

## CHAPTER SIXTEEN: TEACHING ABOUT RACE

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Nearly 15 years ago, in our Habits of Cross-Cultural Lawyering<sup>1</sup> we began a conversation about what clinical law students needed to know about lawyering across difference to provide excellent representation to their current and future clients and to address injustice in the legal system. As described more fully in Chapter Thirteen, the Habits curriculum serves two useful purposes: (1) creating a daily practice of self-awareness and self-improvement that helps lawyers become thoughtful observers in cross-cultural lawyering interactions and addresses critical issues of bias and difference

individually and interpersonally, and (2) creating a common vocabulary for discussion of this practice with others in individual, group and classroom settings. The Habits initiate and entrench life patterns for a professional life, in which professionals and clients come together with surfaced and examined assumptions that can lead us beyond discrimination and prejudice. As such, they are useful de-biasing tools.<sup>ii</sup>

These individual de-biasing tools alone, however, are not enough to equip lawyers to assist poor clients subject to unequal, unfair treatment, often due to their race, by systems that we have not closely examined. The Habits focus on what students can learn through reflection on lived experience. Students, however, are often missing historical perspectives and facts as well as the necessary experience to deepen their reflections and take action. This Chapter focuses specifically on teaching about racial injustice and developing ways to recognize, explore and confront residual and ongoing racial prejudice in our systems of justice. In this Chapter, we outline a curriculum for teaching and learning about race in our advocacy. We seek to add these missing pieces to the Habits and describe a disciplined procedure for initiating and continuing planned and unplanned conversations about race, both in the classroom and in our advocacy.

*“Will we be able to have these conversations about race in our workplace?”*

Students ask us questions that stay with us. A clinic student asked Sue this question at the end of a rich supervision meeting debriefing the racial dynamics in an interview. In this interview, an Afro-Caribbean female client bonded visibly with the student, herself an Afro-Caribbean woman, while her co-counsel, a white woman student, had difficulty connecting with the client. In the debriefing conversation, the Afro-Caribbean student recalled a client interview the previous summer in which an Afro-Caribbean client seeking immigration benefits had bonded with a white female student interviewer and not her. In debriefing this prior interview with her supervisors at her summer workplace, the Afro-Caribbean student had not raised how race might have influenced the interview. Now, however, because race was a permissible topic in the supervision, the student was able to debrief with her teacher and colleague not only her clinic interview but the prior one as well.

This student’s question and our recent explicit conversations with Yale<sup>iii</sup> and CUNY students about talking about race<sup>iv</sup> convince us that unless we talk about race in the clinic and speak explicitly with our students about how to talk about race, we will not have prepared them for important work in their future workplaces. We are sending students a message from our failure to talk about issues of implicit bias, structural inequalities based on race, or racial tension in interpersonal relationships. Students who experience race-based microaggressions towards themselves and their clients may have no framework to talk about these acts and how to respond. Lawyers who do not consider how they might help both their own client and others by taking race into account fail to analyze the context within which their client’s case occurs.

We could have labeled this chapter “Difficult Conversations,” using examples about all forms of inequality, including, for example those based on gender, sexual orientation, class, immigration status, language and disability. Classroom and supervisory conversations about all of these issues can be difficult because students and we bring a range of knowledge and perspectives to the conversation and because bias, stereotype and privilege pervade our perceptions of and responses to these issues. The procedures discussed in this Chapter will be useful in all these conversations about inequality. Nevertheless, we chose to focus specifically on teaching about racial injustice because, despite its effects on clients’ lives, many in society deny its existence and conversations about race are the most difficult to sustain.

Despite important strides forward of recent generations, people of color, both citizens and immigrants, no matter their socioeconomic background, continue to face ongoing structural and attitudinal barriers in daily life, in the workplace, in social interactions, in high status and low status contexts, and in the ongoing struggle for true equality. Yet, many Americans embrace the belief that we are a “post-racial” society, that race no longer plays a role in the distribution of rights and material well-being. To represent clients and address injustice, we must challenge this belief with an explicit and developed curriculum on race.

In addition, our experience of teaching the Habits convinces us that issues relating to racial inequality are the hardest to flag; and even once initiated, these conversations are challenging to sustain. Conversations about race often die on the vine. Anyone who carefully observes conversations about race will often notice a subtle shift from the race conversation to related more comfortable ones on another topic. This may occur through analogy, when a participant observes: “this is just like gender discrimination, ---or when someone offers an opposing hypothesis: “isn’t this really about class?” In these situations, interlocutors instinctively move an unexplored conversation about race to another safer topic. As we discuss below, the Habits themselves can be useful tools to learn about race bias but they can also be used in ways that avoid conversations about race.

We call the Chapter “Talking About Race” because we see the ability to talk openly and frankly about race as an important step in obtaining racial justice. Our students need (and many want) ways to talk about race in their future workplaces for themselves and their clients. Our curriculum is specifically designed to help students learn these skills in the classroom and around the clinic. We hope in further work to explore more fully the transfer of these skills to the workplace and to develop additional strategies for these complex conversations in practice settings.

Clinics may well create the optimal conditions for growing our ability to talk constructively about race, in the classroom and in case advocacy. As noted, these

conversations do not grow and thrive naturally; indeed they wither rather than bloom. Yet, integrated into a curriculum and learning environment where teachers and students spend long stretches of time together, work side by side for shared clients, and encounter a range of life experiences together, clinics are often places where trust is naturally and deeply engendered, and where this kind of risk-taking can more easily take place. We believe that clinic classrooms, with their small size, solidarity and hard work on joint projects, and steep learning curve, might be an ideal place for teachers and students to take the next step in understanding how to have constructive conversations that advance racial justice.

For these conversations about race to begin and grow, we must first remove the rocks that prevent growth in the garden, and second, sow the seeds of these conversations from the first day of the semester. As described in Part One, teachers should ready the space by first, recognizing and removing the rocks that create barriers. Removing discussion barriers requires that teachers create an atmosphere for the conversation that is at once supportive and challenging, and that includes a commitment to nonjudgmental engagement. Teachers must recognize and overcome resistance to the conversation, our students' and our own, and build trust by establishing ground rules for conversations.

In Part Two, we suggest that conversations about race need to be seeded from the earliest moments. Conversations about race are seeded by a four-part process: (1) inviting the conversation early, (2) normalizing conversations about race, (3) introducing key critical race theory concepts and (4) including updated information about the historical and current role of race in the field. Finally, we discuss how the Habits of Cross-Cultural Lawyering might be used to further seed the students' understanding of the role race plays in practice.

In Part Three, we suggest a structure for successful conversations about race, which could first be taught during these seeding events, and then deployed during unplanned, spontaneous moments when race issues arise, or in subsequent planned conversations. Finally, as set forth in Part Four, successful classroom and clinic conversations about race can provide a useful starting place for all advocates who need to convene and continue difficult conversations about race in our advocacy—in court, in negotiation, in counseling, in public advocacy, and with colleagues.

This curriculum grows organically within a total clinical curriculum that also focuses on the lawyer's role, the law of the field, and the concrete work of representing clients and developing legal skills. An intentional teacher can sprinkle these materials throughout the full curriculum as an integral part of teaching about competent, compassionate, client-centered lawyering. The race curriculum builds upon values many clinicians naturally sow throughout their clinical teaching already: transparency, respect, nonjudgment, airing of diverse viewpoints, thoughtful lesson planning, and, ultimately, the centrality of the client's priorities and concerns. By specifically naming how racial

privilege and injustice interacts with these other important concepts, we cultivate our students' learning by equipping them with analytical and conversational skills that make a difference in "achieving justice," a key professional value.<sup>v</sup>

In addition to enhancing connection with and understanding of clients, our teaching about race has several other learning goals, including: (1) to improve our students' understanding of how race and other vectors of oppression have operated and currently operate in the legal system and in the distribution of legal and other material goods; (2) to learn how to use this understanding to analyze justice issues and to identify legal solutions for individuals and communities; (3) to encourage and equip students to be leaders in pursuit of racial justice in the profession and in our society generally; and (4) consistent with the Habits, to enable students and teachers to understand more deeply how their own racial and cultural background will become factors in their lawyering.

For these conversations about race to begin, we must first remove the rocks that prevent growth in the garden by motivating students for the conversation and creating an environment that lowers resistance to the conversation.

### **READYING THE GARDEN: REMOVING THE ROCKS**

Many clinic students and teachers come to these conversations without prior experiences of talking about race in law school or worse, with prior experiences of failed conversations. Some may resist the conversations as too difficult or risky; others may resist because the conversations may not produce answers. Sometimes, clinic students have had other experiences, including relationships with each other outside the clinic, that create distrust or skepticism among the students about whether issues of race can be discussed productively in the classroom or in supervision. To top it off, teachers themselves may experience substantial resistance to convening or continuing conversations about race for related or other reasons.

To remove these rocks or barriers to growing the conversation, we suggest the following:

#### ***A. Practice Nonjudgment***

*Out beyond ideas of rightdoing and wrongdoing, there is a field/I'll meet you there.*

Rumi

Throughout our discussions and advocacy about race in our classrooms and cases, the central concept of nonjudgment, critical to the Habits of Cross-Cultural Lawyering, plays a central and seemingly paradoxical role here. "Non-judgment requires an open spirit of inquiry and fact finding, bracketing our impulses to blame, evaluate, judge. . .

All observations will be made in terms of facts and details witnessed, rather than conclusions or critiques formulated.”<sup>vi</sup> A nonjudgmental participant discusses race in terms of fact, observation, and history, rather than in terms of conclusion, condemnation, and accusation. While the conversation’s goal remains to identify racism and to lead to its full elimination, the methods we suggest do not include finger-pointing and derision. Instead, the focus on factual material, owned observation, and reasoned, frank conversation are centerpieces of this work.

Nonjudgment allows for assessment and evaluation of constructive approaches for naming and eliminating racial inequality through a principled process. If teachers teach and practice nonjudgment, identifying it as particularly important when we are most likely to condemn harshly, students can begin to experience and practice nonjudgment themselves. We intentionally use the term “practicing” nonjudgment to acknowledge that we are constantly striving to become closer and closer to the ideal of nonjudgment even if we often despair of ever achieving it.

