start of the program of legal education, and (2) at least once again before graduation.”⁸⁵ The initial proposal included a provision requiring law schools to “take effective actions that, in their totality, demonstrate progress” to further the goals of the standard.⁸⁶ It also outlined three concrete steps that law schools must take to further such goals such as addressing access to the profession, providing data, and agreeing to oversight by the ABA on progress towards the goals of inclusion and equity.⁸⁷ Now that the rule has been adopted, law schools will focus on

⁸² *Id.* Goal III was developed out of the previous ABA Goal IX, which was to “promote full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” *Id.* (internal quotation marks omitted).

⁸³ AM. BAR ASS’N, GOAL III REPORT 2021: THE DEMOGRAPHIC DIVERSITY OF THE ABA’S LEADERSHIP AND MEMBERS 2 (2021), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2021-aba-goal-III-report-final.pdf>.

⁸⁴ The ABA began asking questions related to advancing democracy and promoting equality as a component of professional responsibility curricula and to “[e]ncourage development of mechanisms to define and require diversity curriculum” in law schools in 2010. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY (2009-2010), DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 30 (2010), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/next-steps-report.pdf>.

⁸⁵ AM. BAR ASS’N, NO. 300, AM. BAR ASS’N 2022 MIDYEAR MEETING 3 (Feb. 14, 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/300-midyear-2022.pdf>. Law schools are given broad discretion in when and how they implement these new requirements. *Id.* at 4.

⁸⁶ Memorandum from the Am. Bar Ass’n Section on Legal Educ. & Admissions to the Bar Standards Comm. to the Am. Bar Ass’n Council on Recommendations for Approval for Notice and Comment on Standard 206 Revisions app. A (Nov. 4, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov21/21-nov-std-206-notice-and-comment-w-appendix.pdf.

⁸⁷ COUNCIL OF THE AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, SUMMARY OF ACTIONS OF THE SECTION’S COUNCIL AT ITS PUBLIC MEETING NOV. 19, 2021 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov21/21-nov-legal-ed-summary-of-council-meeting.pdf (last visited Feb. 6, 2022). There are proposed recommendations for a series of updates to the ABA Standards that would address cross-cultural competency, equity, and inclusion. See Memorandum from Scott Bales, Council Chair, & William Adams, Managing Dir. Of Accreditation & Legal Educ., to Interested Persons and Entities on ABA Standards – Matters for Notice and Comment – Standards 205, 206, 303, 507, and 508 (May 25, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/21-may-notice-and-comment-standards-205-206-303-507-508.pdf. For an example of how I implemented race in

focusing on the letter of the rule or the spirit of the rule. This will be an ongoing work.

B. *Examples of Racial Cognitive Dissonance and the Practice of Law*

Once students understand that their minds are inundated with conflicting messages, it can help them understand that their ideas are based on racialized ideologies linked to images,⁸⁸ names,⁸⁹ and accents,⁹⁰ and can help them become more aware of different types of conscious, unconscious, and implicit biases in the practice of law. The next section provides some recent examples of explicit and unconscious bias in firms, jury selection, judicial conduct, and courthouses, which can be helpful recent examples to share with students.

1. *Examples of Explicit Bias to Demonstrate Cognitive Dissonance*

Explicit bias is often a good starting place for students because the harms identified are generally frowned upon in society. Since 2020, judges across the nation have lost their positions or have stepped down from the bench because of their use of racial slurs or derogatory language.⁹¹ One example of explicit bias is former Allegheny County Common Pleas Judge Mark V. Tranquilli who resigned from the bench because of potential misconduct.⁹²

an Advanced Family Law course, see Sonia Gipson Rankin, *Would You Make It to the Future? Teaching Race in an Assisted Reproductive Technologies and the Law Classroom*, FAM. L.Q. 1, 16 n.71 (forthcoming 2022).

⁸⁸ See Peter Holley, 'Super Racist' Pool Safety Poster Prompts Red Cross Apology, WASH. POST (June 27, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/06/27/super-racist-pool-safety-poster-prompts-red-cross-apology/> (sharing a poster that portrayed lighter complexion children at the pool as "cool" and darker phenotype children being "not cool"); Mike Snider, *Kellogg's to Replace Racially Insensitive Corn Pops Boxes Following Twitter Call Out*, USA TODAY, <https://www.usatoday.com/story/money/business/2017/10/25/kelloggs-replace-racially-insensitive-corn-pops-boxes-following-twitter-rant/797911001/> (Oct. 26, 2017, 11:02 AM) (documented how one lone brown corn pop was cleaning while all the lighter corn pops were not).

⁸⁹ See 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 PSYCH. 1678, 1680 (2015) (describing how faculty were significantly more responsive to white males than to all other categories of students); Knowledge@SMU, *Asian Maths Whizz and Talkative Females: How Stereotypes Can Actually Boost Performance*, INST. KNOWLEDGE AT SING. MGMT. UNIV. (Dec. 31, 2009), <https://ink.library.smu.edu.sg/ksmu/111> (describing how academic advisors discriminated against Asian names and women).

⁹⁰ See Carolyn Chu, *Accent-Based Implicit Prejudice: A Novel Application of the Implicit Association Test 1*, 45-46 (May 2013) (M.A. thesis, San Jose State University) (on file with SJSU ScholarWorks), <https://doi.org/10.31979/etd.2zya-3nhp> (describing how people in the United States were prejudiced against accents).

⁹¹ See, e.g., Neil Vigdor, *Colorado Judge Will Resign After Using Racial Slur, Court Says*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/us/natalie-chase-colorado-judge-racial-slurs.html> (describing a judge's biased behavior against African Americans working in her chambers and the court).

⁹² See Paula Reed Ward, *Allegheny County Judge Tranquilli Resigns Before Misconduct Trial*, TRIBLIVE (Nov. 17, 2020, 11:43 PM), <https://triblive.com/local/allegheny-county-judge-tranquilli->

He referred to a juror as “the one ‘with the Aunt Jemima’ on her head” (referencing a kerchief she wore on her hair),⁹³ and he wondered aloud if a woman’s “baby daddy” was a heroin dealer.⁹⁴ In other instances, attorneys are also blatant when showing explicit bias. During voir dire in a Colorado trial, a prosecutor stated, “because he’s a Latino male, he’ll have influence.”⁹⁵ Explicit racial incidents⁹⁶ and racialized innuendo incidents⁹⁷ show a pattern of, at best, indifference and, at worst, derision about the impact of their bias.

Similarly, in 2020, the New York state court system conducted a review of racial bias throughout the system. The 103-page *Report from the Special Adviser on Equal Justice in the New York State Courts*⁹⁸ captured several shocking racial realities experienced by court personnel, attorneys, and participants of the system. The report captured juror bias, disproportionate representation in the judiciary, and an environment of “toxicity and unprofessionalism” among court officer personnel.⁹⁹ It accounted that there was a practice established statewide in which litigants who paid for counsel on their own were scheduled before clients who were being represented by

denied-back-pay-barred-from-seeking-judicial-office/ (describing how Judge Tranquilli resigned the day before he was set to go to trial for the misconduct).

⁹³ Complaint ¶¶ 24–25, *In re Tranquilli*, No. 4 JD 2020 (Pa. Ct. Jud. Discipline Aug. 12, 2020).

⁹⁴ *Id.* ¶ 29. To review the sanction, see Sanction Order, *In re Tranquilli*, No. 4 JD 2020 (Pa. Ct. Jud. Discipline Nov. 19, 2020) (per curiam).

⁹⁵ Michael Karlik, *Colorado Supreme Court Weighs Role of Race in Latino Juror’s Dismissal*, GAZETTE (Sept. 15, 2021), https://gazette.com/premium/supreme-court-weighs-role-of-race-in-latino-jurors-dismissal/article_d8688650-051d-5f9f-b2ad-c5ce7d7a8e90.html (describing oral arguments before the Colorado Supreme Court on the role of race in a Latino juror’s dismissal). For the Colorado Court of Appeals opinion under review in the case, see *People v. Ojeda*, 487 P.3d 1117 (Colo. App. 2019).

⁹⁶ For example, former Judge Jessie LeBlanc of Ascension Parish, Louisiana, resigned after her racist text messages were released in which she referred to a Black court employee and Black Assumption Parish sheriff’s deputy as “n-----” and a “Thug n-----.” David J. Mitchell, *Judge Resigns After Racist Texts, Affair With Top Deputy; Says She Quit to ‘Stop The Madness’*, ADVOCATE, https://www.theadvocate.com/baton_rouge/news/communities/ascension/article_03fe9402-597c-11ea-846d-57c40c14944e.html (Feb. 27, 2020, 3:23 PM).

⁹⁷ On April 16, 2021, the Colorado Commission on Judicial Discipline censured Judge Natalie T. Chase for her repeated use of racial slurs and callous statements to Black employees related to systemic racism and police brutality. Neil Vigdor, *supra* note 91; *see also In re Chase*, 485 P.3d 65 (Colo. 2021) (en banc) (per curiam) (censuring a judge because of her biased behavior).