A lawyer or teacher practicing nonjudgment when talking about race and pursuing racial justice will consciously adjust her internal and external orientations with instructions to oneself such as these:

***Internally:** Witness your own thoughts, emotions, sensations, urges, and reactions without passing these experiences through the filter of judgment. Invite yourself to take in the full range of experience without imposing a hierarchy of good/bad, right/wrong. Stand apart from yourself as a separate observer.*

*Cultivating that observer—the witness, the seer, who calmly abides through the constant fluctuations of internal experience and the outside world. “Assume the stance of an impartial witness to your own experience. To do this requires that you become aware of the constant stream of judging and reacting to inner and outer experiences that we are all normally caught up in, and learn to step back from it.”<sup>viii</sup> In this way, nonjudgment becomes the vehicle for fact finding and taking in the world with fewer filters of bias. Stepping away from the self, the group, and the present moment helps elucidate the larger forces at play in shaping each person’s perspective. It helps you recall that you rarely have access to all the data available and may never possess certainty about facts in the world. We must remain ever conscious that our understandings are nearly always based on incomplete information.*

*EXTERNALLY: Act nonjudgmentally towards others, inquiring about facts and resisting framing arguments in terms of condemnation. Criticize the ideas and not the person. Remain open to new ideas as long as possible. Believe and convey that you have something to learn from each person even if you do not agree. Create a safe space for conversation by sharing and allowing others to share their perspectives, thoughts, and sensations without fear of derision or blame. If you believe it to be true, frame even disagreements as joint enterprises—“we will continue to discuss,” “I believe we may not be far apart.” Encourage others as far as possible to participate in the conversations about race without passing judgment on any individual’s character based on the views that person shares about race. Recognize that your views, however strongly held, may not account for all the facts. Speak your views without judgment or blame.*

#### *INTERNALLY AND EXTERNALLY:*

*Habit Three, Parallel Universe Thinking, typifies nonjudgment. This example demonstrates the internal and external processes. Jean remembers leaping to judgment years ago, when a state caseworker removed her client’s children from their home and then refused to speak to the client or Jean’s students as they challenged the removal. Using parallel universe thinking, they decided to adopt an external orientation of nonjudgment, continuing to treat the worker cordially and with respect, both because of the possibility that they misunderstood her actions and because contrary actions gained the client no benefit.*

*Nevertheless, Jean was extremely grumpy about it, struggling internally with maintaining a sincerely nonjudgmental orientation. She remembers how angry she was each time the worker pivoted on her heels when she saw students approaching or was stonily silent in negotiation meetings. When the case settled, and the child was returned home, Jean turned to the worker, who suddenly burst into tears. She had opposed the removal from the beginning and had been working constantly behind the scenes for the child’s return, but was not at liberty to say so. How close had they come to branding as an enemy the person who, in the end, facilitated their client’s dearest wish?*

This nonjudgmental approach need not result in paralysis; lawyers will continue to make decisions and take action. In fact, it creates the conditions for thoughtful, positive action. Actions and decisions thriving in well-developed facts, calm observation, and history are essential to this Chapter’s project. Pursuing racial justice requires a firm

factual basis, as untainted as possible by prejudice, before we design actions to address injustice. Focusing on fact allows one to act nonjudgmentally, decide nonjudgmentally, choose nonjudgmentally, and even evaluate nonjudgmentally. Some judges suggest it is possible to judge nonjudgmentally. Nonjudgment also reminds a lawyer to ask for data when we agree with another. Why do we agree? What data supports this view? Nonjudgment encourages data gathering to understand more completely why we agree as well as why we disagree.

Practicing nonjudgment does not mean conceding that every viewpoint is equally valid. In Habit Three, parallel universe thinking, we make an analogous suggestion that lawyers generate multiple parallel universes to help make more informed, explicit choices. Parallel universe thinking posits that many possible explanations for behavior exist; therefore, to act based on one of those explanations, a lawyer has to identify the facts that weighed most heavily, assumptions that seemed most accurate, or hunches that lead the lawyer to prefer one parallel universe over another. Parallel universe thinking encourages the lawyer to pause and confirm that the lawyer's hunches and assumptions are consistent with the facts. Identifying the salient facts and connecting them explicitly to his assumptions allows a lawyer to recognize choices; to coordinate with collaborators, deciding jointly in the face of uncertainty; and even eventually to backtrack to this place, if it turns out that facts, hunches and assumptions are found invalid. Making these choices by reference to facts and being transparent about the decision-making process renders this process nonjudgmental.

We acknowledge that nonjudgment challenges each person in a different way. Some are temperamentally inclined to nonjudgment; others may chafe against its every demand. In our classrooms, we will ask for nonjudgment among people who have very different stakes in these conversations about race and who have been differently harmed and privileged by race. Acknowledging this difficulty, we continue to believe that nonjudgment, as in the Habits, will be key to starting conversations that we have fled from in the past.

### ***B. Recognize and Overcome Resistance***

In planning these conversations, we recognize that a national reluctance to talk about race, combined with the dominant view that we are living in a “post-racial” society (i.e. that race no longer matters), makes our tasks as teachers more complex and more compelling. We are toiling in hot sun; many in our classrooms, courtrooms, and our students' future work environments view race as largely irrelevant. In this context, those who raise issues of race often have to fight or take uncomfortable risks to make race part of the dialogue. Teachers may fear that students will accuse them of using their teacher power to engage in “political correctness” monitoring. While students see us as powerful figures, teachers, especially untenured teachers, often feel vulnerable to student evaluations. As a result, we students and teachers alike often view race discussions as

intrinsically risky, anxiety-provoking, and unsafe.

Those who recognize the salience of race in contributing to the material inequalities that our clients face may also resist the conversations because we often do not have the “answers” for how best to fight against these inequities. In our casework, we struggle along with our students to find ways to address these issues individually and to think about how to link our work with the work of others to address them more systemically.

Resistance to the conversation can also come from students and teachers who see an acknowledgment of difference or bias as violating a commitment to equality (“I do not see black people, I just see people”). Some may believe that we must act with “color-blindness,” others may believe that bias does not matter as long as no prejudicial action is taken. The profession continues to struggle with what to do with our history of gross racial inequality: does this require more racially targeted solutions to correct it, or a race blind or formal equality from now on? Often the legal doctrine students have learned insists on formal equality and does not fully address our clients’ lived experience of racism.

Others, more experienced in constructive conversations about race, at least with likeminded interlocutors, resist conversations where the instruction is too elementary (“we are preaching to the choir”). Even if they recognize that other students may need the instruction, they may want a different conversation focused on action rather than awareness. Students of color may feel the strain acutely, constantly torn between raising the consciousness of other students who do not have their life experience, on the one hand, and needing the conversations to move more deeply as their own experience and insight deepens, on the other.

Teachers can overcome these various strains of resistance by planning for them and recognizing them when they arise in classrooms and supervisions. We can engage our own resistance to raising questions that we cannot answer by recognizing that classrooms and supervisions provide opportunities to do new thinking about how to understand and address racial issues arising in our work, and to understand and address the systems that perpetuate racial injustice. We do not need answers to raise questions. In fact, we model a willingness to keep searching for answers, even when they have proven steadily elusive, when the questions are important enough starting points. We can help students overcome their resistance by illustrating how engagement with these issues will improve their work. In planning classes and supervisions, teachers should set a range of learning goals that engage all students, despite different experiences and knowledge.

### **C. Remove Distrust by Building a Learning Community**

Teachers can mitigate one barrier to the conversation, distrust in each other,

through conscious efforts to build an atmosphere of trust that promotes learning. If students see themselves as members of a learning community with a sense of common purpose and an emotional connection among all class participants as well as teacher and student, difficult conversations about race can occur more frequently and result in honest exchanges. Learning communities recognize that participants make mistakes in the learning process and that mistakes can actually promote learning. Where honest feedback occurs in ordinary conversations about case ideas and lawyering tasks, and where appreciation of each other's work accompanies evaluative or challenging criticism, students build this sense of common purpose. Many clinical teachers have organically evolved ways to build community in the intense and continually collaborative clinical environment; all of these will be critical in removing, rock by rock, barriers to deep and risky discussions.

Teachers build trust through a variety of approaches that communicate their interest in each student's well-being and professional development. For example, we interview students about their goals and return to these frequently in supervision and mid-semester meetings; we teach students to take care of themselves and introduce vicarious trauma theory; and we combine conversation with meals in more relaxed environments. Jean starts each class with a class member offering "a thing of beauty" as a way for all to get to know each other and to remember beauty in the midst of work that requires students to learn about and witness much suffering.

Many teachers build learning communities through established ground rules for conversations for all classroom exchanges, not just conversations about race. Every conversation is structured by expectations and patterns evolving over time. A practice of setting ground rules puts all participants on an equal footing, makes explicit the values in the conversation, and empowers participants to call attention to deviation from agreed-upon norms. The substance of the ground rules can be formulated in a variety of ways. In *Discussion as a Way of Teaching*, Brookfield and Preskill propose a participatory exercise in which members of a group reflect upon positive and negative critical incidents from past conversations in developing ground rules for themselves.<sup>xi</sup> Groups can also delegate formulation of ground rules to a subgroup of the class. In another approach, teachers announce ground rules, as a way of publicly acknowledging their ongoing procedures for running class discussions. If students have incorporated these approaches into other conversations, they will not need to learn them for the first time for the race conversations. They can bring skills learned from handling other emotionally charged or polarized conversations to conversations about race. A group experienced in structured and normed conversation can wade more confidently into race conversations.

Finally, teachers should seek feedback on these conversations. Asking "did you find that discussion helpful?" or "do you have any suggestions for the future?" invites feedback about student reactions that can help teachers improve on conversations. Teachers can also solicit feedback in writing, anonymously, or after some time has

passed, to increase the invitations for feedback as the community develops and the conversation deepens. Delayed feedback may also allow students to reflect on whether an initially confusing conversation proved useful over time.

### **READYING THE GARDEN: SOWING THE SEEDS OF CONSTRUCTIVE CONVERSATIONS ABOUT RACE**

As the ground has been readied for a fruitful conversation, these conversations must also be seeded. Sowing the seeds involves a four-part process: (1) explicitly inviting these conversations early in the semester and signaling their importance in the syllabus; (2) normalizing the conversation by regularly asking the question “how does race play a role in our clinic’s work?” (3) introducing key concepts including microaggression, implicit bias, intersectionality, and material inequality; and (4) including in the curriculum updated information about the role of race in the clinic’s field, historically and currently. Finally, (5) teachers can move from a place of comfort – the Habits of Cross-Cultural Lawyering – to a focus on race as students reflect upon their own practice.<sup>xiii</sup> We will discuss each part of the process in turn.

Note that throughout all the seeding examples, we have initial conversations *about race* to lay the groundwork for more difficult, intractable conversations. These seeding moments can be shorter or more straightforward presentations of new concepts and historical material, or can in themselves be the in-depth conversations we seek to have. These can be a five-minute introduction to ideas that can be picked up later in supervisions or whole classes devoted to topics. Jean, who has twenty-six class hours in one semester in her clinic, tends to drop seeds quickly, but intentionally, throughout the first half of the semester, from the first hour of class. Sue, who has 140 class hours over two semesters, can spend more time turning these initial conversations into deeper explorations of the concepts with the students. We have found both of these strategies successful.

#### ***A. Inviting the Conversation Early: “We will be discussing race”***

In beginning the course, the teacher has unique and powerful opportunities to set the agenda for the semester. Students rely on teachers to delineate the important subject matter of the course, to set goals for excellence in coursework and case representation, and to define the key themes pervading the classroom experience. Given this power and expectation, even a relatively small statement carries great weight.

Our own teaching practices demonstrate ways to signal openness to conversations about race from the start of the semester. For example, Jean seeds the norm of discussing race during the first week in three separate ways. First, in the initial class, she makes a note on her lesson plan to flag the issue of race where it might naturally arise in the exercises and introductions to the law that comprise her lesson plan. She also introduces

a syllabus that explicitly includes a class concerning race and its historical and current role in the field, as well as an early class on cross-cultural lawyering. Second, in the first week, after reviewing student goals, she lists her own goals: (1) representing the client in the best way and with the finest resources the team can gather; (2) understanding each new student as an emerging professional evolving with her enduring identity; and (3) grappling with questions of race and difference. In that vein, she notes that she will be asking all descriptions employed in the clinic to include detailed demographic information about every player discussed, including race, gender and class. Third, as discussed below in our discussion of microaggression, she assigns the article, *Law as Microaggression*, by Peggy Davis<sup>xiii</sup> and introduces this concept to all new students entering the Yale Jerome N. Frank Legal Services Organization clinic in a clinic-wide Professional Responsibility Workshop during the first week.

### ***B. Normalizing the Question: “What role does race play in our work?”***

Regularly ask the question: “What role does race play in our work?” This question seeks both continually to monitor our individual behavior of bias and stereotype, as well as to explore the role of race in the systems in which we practice and the law governing our work. As described below, implicit, unexplored biases shape our and other’s thinking. These stereotypes exist and play a role in our thinking unless we consciously combat them.