Clark County District Court Judge Darvin Zimmerman described Kevin Peterson Jr., a Black man killed by police in 2020, as “the Black guy they were trying to make an angel out of” and is taking time off to reflect on his behavior. Associated Press, *Washington Judge Taking Time Off After Comments on Black Man*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/clark-county-judge-taking-time-off-after-comments-about-black-man-killed-by-police/> (Mar. 17, 2021, 6:21 PM).

⁹⁸ JEH CHARLES JOHNSON, STATE OF N.Y. UNIFIED CT. SYS., REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 1–3 (2020), <https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

⁹⁹ *Secretary Johnson’s Independent Review of New York Court System Yields Recommendations for Advancing Equal Justice*, PAUL WEISS (Oct. 15, 2020), <https://www.paulweiss.com/about-the-firm/diversity-equity-inclusion/publications/secretary-johnson-s-independent-review-of-new-york-court-system-yields-recommendations-for-advancing-equal-justice?id=38301>.

legal aid attorneys or public defenders.¹⁰⁰ Attorneys from historically excluded populations remarked that they were consistently mistaken for criminal defendants, other attorneys of color, or translators.¹⁰¹ Others reported hearing a white court officer refer to a Black court officer as “one of the good monkeys.”¹⁰² Attorneys from historically excluded communities in one county even began a practice of tracking the inappropriate comments they heard from judicial personnel.¹⁰³ It is encouraging that, within one year of the release of the report, New York State Chief Judge Janet DiFiore has already documented tremendous advancements made by the court, such as requiring mandatory bias and education training for judges and non-judicial personnel, implementing data transparency, and expanding diversity initiatives.¹⁰⁴

2. *Examples of Unconscious Bias to Discuss Cognitive Dissonance*

Unconscious bias can be less visible than conscious bias, but is just as pernicious in the legal community. As an example of unconscious bias, professors can introduce students to a study by the consulting firm Nextions. Nextions wanted to know if confirmation bias unconsciously caused supervising lawyers to evaluate writing by a Black American lawyer more negatively.¹⁰⁵ In 2014, a legal memo was drafted with the help of five law firm partners to show unconscious bias in the law firm workplace.¹⁰⁶ Twenty-two errors were purposefully inserted into the legal memo.¹⁰⁷ Sixty partners from twenty-two law firms agreed to participate in the “writing analysis study,” but there was one distinction: half of the partners were told that a Black American man named Thomas Meyer wrote the memo, and the other half were told that a white man named Thomas Meyer wrote it.¹⁰⁸ The reviewers who read “White Thomas” Meyer’s memo rated it 4.1 out of five,

¹⁰⁰ JOHNSON, *supra* note 98, at 56–57.

¹⁰¹ *Id.* at 66. Misidentification of lawyers based on prejudiced assumptions is well documented in courts across the nation. See COMM. ON DIVERSITY IN THE LEGAL PRO., STATE BAR OF N.M., AN UPDATE ON THE STATUS OF MINORITIES AND GENDER IN THE LEGAL PROFESSION: THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO REPORT (2020). The New Mexico State Bar Committee on Diversity in the Legal Profession noted in its 2019 study that women from historically excluded communities were also more likely to be mistaken as paralegals, administrators, or even custodial staff. *Id.*

¹⁰² JOHNSON, *supra* note 98, at 63.

¹⁰³ *Id.* at 66–67.

¹⁰⁴ Brooklyn Eagle Staff, *Report Documents Progress Made, Efforts Underway to Advance Equal Justice in New York Courts*, BROOKLYN DAILY EAGLE (Nov. 18, 2021), <https://brooklyneagle.com/articles/2021/11/18/report-documents-progress-made-efforts-underway-to-advance-equal-justice-in-new-york-courts>.

¹⁰⁵ Arin Reeves, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), <https://www.ncada.org/resources/CLE/WW17/Materials/Writer%20Wilson--Confirmation%20Bias%20in%20Writing.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Seven were minor spelling- or grammar-related errors, but six were substantive technical writing errors, five were errors of fact, and four were errors related to analysis of the facts. *Id.*

¹⁰⁸ *Id.*

while those reviewing the memo written by “Black Thomas” Meyer rated it 3.2 out of five.¹⁰⁹ While “White Thomas” Meyer was praised for “good analytical skills” and potential, “Black Thomas” Meyer was criticized as “average at best” and needing a lot of work.¹¹⁰ The consulting firm identified this as unconscious confirmation bias as the evaluators unconsciously discovered more errors in “Black Thomas” Meyer’s memo.¹¹¹ This unconscious confirmation bias continued when the evaluators moved to the final rating process, which mixed conscious and unbiased analysis based on the numbers of errors found, due to disconnecting the fallacy of the process from the results.¹¹²

In another example, in August 2021, Debbie Bosworth, “a white woman who stole nearly \$250,000 from the village of Chagrin Falls, was sentenced to probation.”¹¹³ Because of the gravity of the offense, the prosecutor’s office rejected Ms. Bosworth’s plea, asking Common Pleas Judge Hollie Gallagher to sentence her to prison.¹¹⁴ But, Judge Gallagher sentenced Ms. Bosworth to probation, concluding that Ms. Bosworth did not deserve prison because she had paid back the stolen money.¹¹⁵

The very next day, in the same courthouse, Karla Hopkins, a Black woman, was sentenced to eighteen months in prison for stealing \$42,000 from a high school.¹¹⁶ One of the aspects that disturbed community leaders was that Judge Ricky Bell sentenced Ms. Hopkins to more time than the prosecutors requested.¹¹⁷ The prosecutor asked for a sentence of nine to twelve months, considering that Ms. Hopkins had entered counseling for a gambling addiction and was working to pay back the stolen money.¹¹⁸

Law students will immediately feel it is best to turn towards an analysis centered on the facts of each case. In this instance, the white woman had committed more crimes over a longer period than the Black woman, and the white woman faced a sentence that was twenty times greater than the Black woman’s.¹¹⁹ However, the Black woman received more prison time than the prosecutors even requested.¹²⁰ Perhaps because there was no judicial statement, we can assume this is an example of unconscious bias, not a

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Disparate Sentences in Ohio Court Raise Questions of Racial Injustice*, EQUAL JUST. INITIATIVE (Aug. 13, 2021), <https://eji.org/news/disparate-sentences-in-ohio-court-raise-questions-of-racial-injustice/>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

well-conceived prejudice shielded by judicial deliberative privilege.¹²¹ But, this is an important conversation to unpack with students.

The jury trial of Greg and Travis McMichael and William “Roddie” Bryan in the murder of Ahmaud Arbery caught international attention, as only one juror was Black, while the other eleven jurors were white.¹²² Prosecutors objected over the course of voir dire about the repeated striking of potential Black jurors from the trial.¹²³ Judge Timothy Walmsley noted that there seemed to be intentional discrimination in the panel, but he said that he could not reinstate any jurors who had been dismissed because the defense made race neutral arguments for why those jurors should be released.¹²⁴ The court claimed that precedent established that arguments do not need to be persuasive or even plausible,¹²⁵ and therefore Judge Walmsley allowed the process to continue.¹²⁶ These seemingly “race-neutral” arguments are an ongoing concern, and appellate courts are reviewing trial

¹²¹ In *State ex rel. Dann v. Taft*, the Ohio Supreme Court stated that predecisional and deliberative materials are protected communications but rarely raised. 848 N.E.2d 472, 480 (Ohio 2006); see also *J & C Mktg., L.L.C. v. McGinty*, 37 N.E.3d 1183, 1186 (Ohio 2015) (“[Law-enforcement investigatory] privilege is not absolute: it is limited by ‘the fundamental requirements of fairness’ . . .”).

¹²² Joe Hernandez, *How the Jury in the Ahmaud Arbery Case Ended Up Nearly All White—and Why It Matters*, NPR (Nov. 5, 2021, 7:00 AM), <https://www.npr.org/2021/11/05/1052435205/ahmaud-arbery-jury>. The one Black juror was likely chosen to circumnavigate a Batson-Wheeler claim. See *Batson v. Kentucky*, 476 U.S. 79, 79–80 (1986) (“Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.”); *People v. Wheeler*, 583 P.2d 748, 758 (Cal. 1978) (“[I]n this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution.”).

¹²³ Hernandez, *supra* note 122.