Research recommends paying explicit attention to race as a way to activate non-prejudiced personal belief and counteract unconscious bias, thereby inhibiting the influence of traditional stereotypes.<sup>xiv</sup> In other words, we must consciously replace stereotypes with non-prejudiced views and to accomplish that we must repeatedly raise, and not duck, the issue of race. Not acknowledging or discussing the role of race risks allowing the pervasive stereotypes and biases found throughout our society to undermine fairness in individual situations. If the question is normalized, then conversation about race is normalized. Because we know this conversation is often resisted, normalizing it is an important way to address this resistance.

This question also asks us to examine the practices, policies and laws that affect our clients. By using the question in this way, we separate the problem from individual actors and allow a more detached examination of the problems facing clients. When asked this way the conversation focuses on “what” is to blame rather than “who” is to blame.<sup>xv</sup> To enhance student’s ability to answer the question about the role of race, students need additional knowledge and insight. The remaining two seeding events – key concepts and historical vestiges – provide this knowledge by introducing students to key ideas to assist them in understanding the role that race plays in their clients’ lives and advocacy.

### ***C. Building Conceptual Understanding for Twenty-First Century Race Discussions***

Critical race theorists and other scholars provide useful insights for naming and more deeply understanding the sources of racial inequality. We find that introducing students to these insights increases their understanding of their clients' lived experiences as well as how to lawyer in the context of inequality. Through learning at clinical conferences and our work with each other and colleagues, we have identified and taught four concepts that we think are particularly useful to students' understanding: microaggression, implicit bias, intersectionality, and material inequality. Other useful concepts that we are just beginning to study are noted in the Areas for Further Study at the end of this chapter.

First, the concept of *microaggression* reveals the deep burdens that daily moments of prejudice place on members of historically disfavored minorities. Those with privilege may fail to experience and see microaggressions and may inadvertently create these destabilizing moments for others. Second, the concept of *implicit bias* explains how discrimination operates to oppress in unintended ways. The third concept, intersectionality, refocuses discussions on multiple sites of oppression as well as the necessity of seeing clients as individuals as well as members of groups. Intersectionality challenges essentialism, the concept that people sharing a particular trait proceed through the world with a unitary experience based on that single trait. Lastly, we suggest students understand *material inequality*, a concept that redefines equality in terms their clients' lived experiences.

### *(1) Microaggression, Privilege, and Power*

Microaggression, privilege, and power are important connected concepts for students to understand in relation to themselves, their colleagues, their clients, and the legal system. We teach these concepts to students to help them recognize and deal with microaggressions committed by and against them and their clients and to see how racial privilege can potentially hinder some students' capacity to understand clients' experiences—especially microaggressions. We want them to be careful observers of how power is exercised in their co-counseling relationships, with clients and in courts.

Microaggressions, a series of minor but constant indignities,<sup>xvi</sup> “incessant, often gratuitous and subtle offenses” based on race, serve to undermine confidence, reduce one's sense of belonging, and subordinate people.<sup>xvii</sup> Microaggression can impair the performance of persons of color by sapping the mental, psychic and spiritual energy of recipients.<sup>xviii</sup> We assign two classic articles, *Law as Microaggression* by Peggy Davis<sup>xix</sup>, and *Microaggressions in Everyday Life* by Derald Wing Sue, et al<sup>xx</sup> to teach the concept and locate it in a legal framework. Derald Wing Sue subdivides microaggression into microassault, microinsult, and microinvalidation, offering concrete examples of several categories within each subdivision.<sup>xxi</sup>

Identifying and using this concept often helps students of color name their life experiences, and helps other students notice subtle examples of racism and other forms of discrimination. For example, Sue assigns these articles before students engage in a court observation in which she specifically asks students to watch for microaggressions. Students of color, especially women of color in family courts often report being mistaken for litigants in various discrete small ways. Students who appear to be from countries heavily represented in immigration court may be asked if they are interpreters or litigants in those courts. Attorneys and those assumed to be attorneys are often given spots up front in the courtroom, while litigants and those assumed to be litigants are kept behind the bar. Thus, the subtle “are you a litigant?” spoken as the law student tries to assume her spot on the lawyers’ bench demotes the lawyer or law student of color from a position of power. Students are asked to think about the microaggressions that their clients experience in the various legal systems they encounter and how that contributes to their clients’ reaction to lawyers, law, and courts.

Classroom conversations can also be the source of microaggressions when students make what seem to them inconsequential comments that are viewed as “coded” conversations by some classmates. For example, when a white student expresses fear about going into a “dangerous” neighborhood, a black student living in that same neighborhood may hear the conversation as one expressing a bias that because the neighborhood is black it is dangerous.

Davis’s and Donald Sue’s articles gives students a framework for analyzing these sometimes “seemingly inconsequential acts” as ones that are interpreted differently by those who are subjected to them on a regular basis.<sup>xxii</sup> The concept can help explain why some clients are angry at court systems; why they distrust their capacity to get a fair trial; and why they do not naturally see their lawyer as an ally. Microaggressions can be largely invisible to students who have the privilege of not being subjected to them. Our goal for these students is to help them recognize microaggressions, understand their impact, and avoid engaging in microaggressions themselves. Michelle Jacobs’s article *People from the Footnotes*<sup>xxiii</sup> can be used to teach students how a lawyer’s own microaggressions may create a harmful interaction with clients. For students who are the subject of microaggression, the concept names behavior they have experienced throughout their lives and allows them to interpret potentially destabilizing experiences and plan to respond to them differently.

In an early workshop for new students entering the school’s clinics each semester, Jean assigns Davis’s article and asks the students speaking in role as an African-American client to speak specifically about microaggression, and about their expectations for legal services from students at an Ivy League law school. Jean has also asked her students to recall times when they have been both victims and perpetrators of microaggression, and given examples of her own from both perspectives. Identifying both kinds of roles can be key to steady improvement in eliminating microaggression,

both as an actor and as a recipient.

A concept like microaggression is also a way to introduce the concept white privilege, a shield that prevents white students and teachers from seeing and experiencing microaggressions. White privilege, especially when combined with class privilege, can leave students ignorant of the background conditions of racial inequality that generate disparate impacts even through race-neutral and seemingly legitimate policy. For example, in criminal cases, employed defendants are generally treated more favorably in bail and sentencing determinations.<sup>xxiv</sup> Yet, the disparity between unemployment rates for black and Latino men—forty percent—and white men—ten percent—shows how this factor is racialized.<sup>xxv</sup> This seemingly neutral category relies on privileging white people's experiences versus the experiences of people of color, and may result in greater sentences for people of color.<sup>xxvi</sup> Clinical teachers can help students see this disparity and also explore with them how to use this insight in individual cases as well as to lobby for systemic change, for example, here to change the standards for bail and sentencing.

Power, privilege and anti-subordination are useful frameworks for talking about attorney-client relations as well as relations among co-counsel. A frame that explicitly discusses these concepts with a racial and intersectional lens contextualizes some of the problems and opportunities that students have in understanding these concepts, thus allowing them to better connect to clients and co-counsel. For example, in teaching interviewing and collaboration, we often discuss lawyer-client and lawyer-lawyer interactions to explore issues of power and privilege. Consider the learning potential of this critical incident presented in class:

*A video is played showing two lawyers, a white male and a Latina woman meeting with a community group composed primarily of women of color.<sup>xxvii</sup> The white male lawyer takes the lead in starting the meeting and talks for the first few minutes about the meeting's agenda. His Latina co-counsel takes a secondary role. His clients say very little.*

*In debriefing this aspect of the interview, the clinical professor asks her students, "How do we think about power and privilege in this context between the lawyer and his clients or between co-counsel?"*

As always, we should start our analysis with parallel universe thinking - a process used to identify alternative explanations for behavior and communication.<sup>xxix</sup> The Latina lawyer may have led three previous meetings with this group and wanted to give her shy, less experienced co-counsel a chance to bond with the clients. But, what if this were a first meeting or this pattern of speaking first and at length by the white male colleague was a common pattern for this team? What issues involving gender and race dynamics might this scenario raise? The scenario provides opportunities to explore whether the two lawyers or clients planned this approach and considered the racial and

gender dynamics of this plan. Unexplored cross-racial work between students and with clients ignores the impact of race, power, and privilege and deprives students of valuable learning.

In this critical incident, a teacher could easily fail to address race and gender by simply discussing this scenario as a potential lawyer-client imbalance in decision-making or lack of planning by co-counsel. We encourage teachers to provide additional learning by exploring parallel universes, including how the woman of color might assert herself in the space or the how a white male lawyer's actions may be interpreted through a race and gender lens and be viewed as a microaggressive act. That lawyer's actions, unchecked, could also accidentally perform the message that he generally devalues the voices of women of color.

Through debriefing client interviews, simulated and real, students can learn about these micro-power dynamics. Students who co-counsel with others of different race and genders also have opportunities to talk about these dynamics in their relationship. By introducing these concepts in class, a teacher normalizes them, makes them easier supervision topics that students can subsequently raise themselves, and enables students to learn from their interactions with each other and their clients. Students can also raise these issues and continue these conversations privately with each other. While these conversations are difficult, trust between the students and the teacher as well as a focused nonjudgmental approach make these conversations possible.

## *(2) Implicit Bias*

Understanding implicit bias—how it operates and how it can be addressed—equips students to engage with clients and others with an intentional approach that can eliminate a student's biased thinking. This understanding also gives students strategies for challenging stereotype thinking in presentations to courts or other audiences. All people use mental shorthand techniques to organize and apply information.<sup>xxxii</sup> We apply this shorthand to people, expecting them to act or think a certain way based on a single characteristic or group of characteristics without knowing we are doing so. Implicit bias is a widespread phenomenon; research has consistently shown the existence of implicit bias in different social contexts and in different countries.<sup>xxxiii</sup> As Professor Jerry Kang explains implicit bias research provides:

a more a more precise, particularized, and empirically grounded picture of how race functions in our minds, and thus in our societies, they also rattle us out of a complacency enjoyed after the demise of de jure discrimination.<sup>xxxiv</sup>

Students' learning about implicit bias can be enhanced by referring them to two sources for study: the Implicit Association Project at Harvard and the report "Helping

Courts Address Implicit Bias,” completed by the National Center for State Courts.<sup>xxxv</sup> The Project introduces them to the Implicit Association Test (IAT), a test measuring bias and stereotype through word association tests by recording how quickly a person associates “good” words with one group and “bad” words with another. For example, in measuring stereotypes of older people, most individuals will more quickly associate “elderly and frail” than “elderly and robust.” As part of this introduction, we also report to them the common results for race. IAT results also show that “most European Americans who have taken the test are faster at pairing a white face with a good word (e.g., honest) and a black face with a bad word (e.g., violent) than the other way around.” About one third of black Americans show similar results.

Research has demonstrated that implicit bias can affect decisions regarding, for example, job applicants, medical treatment, and a defendant’s dangerousness. While little research has been done on implicit bias in judicial decision-making, researchers have described how implicit bias would affect these decision makers and other legal actors.<sup>xxxvi</sup> After introducing the concept of implicit bias and the IAT, we encourage students to take the IAT for race and any other categories that may be operating in the clinical work they do to develop insights into their own biases.<sup>xxxvii</sup> Some teachers ask students to take the IAT before class and use insights from the experience to discuss implicit bias. Note that the IAT can be done online and only takes a few minutes.