¹²⁴ *Id.*

¹²⁵ See Devon M. Sayers, Alta Spells & Christina Maxouris, *Judge Says ‘There Appears to Be Intentional Discrimination’ in Jury Selection, but Allows Trial to Move Forward with 1 Black Juror*, CNN, <https://www.cnn.com/2021/11/03/us/ahmaud-arbery-jury-what-we-know/index.html> (Nov. 12, 2021, 9:52 PM); see also EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION 43 n.141 (2021), <https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf> (citing SANTA CLARA CNTY. DIST. ATT’Y’S OFF., THE INQUISITIVE PROSECUTOR’S GUIDE: BATSON-WHEELER OUTLINE 51–80 (June 10, 2016), <https://countyda.sccgov.org/sites/g/files/exjcpb1121/files/IPG19%20BATSON-WHEELER%20OUTLINE.pdf>). Everything from being too eager, too timid, or too casually dressed, to having too many rings or hair that is too long, has been used to dismiss jurors. *Id.* at 65, 67. Attorney Jack McMahon has a video posted on YouTube articulating how to use peremptory challenges on Black potential jurors without violating *Batson*, even going as far as to discuss the level of education of Black jurors and that “young Black women are very bad.” Jack McMahon, *Jury Selection with Jack McMahon*, YOUTUBE, at 47:30 (Apr. 6, 2015), <https://www.youtube.com/watch?v=Ag2I-L3mqSQ>.

¹²⁶ See generally Sayers, Spells & Maxouris, *supra* note 125 (describing judge’s comments in McMichael and Bryant trial related to jury selection). If Judge Walmsley had dismissed the entire jury and started over, he could have sent a strong message to the defense.

cases where prospective jurors were dismissed because they expressed support for Black Lives Matter¹²⁷ or had undesirable body language.¹²⁸

Students might hear these scenarios and conclude that they would never make the same mistakes as the judges or law firm partners. But students should be reminded that the Tulsa Race Massacre was categorically ignored by the popular media and academia for almost a century despite the Black community's and supporters' cries for justice. Students should be encouraged to note that they have an opportunity to respond to current events and work for substantive policy solutions. They can broaden their awareness of how they can create systemic change by starting with their own thinking when they explore their ability to review previously known information in a new light.

C. *Teaching Growth Mindset and Cognitive Dissonance Adaptation*

If stereotyping operates unconsciously, is there any hope that one's attitudes and behaviors can be altered? The answer is emphatically "yes!" Instructors can provide students with tools that will help them understand. When students learn that their past knowledge informs their subsequent responses, they can use new knowledge to craft these future responses. Teaching students this mantra may help:

Amygdala!

Faith.

Be still.

These terms provide three strategies that may help students if they are experiencing cognitive dissonance and feel uncomfortable. The amygdala is part of the brain, and its primary role is in processing memory, decision-making, and emotional responses that include fear, anxiety, and aggression.¹²⁹ Many people respond to discussions on race from a defensive

¹²⁷ See, e.g., *People v. Silas*, 284 Cal. Rptr. 3d 48 (Cal. Ct. App. 2021) (remanding murder convictions because a Batson-Wheeler motion involving the striking of a prospective juror who expressed support for Black Lives Matter was improperly denied); Nate Gartrell, *Appeals Court Finds Contra Costa Prosecutor's Dismissal of Black Woman from Jury Pool Was 'Plainly Tied to Race,' Overturns 2016 Double Murder Conviction*, E. BAY TIMES, <https://www.eastbaytimes.com/2021/09/17/appeals-court-finds-contra-costa-prosecutors-dismissal-of-black-woman-from-jury-pool-was-plainly-tied-to-race-overturms-2016-double-murder-conviction> (Sept. 20, 2021, 5:59 AM) (describing jury pool dismissal of a Black woman was related to race).

¹²⁸ On October 6, 2021, the North Carolina Supreme Court heard arguments on whether to sanction prosecutors who disqualify jurors based solely on their race. Herbert L. White, *NC Supreme Court to Decide Racial Discrimination in Jury Exclusions*, CHARLOTTE POST (Oct. 5, 2021, 9:06 PM), <https://www.thecharlottepost.com/news/2021/10/05/local-state/nc-supreme-court-to-decide-racial-discrimination-in-jury-exclusions>.

¹²⁹ K. Amunts et al., *Cytoarchitectonic Mapping of the Human Amygdala, Hippocampal Region and Entorhinal Cortex: Intersubject Variability and Probability Maps*, 210 ANATOMY & EMBRYOLOGY 343, 343 (2005).

position because of the way race and racism have been cast in the American saga. The fight-flight-freeze response is the body's natural reaction to danger.¹³⁰ When presented with information that counters past beliefs, some students will fight, becoming defensive or combative. Others will attempt flight by diffusing the focus and deflecting to other topics. Still others will freeze, unsure of what to do or how they should feel, because they have never been taught how to process these different emotions. This is all done to avoid unpacking the cognitive dissonance deep within them related to discussions of race.