The report on implicit bias in judicial decision-making, “Helping Courts Address Implicit Bias” alerts students to the ways that implicit bias may play out in the courts. Using this in conjunction with the IAT is helpful for those students who need a more concrete application of implicit bias to the legal system than the IAT provides. For example, the report observes: “When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely.” Knowing this enables students to think about how to argue for more specific criteria especially when arguing for clients where particular bias or stereotype might be operating. The report also summarizes research on how to counteract implicit bias to ensure better decision-making, including advocating the kind of reflective engagement on bias that our Habits curriculum suggests. These include suggestions that judges acknowledge group and individual differences; check their deliberative processes for bias; reduce stress; impose greater structure on decision-making and increased positive interaction with group members who are stereotyped negatively.<sup>xxxviii</sup>

These suggestions for judges work for advocates as well. In class, rounds, and supervision, we encourage students to think about implicit bias as one explanatory theory that creates disparities in the legal system and other systems.<sup>xxxix</sup> We also identify fact-finding and credibility determinations as rich sites for implicit bias and therefore important focal points for careful and detailed advocacy.

In teaching our curriculum about race and the Habits, including our teaching about implicit bias, we highlight important categories: we are teachers, students, clients and other legal actors of identified races, among other characteristics. We hypothesize that in any interaction, individual or systemic, that race is making a difference. At the same time, we know from the implicit bias literature that using any one category or thinking categorically to fully define a person or a social issue can result in the very bias or stereotype we seek to avoid and cause us to miss issues. To counteract these impulses, we teach two interrelated concepts: essentialism and intersectionality.

### *(3) Using and Breaking Categories: Intersectionality and Anti-Essentialism*

Essentialism uses one demographic characteristic of an individual to stand in for the whole of that individual, and interprets that person using a one-dimensional perspective based on a characteristic or experience that the person shares with a particular group.<sup>x1</sup> Anti-essentialism is a process that surfaces these assumptions of sameness, which mask differences among individuals. Approaching clients with an anti-essentialist perspective helps students and lawyers solve problems and discuss a client's context with more sophistication.<sup>xli</sup>

Intersectionality, a related but distinct concept, explains that a given person can at once be a member of multiple different socially constructed groups.<sup>xlii</sup> A narrow focus on just one demographic axis of a person may lead one to misinterpret—or miss altogether—discrimination experienced by that person along another axis. A student who understands intersectionality will recognize, for example, that an undocumented Bengali battered woman will face multiple forces of subordination including race, ethnicity, gender, immigration status, class, and caste. Collectively, all of these separate categories, along with her unique lived experience, intersect to cause her particularized experience of subordination.<sup>xliii</sup>

By teaching students the concepts of anti-essentialism and intersectionality, clinics can help students see a client as an individual with a particularized package of experiences unique to that individual and as a member of multiple groups.<sup>xliiv</sup> In the clinical classroom, teachers can help students understand these concepts by assigning critical race scholarship.<sup>xliv</sup> For example, in a Battered Woman's Clinic at CUNY Law School, we assigned multiple readings that use intersectionality and essentialism to describe the special problems faced by women in different ethnic and racial communities.<sup>xlvi</sup> The students read these articles and chapters over the course of three interviewing classes. The chapters help students see their clients and their issues multi-dimensionally. For example, while teaching students the concept of "filling," where the listener fills in unspoken details to a story, the teacher can reference essentialism and ask how our assumptions about the essential "battered women" cause us to fill in details that may not be there. We can link essentialism to narrative theory and the idea of "stock stories," familiar stories that explain how the world works. These concepts improve

students' interviewing abilities and alert them to potential problems in advocacy when judges or other legal actors engage in the essentialist thinking that stock stories require.

When we assign critical race theory and other readings, we follow several common practices. First, we assign excerpts of the longer articles to give students the salient ideas espoused by the reading. We integrate the discussion with our teaching of lawyering theory to illustrate the relevance of the material to practice and to students' approaches as lawyers.<sup>xlvi</sup> We sometimes focus the discussion narrowly on the reading by asking students to adopt a believer's stance<sup>xlviii</sup> and identify how the author's insights, assuming they are true, might offer important lessons or approaches for lawyers.

In addition to aiding students with individual client work, intersectionality and anti-essentialism are critical to understanding ongoing systemic discrimination faced by our clients.<sup>li</sup> Consider the following class Jean teaches in an asylum clinic in which each student has been assigned a new client, for whom she hopes the team will file an application during the semester:

*The first asylum clinic class starts with an examination of the refugee claims of Victor Laszlo, the anti-Nazi Czech refugee played by Paul Henreid in the 1942 classic film, Casablanca. Sometimes jokingly referring to the class as "Six Degrees of Separation from Victor Laszlo," Jean posits that, for students to assess how strong or weak their client's claim is, on every important vector—the substance of the persecution, the legally protected ground, the nexus between the two, the demographic characteristics, the shape of the refugee story—the students should analyze how similar or different the client's case is from that of Laszlo, a white, educated, English-fluent, attractive, famed political dissident travelling on legal papers with his wife and pursued overtly by the Nazi military. Jean suggests that every place in which the client's case diverges sharply from Laszlo's, the student must pay special attention in the briefing, evidence collection, and affidavit writing.*

*Over the years, the class has identified the ways in which Victor Laszlo represents an intersectionality in which many privileges and norms converge to create a paradigmatic refugee, whom the law would easily recognize. As a white, straight, financially secure male claiming persecution by a malevolent government based on his overt political opinion, Laszlo is an attractive refugee, and typifies the convergence of privilege in his race, gender, class, sexual orientation, language, religion and political opinion. Students find that African, Caribbean or Latin American women who are victims of domestic violence, claiming protection as members of social groups subjected to male dominance and abuse, and facing private persecutors in countries with unenforced legislation banning*

*domestic violence, have initially faced substantial hurdles which could be instantly identified in comparison with Victor Laszlo as the paradigmatic refugee. In this context, the class can identify and strategize about how to continue to expand the law's understanding of bona fide refugees beyond this narrow paradigm, by educating decision-makers about the lives of refugees in the twenty-first century.*

This focus on intersectionality and anti-essentialism can be particularly critical when the legal structure tends to reinforce essentialism and discourage intersectional thinking. For instance, students representing asylum seekers must establish one central reason for their clients' persecution and are required to state claims based on race, nationality, particular social group, religion or political opinion. The constraints of the governing law place these students at greater risk of conceiving their clients' experiences and fears in essentialist terms. This offers an excellent opportunity for the teacher to point out this context as an example of ways in which the law continues to reinforce essentialist thinking, even as those categories increasingly fail to capture the complexity of lived experience.

Finally, once students learn these concepts, they become useful for conversation in supervision. For example, in expanding the students' understanding of why abused clients may be reluctant to leave their housing, we can ask students how multiple inequalities might influence the client's stance and explore other sites for discriminatory treatment or disparity based on race and other intersecting factors. For example, gender and race discrimination in housing are but two sites of discrimination that might narrow the availability of housing as clients face landlords reluctant to rent to women of color. These concepts and the conversations they spark not only increase the student's understanding of the client but also alert the student to the challenges that must be addressed to create real change for this client and others similarly situated.

#### *(4) Understanding Equality and Material Inequality*

In our curriculum, we want students to understand material inequality, a concept that focuses on the disparity in resources faced by clients, and the role that race plays in establishing material inequality. In the next section, we suggest that students carefully probe the law for sources of historical and current discrimination that may result in material inequality. Here, we focus students' learning on the depth and breath of deprivations faced by clients who are often clients of color. If they have the empathetic skills and perspectives we teach them or if they embrace believing along with doubting, they learn from their clients' narratives about struggle, disadvantage, lack of access to healthcare, foreclosures, family destruction, et cetera. We want them to consider whether and how race plays a role in this deprivation.

In each clinic practice field, studies show the disproportionate allocation of social

goods and disproportionate share of negative results based on race. For example, studies show that in black and Latino communities, the largest expenditure of public dollars is allocated for prison and foster care, while in white communities schools received the largest expenditure.<sup>lii</sup> Many students, like most Americans, accept the dominant view that race is an irrelevant explanatory theory for the distribution of social goods.<sup>liii</sup> Research shows that most Americans resist seeing discrimination even when the facts clearly point to that result.<sup>liv</sup>

Students may have difficulty seeing the disparity of material goods faced by communities of color as racial inequality either because they have accepted a view of formal equality favored by the law and/or because of the dominant American meritocracy ideology. While formal equality looks for race neutrality and equal treatment, material inequality looks at the results and asks for a systemic analysis of causes and strategies for change. If students believe that meritocracy controls success and distribution of goods, then lack of goods will be attributed to person failure or bad luck. We want to open up their analysis to explore systemic vs. individual responsibility.

When the student sees injustice happening to her client, she often sees her client as an exceptional person who works hard, does the right thing, yet remains materially disadvantaged?<sup>lv</sup> Our teaching goal for these students is for them to recognize when their clients are not exceptional people but individuals who face broader societal inequities with many others. Our teaching goal for all students includes a commitment at least to explore whether racial inequity could be an explanatory theory and increase their capacity to recognize how racial inequality might be engaged in their cases.

To help our students situate their clients in broader descriptions of deprivations based on race, we engage in a variety of activities over the semester. We often start with their own observations in court, in the welfare office, and in their client's narrative by asking what role race plays. Students' capacity to observe racial dynamics differs dramatically; some do not observe race unless directed to do so while others bring sophisticated analysis to the observation. Classroom conversations that debrief observations can move from descriptive to inquisitive and analytical modes, as illustrated by the following example:<sup>lvi</sup>

*In a visit to immigration court where people are challenging removal, students noted that the bench and court officers are disproportionately white while the litigants are disproportionately people of color. A few students were outraged by the treatment of litigants by lawyers and judges. They observed lawyers yelling at clients and judges dismissing clients' concerns. Students noted that litigants not proficient in English often do not know what is going on (because only their exchanges with the judge are interpreted), many litigants are unrepresented, and often the interpretation is difficult because the litigant and the interpreter have trouble understanding each other.*

*These observations start an inquiry: How did the litigants get to the court? The teacher asks how our clients got to court. As the students answer, they realize over forty percent of their clients were picked up on Greyhound buses and taken into detention. Who rides and who does not ride these buses? In addition, the teacher asks students to consider who is not in court? For example, a large number of people who are deported never get to have the due process hearings provided by immigration court. One significant group is people who are convicted of a broad range of crimes.<sup>lviii</sup> The teacher asks: what do we know about race and criminal justice and how that impacts who is not in court?*

These personal observations allow us to set the stage for study of literature documenting material inequality. We are cognizant of research that shows that statistics alone do not influence people's thinking about race,<sup>lviii</sup> and our own experience confirms that students who sincerely believe in post-racialism may push back in class and in supervision and struggle internally against these statistics. Still, we also know that reflection alone, such as that done on court observation above is insufficient to inform students about the full material inequality faced by clients. We have found that these observations create student engagement and interest in readings in their field and about their client communities. In other words, their individual reflection then allows us to examine more systemic information about material inequality. Who is deported and for what reasons? What is the success rate in immigration court for people from different countries and which judges are more likely to believe the litigants?<sup>lix</sup> And how does bringing a racial lens to the inquiry help us understand the court and the context better? This in turn sets up the final seeding event, a class on how the law itself may have created and perpetuated these disparities.

#### ***D. Historical and Current Vestiges of Discrimination in the Law***

When we introduce students to the history of race in the clinic's field of practice, we can provide critical data in understanding the challenges our clients currently face. In clinical practices specializing in particular fields, even a single dedicated class session can identify when and where the field has relied on overt racial categorizations in determining status, qualification, eligibility or some other legal benefit or outcome. The class can also explore less explicit ways that race has played a role. Importantly, the class can look at how historical vestiges might continue to affect our practice and our clients' experience in the field today. And, finally a class can explore how new forms or forces of racial discrimination might be at work in the field today.

In presenting this information, we use a variety of pedagogical techniques, devoting one or more class sessions to the subject. In Jean's thirteen-class semester, she devotes one class to the subject in addition to a class on the Habits. In Sue's 28 weeks,

several classes or parts of classes will address these issues. Teachers can also address the issue in rounds and supervision and preference discussion of the issue whenever it naturally arises. In student-led classes, which we have both used, students are also encouraged to pursue these issues.

Where a clinic or clinician does not already have extensive background knowledge about historical and current racial dynamics in the subject matter area, enlisting students in the research may prove extremely rewarding. For instance, Jean asked experienced student directors in her Sol and Lillian Goldman Family Advocacy for Children and Youth clinic to help her investigate the debate on racial disparities and disproportionality in child welfare, because she had become convinced that she did not know enough and did not include enough about this issue in her teaching and practice. Her students were confused at first by this request because they experienced Jean as integrating issues of race and difference, pervasively through the Habits, a partial class on the class-and race-based historical origins of Child Welfare and often in casework. Nevertheless, as Jean and the group began the research, they found a huge body of very current, lively debate proceeding in the field.<sup>lx</sup> Their research has continued over six semesters, memorialized in a heavily footnoted PowerPoint presentation for a class offered for new students in the second half of the semester.

Jean also observed that she found herself needing to initiate fewer discussions about race, both because she was now more comfortable that the students would be provided a thorough presentation of the current work in the classroom and because the students were raising these issues spontaneously more often. For Jean, this collaborative experience was the most successful and rewarding extended conversation with students in her career about the continuing role of race in this clinic's work.

In addition to working with students on these issues, working with social workers who study racial and cultural dynamics or with advocates who have incorporated racial justice work into their casework can enrich classroom and casework conversations. For example, Sue co-taught with Maris Arias and Liz Newman, advocates with deep roots in battered immigrant women's communities, and Martha Garcia, a social work professor whose professional study and work included attention to issues of culture, race and language. Their collaboration informed approaches to teaching about these issues.

In this Battered Woman's clinic with ample seminar time, students read articles and book chapters that detailed racial disparities created by law and practices in their field. For example, Dorothy Roberts's book, *Shattered Bonds*,<sup>lxii</sup> was assigned to show that mothers are more likely than fathers to be charged by the state with neglect and how once charged, mothers of color are more likely than white mothers to be separated from their children and for longer periods of time for the same offenses. Students read articles that detail the paucity of services for immigrant women and non-English speakers,<sup>lxiii</sup> and articles that explore how high unemployment rates in communities of color and

inadequate childcare facilities for working mothers can explain why women stay in abusive relationships or have difficulty regaining custody of their children. Students study the disparate impact that mandatory arrest laws have in communities of color and the complicated relationships that communities of color have with the police. Students explore whether and how these articles' insights apply in their local community and to their clients. When students research local conditions, they are more likely to credit the results and develop practical insights into the experiences their clients face.

In one recent Race and Immigration class, Jean, Annie Lai, and Jessica Vosburgh designed a class focused first on history: how the law has approached race in the past. In this hour, the class participants explored their own family histories, located their families' arrivals in the historical trajectory of race and immigration, and identified critical race moments in the field's history. The history revealed that US immigration law has relied until relatively recently on explicitly racial and national categories in identifying welcome and barred immigrants. To prepare for this hour, students read scholarship tracing this timeline. The second hour focused on the present day, looking at the Arizona litigation materials in *U.S. v. Arizona* (the DOJ challenge to Arizona's anti-immigrant law S.B. 1070) and *Ortega Melendres v. Arpaio* (a federal case challenging racial profiling by the sheriff's office in Maricopa County, Arizona) alongside an excerpt of an article by Reva Siegel on discriminatory purpose doctrine.<sup>lxiv</sup> In a following semester, this second hour explored the role of race in the debate and emerging contours of national immigration reform.

Equipped with historical information and ongoing dialogue to explore its current significance, students can continue to learn from their experiences, placing them both in a historical context and identifying the contemporary challenges posed to their clients. The Five Habits, discussed next, offer additional ways to engage that inquiry.

### ***E. Five Habits of Cross-Cultural Lawyering***

In Chapter Fifteen, we discuss the Five Habits for cross-cultural lawyering in depth. Here, we focus on how those Habits can be an entry point for learning some of the concepts concerning racial justice discussed above. We have already identified the central place that nonjudgment has in the Habits and in this race curriculum. Teachers who already teach the Habits may find them a natural segue into race discussions. In this section, we briefly describe the Habits and the ways in which a teacher might connect learning about the Habits to the specific concepts described above for seeding conversations about race.

Habit One, Degrees of Separation and Connection, creates two ways of mapping the client's and the lawyer's worlds to explore how culture might influence their relationship and fact gathering. Habit One asks students to create a Venn diagram with circles representing the lawyer's and client's universes. Habit One also asks the lawyer to

inventory a list of differences and similarities that the lawyer perceives between lawyer and client. Habit One allows a teacher to teach about white privilege and other forms of privilege when exploring what is on the list and what is left off. For example, in listing similarities and differences, white students will often fail to identify their race in the list. Students often note that they have the privilege of not noticing one's own race in a world where their clients often do not.

Habit One's focus on the impact of similarities and differences on trust-building allows students and faculty to explore how racial mistrust and microaggression might influence the relationship. Jacob's *People from Footnotes* and Derald Wing Sue's *Microaggressions in Everyday Life* are useful additions to a class on the Habits. These articles illustrate how similarities and differences will affect the way clients interpret lawyer behavior and influence fact gathering. In explaining why Habit One asks for inventories of all possible similarities and differences, teachers can also teach intersectionality as a way to avoid seeing the client one-dimensionally.

Habit Two, the Three Rings, expands the mapping of Habit One to focus on the ways that culture shapes the strengths and weaknesses of the client's legal claim or influences problem-solving for clients in non-litigation settings. The concept of implicit bias can be usefully introduced here as students learn to do Habit Two analysis. In assessing similarities and differences between the client and the law and decision makers, students can identify how implicit bias might operate in their clients' cases and plan to explicitly take the bias into account when assessing case strengths and building responses. Students can also explore how paradigms steeped in intersecting privileges, like Victor Laszlo's, can over-dominate the law's thinking in their field and strategize how to advocate in ways that expand the law's understanding of meritorious claims.

Habit Three, Parallel Universes, asks the lawyer in dozens of daily work interactions to identify alternative explanations for the phenomena he witnesses. Also known as the Habit of Not Jumping to Conclusions about Behavior, this Habit, which can be done instantaneously, requires brainstorming multiple explanations for a client's, or any other professionally significant person's, words or actions before planning an action strategy. Parallel Universe Thinking can help students interpret "seemingly inconsequential acts" as ones that are interpreted differently by those who are subjected to them on a regular basis. This understanding increases students' ability to recognize and use the concept of microaggressions. Parallel Universe thinking is often a safe and familiar entrée into more delicate discussions. Parallel Universe thinking also allows the teacher to keep race on the table, for instance, in consistently asking students brainstorming alternative explanations to factor in race and culture into their parallel scenarios.

Habit Four, Red Flags and Correctives, focuses on lawyer-client communication. This Habit of Not Making Habits When Communicating with Clients takes place both in

the moment of client interviewing and counseling, and in retrospect, analyzing those encounters to plan for improved future meetings. Cross-cultural communication is fraught with potential for problematic conversations. Cultural norms influence how we speak, who speaks to whom, when we speak and what we talk about. When focusing Habit Four on improving communication across racial difference, a teacher can use both the Jacob and Sue readings. The readings help students brainstorm race-based parallel universe explanations such as racial mistrust by the client or microaggressions by the lawyer that explain communication failures and suggest directions that may improve relationships and avoid problematic exchanges.

Habit Five, the Camel's Back, addresses the inevitable moments when the lawyer blunders cross-culturally. Habit Five, The Sadder but Wiser Habit, looks retrospectively at a problematic moment to determine what factors led to a cross-cultural mishap, to eliminate those factors in the future. These factors can include implicit bias and structural problems in the workplace as well as other stresses that can lead lawyers to the breaking point. Simply put, the overloaded and overwhelmed lawyer is much more likely to act on implicit bias or ingrained stereotype. The call to self-awareness and self-inquiry, as well as nonjudgment directed towards oneself, that Habit 5 encourages may more likely occur if the students understand that implicit bias occurs across society and is not an individual failing. The true failing occurs when lawyers fail to function more intentionally and strive to eliminate bias.

We have suggested that readying the garden requires teachers to remove barriers to having conversations about race that prepare for seeding the conversations. We have identified some key concepts that students should learn to aid their capacity to see how racial bias and privilege work to reinforce a system of injustice. We suggest that these aid the student to recognize issues of individual and systemic racial bias in their clinical work, as they employ the Habits to examine their own actions and assumptions. We do not pretend that developing this level of understanding is easy. Whether we are teaching students through classroom conversations in seminar or rounds or case conversations in supervision, these seeds are early conversations about race, which lay the groundwork for more difficult discussions, described in the next section.

### **GROWING THE CONVERSATIONS, EVEN THE DIFFICULT ONES, IN THE CLASSROOM: THREE PRINCIPLES AND TEN TECHNIQUES**

Once the groundwork is laid, we can more confidently enter these difficult conversations, which, ungrounded in good preparation and unstructured by good discussion principles, can so quickly become fraught with judgment, negative emotion, and misunderstanding. What are the principles that lead to constructive conversations about race? What are the techniques that implement those principles in a workable way in the classroom? This section sketches those principles, and proposes some structures that might help keep the conversation on track

While this may seem paradoxical, we are convinced that nonjudgment can pervade these conversations all the way until the end. At first we wondered if this was impossible; surely, in leading conversations that allow us to progress towards a world of greater racial justice, at some point we will have to note that we do not view every opinion as equally valid. As noted below, Principle Three *suggests a teacher choose a direction for conversation that furthers racial justice* and take responsibility for that choice. This choice is consistent with nonjudgment in two separate ways. First, the explicit choice encourages teachers to express factual bases for their conclusion that one perspective better advances racial justice and better accounts for the facts observed in the world. Second, as in parallel universe thinking, the teacher takes responsibility for the assumption or conclusions that inform her choice to act and advance a conversation in a particular direction. Making explicit a choice to pursue some avenues for conversation and to forego others holds the teacher responsible, compels the teacher to be transparent about assumptions she makes in the face of multiple parallel universes, and allows the teacher to return to the point at which she chose an erroneous parallel universe and start again, if she later learns that her assumptions were in fact erroneous.

As we identified these principles and techniques critical to cultivating constructive, if difficult, conversations about race, we realized that most would already be familiar to teachers who are conscientious in their pedagogy, mindful about discussion methods, and sophisticated about negotiation and good communication. Although some of the ideas may be novel, all stem from solid grounding in clinical pedagogy and professional communication skills. Perhaps what teachers need most during the headiest, most heated conversations about race is a call to their highest teaching selves and some guidelines for wading into these conversations with confidence. Here are our ideas.

#### ***A. PRINCIPLE ONE: Embrace Tension and Difficulty As an Inevitable and Constructive Part of The Learning Experience***

In conversations about race, we ask students to take risks. We need to acknowledge that all cross-cultural learning and especially conversations about race are often stressful precisely because they are change-oriented. In addition, some students may experience stress because classmates articulate worldviews that are painful to them. Other students may experience stress because they have said something that exposed biases that they are embarrassed to acknowledge.