Students should also be encouraged to find ways to unearth the root cause of the cognition that is impacting their attitudes and behavior. By knowing that it is often a stereotype that is driving their fear response, they can turn to an action beyond fight-flight-freeze. They can choose *faith*. The faith option is based on growth mindset principles. In renowned psychologist and Stanford University professor Dr. Carol Dweck's book, *Mindset: The New Psychology of Success*, she provides another way to address that moment of cognitive dissonance.¹³¹ While Dr. Dweck defines a fixed mindset as a belief that one's basic abilities are fixed traits and there is no way to change, growth mindset helps people realize that they can develop their desired behaviors through effort and persistence.¹³² Students cannot grow if they attempt to shield themselves from discomfort. And they will be surprised and even pleased to discover how well they can adapt in a space that is designed to be uncomfortable because of the conversation, but safe because of the shared goals. In the same way that students can learn how to take a closed-book final exam, write a forty-page note for Law Review, or argue an appellate brief, students can learn that they are capable of maturing their understanding of race. By teaching students to approach race discussions from a growth mindset, students can find faith so that they can become more aware after engaging in meaningful conversations about identities and race.

The amygdala instinctively directs the initial response to cognitive dissonance related to race, but the basal ganglia, also in the cerebral hemisphere, is where the brain develops habit learning.¹³³ Humans can learn new habits with training. By *being still*, students can restrain their urge to distance themselves emotionally from the discomfort of discussions on race. If students can remember that the emotions they are experiencing are learned

¹³⁰ Some scholars have gone further and argue there are six fear responses that will occur: Freeze-Flight-Fight-Fright-Flag-Faint. See Maggie Schauer & Thomas Elbert, *Dissociation Following Traumatic Stress*, 218 J. PSYCH. 109, 109 (2010).

¹³¹ CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* 6–7 (Ballantine Books Trade Paperback ed. 2016).

¹³² *Id.*

¹³³ Carol A. Seger & Brian J. Spiering, *A Critical Review of Habit Learning and the Basal Ganglia*, 5 FRONTIERS SYS. NEUROSCI., Aug. 30, 2011, at 1, 3–4, <https://doi.org/10.3389/fnsys.2011.00066>.

behaviors, then they can monitor themselves for reactions.¹³⁴ It is important to recognize that staying in the moment can feel daunting for law students, and it is not often encouraged in legal education.¹³⁵ Consequently, it is important to remind students that cognitive loads (mental fatigue) can increase the likelihood that a stereotype will direct their responses if they are not paying attention.¹³⁶ The pressures of time, distractions, lack of sleep, and hunger are all types of cognitive loads that can occur, and these pressures are assuredly present in the lives of law students.¹³⁷ Stanford University's LARA Method (Listen, Affirm, Respond, and Ask Questions) provides an excellent template for walking students through physical reactions and deescalating their own reactions to uncomfortable conversations.¹³⁸

Once students understand what their brains are doing and how they have agency to change views, professors can then walk students through the information that they need to understand the roots of their beliefs and where their stereotypes originated.

D. *Speaking on Individual Lived Experiences and Understanding Yourself*

Professors can discuss their own metacognition related to their lived racial experiences and encourage students to do the same. Students can start by unpacking four parts of their experience: their nature; how they were nurtured; their training; and their profession.¹³⁹

¹³⁴ I often quote my mother, Rev. Dr. Sheila Gipson, at this point. "Before you speak, think."

¹³⁵ This does not need to be the standard and encouraging mental wellness in students is essential to improving the well-being of the legal profession. See generally NATHALIE MARTIN, *LAWYERING FROM THE INSIDE OUT: LEARNING PROFESSIONAL DEVELOPMENT THROUGH MINDFULNESS AND EMOTIONAL INTELLIGENCE* (2018).

¹³⁶ *Stereotype Threat*, UNIV. OF COLO. BOULDER, <https://www.colorado.edu/center/teaching-learning/inclusivity/stereotype-threat> (last visited Feb. 22, 2022).

¹³⁷ KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., *IMPLICIT BIAS MODULE SERIES TRANSCRIPTS 17* (2022), https://kirwaninstitute.osu.edu/sites/default/files/module_captions/video-captions.pdf; *Implicit Bias Module Series Module 4*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, <https://kirwaninstitute.osu.edu/implicit-bias-training> (last visited Feb. 22, 2022). See also Tanya Levy & Winston Price, *Implicit Bias in Healthcare Presentation at the MCG 2019 Statewide Facility Development Conference* (June 1, 2019) (presentation available at https://www.augusta.edu/mcg/academic-affairs/eii/conference/documents/2019_implicit_bias_presentation.pdf) (describing the impact of cognitive loads on unconscious bias).