Principle One calls on us as teachers to reduce tension and difficulty to the extent possible and then to embrace the idea that the remaining tension and difficulty are inevitable aspects of the learning process and can be managed in a respectful learning community. Tips 1-3 in subsection D. below may particularly help to maximize learning in situations where there may be disagreement or tension.

***B. PRINCIPLE TWO: Employ Nonjudgment and Isomorphic Attribution While Giving Everyone an Opportunity to Be Heard***

Many of the seeding practices, including the Habits, may have created a classroom environment of nonjudgment that encourage isomorphic attribution, a process of attributing meaning to actions and words that the actor or speaker intends rather than one that the listener attributes based on the listener's cultural lens. A search for meaning invites the voices of all. This environment will be critical to constructive conversations about race. Many of the tips below seek to create a classroom ecology that can both challenge and support students in these difficult discussions.

***C. PRINCIPLE THREE: Choose and Cultivate a Direction for Conversation That Furthers Racial Justice; Take Responsibility for Your Choice***

Difficult conversations about race often require teachers to do more than make sure every opinion is fairly aired. After seeding these conversations and creating hospitable conditions for them, when they finally occur, they must yield fruit—increased understanding of race in our practice and, we hope, action to advance racial justice. For this reason, we cannot simply aim to air the diversity of views. Teachers must weed out unproductive lines of inquiry and amplify the voices that they deem most likely to move the conversation forward. Teachers should take full responsibility for these choices as they happen, and, wherever possible, transparently explain their reasoning for devoting conversation time to one viewpoint rather than another.

Teachers choose the direction and use of class discussion routinely; in some ways, this third principle is no innovation. Often in these conversations, teachers use their prerogatives to move the conversation intentionally without articulating the rationale. In race discussions, we suggest teachers model a transparent, undefensive, and fact-based authority and justify the discussion's chosen direction. By asserting their carefully deliberated teaching objectives for the class, teachers can advance understanding of how to serve racial justice, and can perform key messages in this choice-making.

***D. Ten Techniques for Carrying Out These Principles in the Classroom***

To give the three Principles life, we next identify ten techniques, many already well known to clinical teachers. Here, we identify how to use the techniques to advance conversation and understanding about race that will enable students to be better lawyers with deeper understanding about race.

*(1) Acknowledge the Difficulty*

When disagreement surfaces around difficult conversations, teachers can explicitly acknowledge the discomfort and identify it as a source of learning for

everybody. We can motivate students to continue by pointing out the conversation's value to their work as lawyers. Lawyers speak to multiple audiences, and by understanding each other's perspectives, students gain insights into their clients, judges and other decision makers. If students can stay in the difficult conversations, they can learn how to communicate more effectively. We can encourage and commend the group for reaching these conversations and choosing to continue them. We can remember together that we have been seeding these conversations for some time; the moment has now come and we are about to learn important things for moving forward, for our clients and for our society. Note that even this brief acknowledgment can create a small space for participant to take a breath, collect their thoughts, and gather their wits for the discussion.

Every participant in a conversation about race and privilege has unique gifts and challenges. (This may well be worth noting during the class!) A white teacher or student can model humility about understanding experiences of people of color, and can show interest in learning more about white privilege. Both, inevitably, will make some errors when showing empathy about a poor client of color's experience, will misidentify microaggressions when they occur and fail to appreciate the full complexity of dealing with them. Students and teachers' of color draw on a base of experience critical to deepening the law's understanding of all people's experiences, and may be able to speak with authority about microaggression and the challenges of intersectionality. Students, and even teachers, may also feel vulnerable to being seen as a recipient of affirmative action or burdened by the ongoing challenge of helping white peers understand her experiences better. Both teacher and student may fear raising race issues because it may be viewed as serving her self-interest. A teacher may decide to make these differential starting places explicit or even design a classroom exercise around them. Whether explicit or unstated, a teacher must remain keenly aware of these differential locations among classroom participants.

## *(2) Articulate a Clear Discussion Prompt*

A teacher can improve the quality of these discussions by first formulating a clear prompt or question to start a conversation, as well as follow-up questions. In our work debriefing failed conversations, we often find that the question that started the conversation set it off on a failed path. Sometimes we have failed to prepare for predictable conflict about a reading. Sometimes we have opened with a general question, "what did you think about the reading?" that invited a full range of reactions including off-the-cuff challenging and sometimes hurtful reactions when a more deliberative prompt that asked for fact-based or text-based ideas may have taken the conversation further. A teacher might also consider projecting the prompt on the board through a PowerPoint slide or in chalk to create a visual redirection when the conversation strays off-course.

Teachers should take special care to use factual, unfreighted language by thinking through the phrasing of the discussion prompts, posing questions consistent with the database available to the participants. Frame prompts are as simple as possible, without compound ideas, and use terms that have been clearly defined and are understood by all participants. Prompts that are located in texts or concrete situations rather than global thoughts about society can be useful prompts to anchor the conversation. Prompts located in a clearly delineated set of facts can also keep discussion on track. Another approach is to use a very stylized conversation as described in techniques five, seven, and eight listed below.

Finally teachers must avoid prompts that create or suggest a presumed norm of cultural or racial experience. Asking, for instance, a person of color to explain their experience to a room largely composed of white students replicates one of the “ghosts of diversity trainings past” from the Habits, in which students of color feel they are repeatedly asked to speak for their race and educate their white colleagues.

### *(3) Take Time Out to Write*

Conversations about race can quickly become heated, full of allusions and references, and dominated by a few voices. Taking time out in the conversation to ask people to collect their thoughts in writing can create space within these conversations to pause, take a breath, sort out their reactions, gather their thoughts, calm themselves, ask for clarification, and include more voices. Consider offering a moment for written reflection right after announcing the prompt, or halfway into the conversation, or towards the end; the pauses will permit people to collect or connect their thoughts, wherever they arise. As well, students can be asked pre-class to engage in reflective writing to gather their thoughts.

In class writing provides an opportunity for the teacher to collect her thoughts about how to move the conversation forward. The teacher can identify her goals for the conversation and think about how to structure it using some of the other techniques described here to move the conversation forward after the quick write. Consider bringing a list of promising classroom techniques to class with you to review at choice points in the conversation. The teacher may also decide to refine the prompt to move the remaining discussion along a particular path. As Principle Three mandates, teachers must use their plenary prerogative to organize class time to make sure the difficult conversation bears fruit.

Even writing students’ thoughts on the board can be a helpful way to see in writing the range of thoughts and to detach the viewpoint from the individual. This kind of writing also helps create space, pauses, a record that people can use for reflection and a disincentive to speak off the cuff or carelessly. Seeing your ideas written down also allows your students to see how you have digested the idea and may allow them to refine

or correct your misunderstanding. Consider distributing the notes to the class afterward via email, a PDF or word document generated in class, or even a photo taken of the blackboard.

Finally, classroom discussion boards and other virtual fora can create places for continued written reflection over time both before and after the class discussion.

#### *(4) Co-Reconstruct the Facts – Do Not Rush to Tie It up in a Bow*

As these conversations begin, establish as level as possible a factual footing for all participants. We all come to conversations about race with a broad range of assumptions and different knowledge about the roles race plays in our clients' lives and the legal system. When teachers are planning conversations about race or when these conversations arise organically as part of other planned conversations, teachers should assume that they and their students engage in the conversation without shared narratives. For planned conversations, teachers should assign readings that place students on a more equal factual footing as described above in subpart C of Sowing the Seeds.

To advance the conversation, teachers should encourage moving the conversation to “inquiry mode” to promote a sharing of facts and perspectives. A teacher can model this constantly, especially where students, often of a different generation from the teacher, reference common materials about which the teacher knows little or where a teacher references history that is unknown to students. A teacher can ask for clarification and information, and in so doing, encourage others to do the same as well. Inquiry mode can remain useful as students and/or teachers reach different conclusions about whether or how race plays a role. We can teach our students to explain their conclusions and understand those of others by isolating the critical data and the attributions made to it.

To accomplish this, we should encourage students to explain the facts that underlie their conclusions. When we and our students reach conclusions that draw on personal narratives, we should encourage students to identify how their personal experiences are the same or different than the topic under discussion. Personal narratives are among the most difficult for others to challenge. All participants, including the teacher, can be asked to answer the question, “What am I privileged to not see?” and, “What might my colleague/client see that I do not, and how can I learn from that person?”

In storytelling about cases in rounds, supervision, and seminar, students should include a description of the race and other salient identity characteristics of clients and other actors. By including racial identity as part of the story, we normalize conversations about race and we also encourage an inquiry about how race matters in the case.

#### *(5) Use Methodological Belief and Doubt*

Methodological belief and doubt, discussed at length in Chapter 15, offer teachers options in either highly polarized or highly like-minded classes. While other techniques may work best where class views are diverse, but not charged or uniform, try Methodological Belief and Doubt where views are uniform, emotionally raw or sharply divided.

In a class discussion where participants hold diverse views about the role of race in the particular context being discussed, the teacher has a dilemma. How does a professor, in starting a class designed to explore race in a particular context, think about the student who strongly, earnestly, does not believe that race is playing an important role in a situation in which the teacher and other students perceive an extremely strong role for race? In polarized classes, teachers can profitably use Methodological Belief: time-limited group exercises in fully crediting one perspective, even within conversations largely focused on exploring conflicting perspectives.

As discussed above in Chapter 15, Methodological Belief and its related “believing game” help the class briefly embrace a view together, pledging during a fixed time frame to explore fully a particular point of view.<sup>lxv</sup> During the believing game, Peter Elbow, its creator, suggests we ask:

- What's interesting or helpful about the view? What are some intriguing features that others might not have noticed?
- What would you notice if you believe this view? If it were true?
- In what sense or under what conditions might this idea be true?

Methodological belief can challenge thinkers to an extreme. It can be deeply uncomfortable to entertain, even briefly, an abhorrent point of view. Yet, the discipline of doing so can quickly yield tremendous insight. Recently, Jean asked a group of students who strongly believed in affirmative action to employ Methodological Belief in the position that no affirmative action should be used in a particular context. After prompting the discussion, all in the discussion, including Jean, sat in agonized silence, until one student noted that, absent any affirmative action, students of color selected in a particular context would both know themselves and know that others knew that they had been chosen on merit alone. This insight led to additional insights about effects of a non-affirmative action process that could be positive in the eyes of this skeptical group. For a student with a minority view in a classroom, who may be asked to spend most of rest of the discussion himself in Methodological Belief, having the group entertain his view together in this way demonstrates respect for all views and voices in the room.

If a group is unanimous in its views, Methodological Doubt can also invite a group in consensus to a fuller understanding of contrary positions. There, we challenge the group to imagine a perspective which doubts everything about their view—its facts and data, its reasoning, and its implications. Methodological Doubt may come easier to

law students and their clinical professors; many class discussions and faculty workshops in our schools employ doubt, and the extreme of methodological doubt, regularly. For this reason, Methodological Belief may be an even more important practice to teach our students, to balance out the academy's natural skeptical leaning.

Transferred to discussions about race, Methodological Doubt and Belief can play a critical balancing role. Even if a teacher who follows Principle Three intends to spend the bulk of the discussion time exploring the argument that race is playing a large and important role in a case or practice environment, the teacher can honor a student who strongly disagrees by engaging the group in even five minutes of methodological belief that race is playing a minimal or negligible role. The reverse is also true: the teacher can ask a group that believes that race is not important in a given situation to consider for five minutes that it is critical and transformative, and explore that as a group.