¹³⁸ *The LARA Method for Managing Tense Talks*, STANFORD UNIV.: SPARQTOOLS, <https://sparqtools.org/lara> (last visited Feb. 22, 2022).

¹³⁹ Educational scholar, Dr. Alicia Chávez, crafted an Identity and Leadership Autobiography assignment that provides examples on how to lead students through this activity. See *IDENTITY AND LEADERSHIP: INFORMING OUR LIVES, INFORMING OUR PRACTICE* 274 (Alicia Fedelina Chávez & Ronni Sanlo eds., 2012). Professor Susan Bryant noted that "[c]ulture is like the air we breathe—it is largely invisible and yet, we are dependent on it for our very being." Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33, 40 (2001). In 2018, Stanford University provided a public source for learning behavioral changes through their SPARQtools. These tools provide self-paced online curriculum to study bias and equity. *About*, STANFORD UNIV.: SPARQTOOLS <https://sparqtools.org/about/> (last visited May 8, 2022).

For example, I explain to students that my nature is that of a woman whose father is Black American and a mother who is a Black Latina with Jamaican heritage from Panamá. Though I am Black, I have a bicultural heritage. I am also a person who can struggle with being anxious in unfamiliar settings. I was nurtured as a “Jersey Girl” in a Christian family. My training was in computer science at Morgan State University, a Historically Black University (HBCU) in Baltimore, Maryland, and in law at University of Illinois College of Law, located in rural Illinois. I attended Morgan State University to follow the positive experience that my father had in attending an HBCU (Southern University) and to follow my two cousins who had preceded me there. (Later, my sister, another cousin, and my daughter would also attend Morgan State). At Morgan State, I was given two major lessons: you can accomplish anything you want, and you are to give back to the community. My profession is lawyer and law professor. All these components have impacted the way I see the world and how I make decisions. I am not exclusively defined by these identifiers and additional life experiences related to relationships and health have continued to influence how I think and react. This is not to say that one path was better than another, nor that one did or did not have the right upbringing. Simply, it provides a basis to be aware that we all have different ideas for a reason.

This is also an excellent opportunity to remind students to practice empathy. Author H. Jackson Brown, Jr., wrote, “[R]emember that everyone you meet is afraid of something, loves something, and has lost something.”¹⁴⁰ Students align in categories that cut across visible identities. As students explore their own lived experiences, they will see where their paths intersect, overlap, and diverge from those of their classmates, often discovering commonalities.¹⁴¹ There are people who are the life of the party, are adopted, believe in life after death, are members of the LGBTQ+ community, suffer from loneliness, love fast food or sci-fi, have been bullied, have bullied others, have been madly in love, have lost a child, or have overcome addiction. These are unique parts of our stories that help form the foundation for every subconscious choice we make.

Professors can then encourage students to remember a recent interaction with other people, asking them to reflect on who was talking and who was quiet. They can go further in analyzing the tone of the conversation, observing how people responded nonverbally. They can catalog who was interrupting others, who was getting interrupted, and who was never

¹⁴⁰ H. JACKSON BROWN, *THE COMPLETE LIFE'S LITTLE INSTRUCTION BOOK* 517 (1997).

¹⁴¹ This process is not without its criticisms. Some students in the past have felt uncomfortable reflecting on their journey, stating they came from community that felt this type of reflection showed a lack of humility by focusing on oneself too much. We talked about how important that insight was in understanding how they address conversations on race.

interrupted. I ask them to think about how long people spoke and who engaged in side-conversations.¹⁴²

Once students have had the opportunity to articulate their individual experiences, reflect on their classmates' similar and different experiences, and reflect on group dynamics, they can begin to discuss the impact of the cognitive dissonance on others. Discussions on dialogue and group dynamics focus on inclusion and exclusion.¹⁴³ Without deeper reflection, these terms can be vague, leaving people frustrated. When a person says they want to feel included, they are expressing a desire to belong, to be valued for who they are, and to be encouraged to be themselves. When someone says they feel excluded or left out, they are attempting to articulate that they feel they are not welcomed, valued, respected, connected, or heard. It is good for everyone in the class to know that these feelings exist.

Dr. Lynn Shore of Colorado State University College of Business and her colleagues note two additional categories that often do not receive equal attention, though they are related to unconscious and implicit bias.¹⁴⁴ Students in classrooms are often dealing with two other structures that can impact their ability to connect: trying to fit in or knowing they stand out.¹⁴⁵ Professor Devon Carbado and Professor Mitu Gulati identify the four interrelated selection mechanisms of similarity, comfort, differentiation, and respectable exoticism.¹⁴⁶ Both "fitting in" and knowing one "stands out" present challenges for different reasons. Students that fit in recognize that they will continue to belong only if they diligently work to make themselves similar or assimilate to supposed dominant cultural norms. In these instances, they may be connected, but they know it is because their individual self is not truly valued. For students that articulate that they feel as if they are standing out, it is because they know that their uniqueness is valued but that, at the same time, they are truly not connected to the space. Sometimes these students are treated as if they are heroic or unicorns. They

¹⁴² KATHY OBEAR, TURN THE TIDE: RISE ABOVE TOXIC, DIFFICULT SITUATIONS IN THE WORKPLACE 76–78 (2016). This problem is so pervasive that under Justice Sonia Sotomayor's leadership in October 2021, the United States Supreme Court changed the format of oral arguments in part to address the way male Justices continued to interrupt female justices. Ariane de Vogue, *SCOTUS Changed Oral Arguments in Part Because Female Justices Were Interrupted, Sotomayor Says*, CNN, <https://www.cnn.com/2021/10/13/politics/sotomayor-oral-arguments/index.html> (Oct. 13, 2021, 9:41 PM). United States Supreme Court Chief Justice John Roberts was influenced by scholarship from Professor Tonja Jacobi and Dylan Schweers. *Id.* (citing Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017)).

¹⁴³ Lynn Shore et al., *Inclusion and Diversity in Work Groups: A Review and Model for Future Research*, 37 J. MGMT. 1262, 1267–68 (2011).

¹⁴⁴ *Id.* at 1266.

¹⁴⁵ *Id.*

¹⁴⁶ See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1804–09 (2003) (providing examples of a job interview for a law firm and how similarity, comfort, differentiation, and exoticism operate in deciding cultural fit at law firms).

are never truly included, as they are primarily valued when they are in line with the dominant space's goals. These four categories of students' emotions provide a strong framework for introducing dialogue about implicit bias in the academy. Once professors help students develop skills on *how* to talk to each other, a professor can address *what* to discuss.

After helping students understand why they might have a visceral reaction to discussions about race, and helping them understand how to become receptive to new insights, the instructor can then introduce students to structural racism and the historical evidence that documents the harm. This can help them understand their personal dynamics at the micro-level. Speaking on these issues allows professors to more effectively and equitably manage classrooms by establishing a space of respect and dignity. It helps students develop agency and language to express their experience and needs.

CONCLUSION

The subtitle of the 2021 *Connecticut Law Review* Symposium, "What's the Law Got to Do With It?" helps us appreciate how and why cognitive dissonance has such an impact on discussions of race and racism in legal education. Race does not have to be a second-hand topic in legal education. This Essay has raised many questions and tried to answer a few, including the questions of how to take steps in the classroom to reduce cognitive dissonance and how to teach racism and implicit bias. However, many questions remain. When should law schools explore racial bias in tort awards? When is the racialized impact of determining the best interests of children explored? When is understanding implicit bias going to be included in an IRAC analysis for the bar exam? When should law schools begin to monitor how many of their graduates are brought up on ethics violations related to race, class, gender, or sexual orientation as closely as they monitor bar passage? Although issues of race in the law will not be explicitly tested on the bar exam nor tested in every law classroom, such issues will be explored every day in students' future practice. It is imperative that law schools are at the forefront of ensuring that an educated population understands the structural effects of racialization and racism in the United States and around the world. My mentor, Marsha K. Hardeman,¹⁴⁷ frequently reminds me, "They will listen if they know you care." Through this training, we can forever change the way our students feel, thus improving their capacity to competently and meaningfully practice their trade.

What's race in the law got to do with it? By embracing faith and change in moments of uncertainty, law schools can empower students to be compassionate legal advocates when they depart from our classrooms.

¹⁴⁷ Lena Kassicieh, *Celebrating UNM School of Law Alumna Marsha (Head) Hardeman*, UNIV. OF N.M. SCH. OF L.: NEWS (Feb. 15, 2022), <https://lawschool.unm.edu/news/2022/02/celebrating-unm-school-of-law-alumna-marsha-head-hardeman.html>. Ms. Hardeman was the first Black person and first woman to become Student Bar President at the University of New Mexico School of Law in 1976. *Id.*