Note also that teachers can use well-crafted prompts, simple fact patterns, or readings, rather than student opinion, as a springboard for Methodological Doubt and Belief in order to ensure a balanced discussion of the issues.

#### *(6) Require All Participants to Be Able to Restate Accurately Other's Positions*

All of us in these conversations, should be able to recap, accurately and without distortion, the views expressed by others. As lawyers, we regularly ask ourselves to express, truly and accurately, our clients' views; we can employ the same skills here.

Hearing one's own views carefully and completely restated can assure participants that they have been fully heard; conversely, hearing one's views distorted, truncated, or misinterpreted can damage the trust necessary for these conversations to continue. Establishing a norm of being able to recite fully, to the speaker's satisfaction, her stated views instills a discipline that will be critical for these conversations to continue. Every response need not restate the previous speakers' views, but encouraging the discipline of being prepared to restate another's views will create less polarized, more nuanced give-and-take as discussions deepen. The practice helps participants notice when and exactly where conversations and understanding go awry, prevents arguing against a "straw man" and keeps all participants in a truly shared conversation.

We can all learn to develop the practices of disciplined restatement of contrary positions and asking for clarification and correction when we do so. We can establish this classroom norm early on in the semester and even, if we have not yet done so, use these discussions as the moment to start.

#### *(7) Consider Using a Rounds Approach*

In Chapter 6, we describe the stages of a rounds conversation. The different

stages separate facts from problem definition and from solutions. This structured process is designed to focus the conversation on facts – who what when and where - and to lessen premature problem definition before facts are described. Because it uses a process that allows for hypothetical thinking and further exploration of facts *before* brainstorming solutions, students can offer tentative ideas without fully adopting a position. This approach typically leads to more developed thinking about what might be causing the problem.

For example, approaching the question, “what role is race playing?” in a rounds conversation format allows for multiple and contradictory responses without a firm commitment to the answer. This brainstorming phase allows teachers to honor minority views briefly in a different way analogous to Methodological Belief. This phase also allows a teacher to explore what additional facts might be needed to test the different answers or to allow students to think about case or project strategies that respond to multiple and even contradictory explanations. The rounds process concludes with strategizing, based on the most promising parallel universes, and reflection on the thought processes employed—both critical phases for these thoughtful discussions about race.

#### *(8) Except When/Especially When<sup>lxvi</sup>*

One promising technique adapts Binder and Bergman’s “Except When/Especially When” framework<sup>lxvii</sup> to these conversations about race. If a discussion seems to be zeroing in on a promising conclusion based upon the evidence, for example, “Child Welfare workers in our courthouse tend to view inner city black teenagers with distrust,” the group can test and refine the generalization, first by brainstorming all “except whens” to the generalization: “except when those teenagers are doing well in school,” “except when those teenagers are living with stable extended family members”; and then all “especially whens”: “especially when the teenager has a history of drug use,” “especially when the teenager has been diagnosed with a mental illness.” This strategy, used throughout such conversations, helps to test generalizations that may be motivating discussions, and give them more nuance and refinement. Dozens of “except whens” suggest a weak or invalid generalization; many “especially whens” may offer potential refinements or nuances. The person’s actions will also be viewed more complexly. In addition, considering the generalization may allow the conversation to focus on a proposition rather than a specific person or context. Interlocutors who work together to refine critical generalizations may find more common ground, or pinpoint key areas of dispute. The refined generalization may also yield the need for additional data-gathering to resolve further disagreements within the group.

#### *(9) Action planning*

Time for the harvest! Wherever possible, discussions of race should include at least a brief discussion of action planning. Ideally, most discussions would yield at least

one idea for taking the ideas explored in the classroom out into the world where they can benefit our clients. As hard as they are to achieve, good conversations alone are not enough. Because our ultimate goal is to advance racial justice, we must constantly challenge ourselves to figure out how the ideas nurtured and grown in this garden can bear fruit in the world.

Although premature action has its own problems, as set out below moving these conversations out into less hospitable environments may be a worthy action plan, as a starting point. Breaking the silence about race in contexts where those conversations are not currently welcome may well be the best, and even the most radical, action plan we can contemplate. If we begin by successfully pointing out where race plays a role in decision-making and priority setting, we could soon progress to substantial reductions in racial bias in our individual case settings.

#### *(10) Review the Session Afterward to Prepare for the Future*

Take time to reflect on these conversations afterwards, to learn how to improve them over time. Teachers can engage in this process by themselves, or, as Epstein's essay in Chapter Seven points out, in rounds conversations with other teachers. As with Habit Four, Red Flags and Correctives, a process described in Chapter Fifteen, a teacher can look carefully at places where conversation flourished and where it died on the vine. While reflection is often focused on problem classroom encounters, teachers should also devote energy to conversations that worked to learn from them. Even where the conversation is painful to revisit, teachers practicing nonjudgment of their own mistakes or difficult experiences, reap all important lessons from the conversations we do have.

Whether alone or in conversation with others, teachers should strive to explore in detail the moves in the conversation. Teachers should identify: What did different students in the class get out of the class? What worked in the class? How will clients profit from the conversation? Even where a class went sour, were there productive moments before the turning point? What was the prompt? Was there a better way to start the conversation? What techniques did I use to continue the conversation or to lessen the judgment and create understanding? What could I do the next time in the same situation? Clinical teachers should also see if these conversations take root outside the classroom; supervisions and other follow-ups provide both opportunities to continue the conversation productively.

We toil in hot, thorny and pest-ridden gardens that do not always bear fruit. When conversations go seriously awry, however, teachers can recover. Honestly and openly debriefing failed discussions after reflection can invite new, wiser ones. We will surely make progress if we can remember that even conversations that go terribly wrong can be a learning opportunity for students and teachers alike.

## GOING FROM THE CONVERSATIONS OUT INTO THE WORLD FOR THE CLIENT: FIVE QUESTIONS AND A PROMISE

The Principles and Techniques provide methods that teachers can use to enable conversations that in themselves seed important and previously missing conversations in case contexts. Our goals for this curriculum thus extend beyond enabling clinic conversations; we need to answer the question, “*Will we be able to have these conversations about race in our workplace?*” in the affirmative. We need to be able to say, “Yes, you can have conversations about race, especially if you are willing to seed and tend them.”

Lawyers can try to seed these conversations in the office, the courthouse, the conference room, and the waiting room much as teachers try here in the classroom. When openings arise and their client’s interests could be served, lawyers can begin to raise questions about microaggression and implicit bias, cite to history and statistics, and generally raise issues of race. This will not be easy, by any means, in many of our case contexts, but we must start trying, and encourage students to look for even the smallest fertile opportunities. As in the classroom, routinely raising the issue normalizes the inquiry, and invites deeper conversation under the right conditions.

While we continue to work on how to integrate the Principles into workplace conversations and case contexts, we can begin to imagine how one could transfer many of the Principles and Techniques from the classroom into practice conversations. Envision a conversation in negotiation (or even the courtroom proceeding) something like this Six-Step Process, including Five Key Questions to Aid the Conversation:

**Step oneOne: *Continue amid controversy by*** acknowledging that the conversation involves conflicting and potentially difficult issues about race and encouraging the conversation. Perhaps by agreeing for example in a litigation setting that both sets of clients need us to “go here,” we can move into this complicated inquiry.

**Step two: *Co-reconstruct the facts by*** asking for additional facts and constructing the factual foundation together, as we did in the classroom: “What do I need to know or recognize that we have not discussed yet?” Invite a full discussion of the facts, and narrow the area of disagreement. If in case these conversations, we reduce the area of conflict, and pinpoint the contested facts, these discussions may already bear early fruit. We may well make important new discoveries about key previously unknown facts. Could even some parts of discovery become a joint venture?

**Step three: *Carefully listen*** by being willing to hear a full enunciation of the other side's position, and asking the same for yours. In this phase, again, one can

unilaterally model deeply respectful, fully listening behavior before legitimately asking for the same in return. This unexpected shift from other, much more combative, much less receptive lawyering behavior could itself be startling enough to command enough interest and momentum for the conversation to continue a bit longer than planned. Even if you start but don't complete this Step, perhaps some progress has been made?

**Step four: *Comprehensively restate the other's view*** by recapitulating the other person's position precisely, comprehensively, taking great care not to create shortcuts, shade language, add coded words, or neglect the nuance of others' positions. Holding oneself to this discipline on a moment's notice can restrain careless, angry shorthand and promote better understanding. If the advocate misunderstands, the opponent will likely correct her and provide a fuller correct understanding of positions that may end in litigation. While not necessary in each instance, an advocate who repeats or recapitulates at key moments and who is willing to do so at anytime may move a case forward rather than to stalemate

Hearing one's own position fully articulated without caricature or simplification is powerful. Asking the same for your point of view can pinpoint areas of disagreement, and at least ensure that deeply disagreeing parties are fully understood on their own terms. While a conversation may end after this step, the participants will likely leave with a new, more nuanced understanding of the other side, which may in turn lead to a greater possibility of future resolution. Note that this Step is also consistent with developing a trial strategy if this remains the only resort. Fully understanding the other person's planned presentation creates a solid foundation for preparing a case contesting that issue. Where ethically permissible, this exchange promotes, at least, a narrowing of the issues for trial.

**STEP FIVE: *Clarify changes and confirm choice***. Like the teacher in Principle Three, the advocate transparently proceeds with an adversary acknowledging any shifts in position, and also reaffirming deeply held positions, ideally with reference to the jointly co-reconstructed facts. As in the classroom, the lawyer takes responsibility for the facts that she preferences, and the assumptions that she weighs heavily in stating her end point. This could also be the time when she states directly, honestly, and with reference to facts, the places in which she believes that her adversary is mistaken. If done with sufficient transparency, taking of responsibility, and reference to the facts, this continues to be an act of nonjudgment, of speaking your view without judgment or blame. Rather than simply "agreeing to disagree"; this stage is explicitly detailed, precise, and upfront about remaining areas of disagreement, where that is consistent with your client's interests.

While the interlocutors may remain at odds, signaling openness to hearing the

other side's point of view, adjusting position based on the conversation, and remaining clear about one's viewpoint may create either an excellent environment for continued conversation after reflection, or a clearer sense of the remaining contested issues. If this phase pinpoints central factual disagreements, the opponents may be able to agree on a plan to investigate those facts more fully.

**STEP SIX: *Commit to reflect*** on the conversation and return with any thoughts you might develop about bridging the gap. Of course you must do this only if you are sincere. If there is still room for creativity in problem-solving, however, this step is critical, as it sets the stage for a new conversation to begin.

This approach to conversations in client settings can be summarized by five illustrative questions and a promise:

- (1) Can we please continue this conversation, despite its difficulty and intensity, given its centrality in resolving the issue between us?
- (2) What do I need to know that I don't understand? What am I privileged not to see? May I tell you some additional things that I think you may not have taken into account?
- (3) What is your full understanding of the situation? How does it shape your legal position? I will listen as long as it takes. Will you do the same for me?
- (4) May I repeat for you what I heard so that I can make sure that I fully understand your position? Can you tell me how you understood my position?
- (5) May I tell you how my understanding of the situation has been altered by your thoughts and this conversation? May I also tell you honestly what I continue to believe, and where I think we most differ? Will you do the same for me?
- (6) I promise I will reflect on this conversation, and come back to you with any thoughts I have about how to bridge the gap between us.

We acknowledge that this formal conversation is more time-consuming than many practice settings allow, requires much more cooperation than many adversaries may currently be willing to offer, and requires great discipline from both sides. Yet, we also believe that a commitment to growing ongoing, structured conversations like these will instill a practice of deep, unbiased conversation that can be built on as time goes on. Even one successful conversation between two people formerly at loggerheads can yield great benefits for the future. Even one successful step into the conversation may create the possibility of frank talk about race in this case or matter, or the next one. At least between those interlocutors, if conversations like these prove successful even once, both

sides will be highly motivated to continue them. Success in one matter using this methodology can offer alternatives to those who seek something besides heavily litigated or intensely negotiated conclusions. As each individual lawyer gets better at starting these conversations, they will become less unusual, and more part of the courthouse or boardroom or administrative culture. Our clients will hear the silence about race broken, and find openings to be heard about this central conundrum.

Some readers right now likely despair: There is no way these conversations could ever happen in my rushed, harsh daily environments. No doubt you are largely right. It is tempting to remain where we are, because the alternative seems so risky and fraught. But if these are the conversations we hope will someday take place even in our deeply broken courthouses, administrative law buildings, and conference rooms, this is the time to start them. There is no more time to waste in remaining silenced, frustrated, and prevented from engaging what appear to be the real issues at hand. Our clients deserve more. Even a practice that successfully adds one step of these conversations over a year or two years' time will be making steady progress towards fully communicative conversations that can transform norms and ultimately outcomes.

## **AREAS FOR FURTHER STUDY**

We invite all clinical teachers into the many areas for further study about conversations about race. Here are a few very ripe areas for research arising directly out of this Chapter.

- (1) We ourselves hope to continue the inquiry into talking about race in work and case settings, and realize that the many different legal fora--court, administrative agencies, transactional work, mediation—all offer specific contexts for rich exploration. We recognize that conversations in our own offices may pose some of the largest challenges and tensions.
- (2) What techniques have clinical teachers around the country successfully used in facilitating these conversations? While we have recorded our own teaching experiences and lessons learned in conversation with national colleagues, more systematic data collection would no doubt yield a host of useful and practical ideas.
- (3) How can a teacher better identify and track the particular interests and vulnerabilities of different members of the conversation? Teachers in highly diverse classrooms may grow dizzy with the complexity of personal agendas in the room.
- (4) What can we learn from the diversity among teachers who have tried to raise these issues? How do teachers overcome constraints on their teaching of race

issues posed by their own backgrounds, by being untenured, by being at schools that do not yet invite these conversations, to name a few examples?

- (5) What other concepts can help teachers and lawyers understand the dynamics of race in our society more clearly? Excellent research on stereotype threat and aversive racism can further inform our teaching.<sup>lxviii</sup> What other concepts have other teachers used in broaching these issues?

## CONCLUSION

While we remain committed to the Habits as an example of the myriad ways the thoughtful lawyer can confront her assumptions and steadily improve her practice, we are also freshly convinced that this approach to cross-cultural lawyering alone is not enough. The sophisticated practitioner, and the clinical law student, must commit to a daily practice of challenging their assumptions and biases in whatever ways they find useful, but the task of ridding our legal practice and our legal system of pervasive racism and prejudice requires more.

Focusing only on our own self-improvement and culture-sensitive practice risks replicating a mistake currently made in our legal jurisprudence: focusing only on individually-targeted, intentional acts of racism by identified actors, rather than seeing clearly the racism that continues to manifest in our national policies and fact-finders throughout our legal systems, reproducing historical racial discrepancies which have long lost any articulated legitimacy. We can now chart a path of starting these conversations regularly, learning from history, sociology, and the Habits, and then taking our students deep into the heart of these inquiries with principles and techniques that will move us forward towards racial justice.

Thus, a continued focus on practices like the Habits goes hand in hand with a renewed interest in studying and discussing race, continually, openly, and despite resistance, in the clinic. We address critical issues of bias and difference individually and interpersonally, so that each of us, and each generation, can develop practices of reflection and self-understanding that will improve our cross-cultural work, minute by minute, and day by day. Hopefully, this consistent micro-progress will embolden us in the larger unfinished struggle to see clearly, name plainly, study conscientiously and confront consistently racism and prejudice in our systems of justice. Both sets of daily commitments, in tandem, are required for the racism-free world towards which we must be constantly striving.

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<sup>i</sup> JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 241-328 (3rd ed. 2007); Susan Bryant & Jean Koh Peters, *Six Practices for*

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*Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Approaches*, in THE AFFECTIVE ASSISTANCE OF COUNSEL (Marjorie A. Silver ed., 2007); Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, AND LAW (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001); Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J. L. & POL'Y 17 (2001).

[Teaching materials, articles, and discussions of the Habits can be found at <http://legaledweb.com/curricula/>

<sup>ii</sup> We are each thankful for the opportunity to work on these issues with a thoughtful group of colleagues in preparation for the 2010 Clinical Teacher's Conference. Jean's work with Ann Shalleck and Sue's work with Sameer Ashar, Tirien Steinbach, Mary Lynch and Margaret Montoya sharpened our thinking about the issues we discuss here. In the small group on critical theory, in the AALS plenary and in her numerous writings, we learned important lessons from Margaret Montoya both about the substance of critical race theory and its importance for pursuing racial justice.

<sup>iii</sup> In recent semesters, Jean has worked closely with her students creating the two race classes for her two clinics as well as with research assistants working on this chapter.

<sup>iv</sup> In Spring 2009, Professor Montoya facilitated the development of a Race and Privilege group at CUNY, a group of students working to include those issues in the curriculum, including a day-long clinic workshop on race.

<sup>v</sup> MODEL RULES OF PROF'L CONDUCT, Pmb1. (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html); RON STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

<sup>vi</sup> JEAN KOH PETERS & MARK WEISBERG, A TEACHER'S REFLECTION BOOK: EXERCISES, STORIES, INVITATIONS 33 (2011).

<sup>viii</sup> Jon Kabat-Zinn, in the context of a therapeutic method known as Mindfulness-Based Stress Reduction, recommends this mindfulness. See *Stress Reduction Program*, CENTER FOR MINDFULNESS IN MEDICINE, HEALTH CARE, AND SOCIETY, <http://www.umassmed.edu/cfm/stress/index.aspx> (last visited May 23, 2013).

<sup>xi</sup> STEPHEN D. BROOKFIELD & STEPHEN PRESKILL, DISCUSSION AS A WAY OF TEACHING: TOOLS AND TECHNIQUES FOR UNIVERSITY TEACHERS 53-57 (1999).

<sup>xii</sup> The Habits are taught widely as part of clinical curriculums see Chapter 15 footnote xxx.

<sup>xiii</sup> Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

<sup>xiv</sup> Jody Armour presents a compelling case for the importance of normalizing the inquiry in *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Cal. L. Rev. 733 (1995). See also, Pamela M. Casey et al., NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), available at <http://www.ncsc.org/> (last visited November 17, 2013.)

<sup>xv</sup> Annie E. Casey Foundation, *How To Talk About Race*, in RACE MATTERS TOOLKIT (2006), available at <http://www.aecf.org/upload/publicationfiles/howtotalkaboutrace.pdf> [hereinafter RACE MATTERS]

<sup>xvi</sup> See e.g., Kenneth B. Nunn, *The "R-Word": A Tribute to Derrick Bell*, 22 U. FLA. J.L. & PUB. POL'Y 431, 432 (2011). The author describes an event at a hotel where he was attending a legal conference when a white woman assumed he was the bellman despite his casual attire.

<sup>xvii</sup> Davis, *supra* note 13, at 1560 (citing C. Pierce & W. Profit, Homoracial Behavior in the U.S.A. 2-3 (1986) (unpublished manuscript)). *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271 (2007).

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<sup>xviii</sup> See Sue et al. , *supra* note 17, at 273.

<sup>xix</sup> Davis, *supra* note 13.

<sup>xx</sup> Sue et al., *supra* note 17.

<sup>xxi</sup> *Id.* at 274-75.

<sup>xxii</sup> Sue et al., *supra* note 17 , at 279.

<sup>xxiii</sup> Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

<sup>xxiv</sup> See, e.g., FLA. STAT. ANN. § 903.046(2)(c) (requiring the court to consider employment history, among other factors, when determining whether to release a defendant on bail and the amount of bail, and conditions of bail); N.C. GEN. STAT. ANN. § 15A-534(c) (including employment among the factors that must be considered in determining conditions of pretrial release); MD. R. 4-216(f)(1)(C) (listing defendant employment status among the factors that must be taken into account when determining whether a defendant should be released and the conditions of release).

<sup>xxv</sup> According to the most recent available data, the unemployment rate for white people aged 16-19 is 22%, while the unemployment rate for black people aged 16-19 is 41%. Bureau of Labor Statistics, *Economic News Release, Table A-2, Employment Status of the Civilian Population by Race, Sex, and Age*, BLS.GOV, <http://www.bls.gov/news.release/empsit.t02.htm> (last updated May 3, 2013) (providing statistics through April, 2013).

<sup>xxvi</sup> This may be one of the many reasons for disproportionality of incarcerated. Every defense attorney knows that those who are bailed are less likely to serve time for similar acts. See Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, CRIM. JUSTICE P. REV. 1, 13 (2012) (finding that, in a study of over six hundred cases collected from New Jersey's Criminal Disposition Commission, defendants detained prior to trial received longer sentences than defendants who were released on bail); John Rubin, Thomasin Hughes, & Janine C. Fodor, 1 NORTH CAROLINA DEFENDER MANUAL: PRETRIAL 2-3 (2010), available at [http://www.ncids.org/Def%20Manual%20Info/Defender\\_Manual/DefManChpt01.pdf](http://www.ncids.org/Def%20Manual%20Info/Defender_Manual/DefManChpt01.pdf) (emphasizing the importance of seeking pretrial release for defendants and noting that “[y]our client may receive a better result at trial or sentencing simply because he or she is not in jail.”).

<sup>xxvii</sup> This scenario was developed by Carmen Huertas for use in a CED clinic seminar.

<sup>xxix</sup> See *Chapter Fifteen: Reflecting on the Habits: Teaching about Identity, Culture, Language and Difference*.

<sup>xxxii</sup> Kang, Jerry, *Trojan Horses of Race*, 118 HARV. L. REV. 1489-1593 (2005)

<sup>xxxiii</sup> *Id.* at

<sup>xxxiv</sup> *Id.* at

<sup>xxxv</sup> See, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/> (last visited July 16, 2013) [hereinafter PROJECT IMPLICIT]. PAMELA M. CASEY ET AL., *HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION*, [HTTP://WWW.NCSC.ORG/](http://www.ncsc.org/) (last visited November 17, 2013)

<sup>xxxvi</sup> For an overview of relevant research, see PAMELA M. CASEY ET AL., *HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION*, [HTTP://WWW.NCSC.ORG/](http://www.ncsc.org/) (last visited November 17, 2013)

<sup>xxxvii</sup> The IAT can be done online and only takes a few minutes.

<sup>xxxviii</sup> A commitment to a diverse judiciary, court employees, and the profession itself can help realize this goal. See also CENTER CT. INNOVATION, *PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, RECOMMENDATIONS* (2011), available at [www.courts.ca.gov/programs-profair.htm](http://www.courts.ca.gov/programs-profair.htm).

<sup>xxxix</sup> In Habit Five, we review our own cross-cultural blunders and examine the precise factors present to avoid replicating the same mistakes in the future. See PROJECT IMPLICIT, *supra* note xxxvii; NATIONAL CENTER FOR STATE COURTS, *HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION* (2012), *supra* note 35.

<sup>xl</sup> See Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 178 (2005) (“[E]ssentialism denies the multiplicity of individuals, as well as the fact that differences are fluid and relational, not static.”).

<sup>xli</sup> A lawyer who fails to recognize significant differences among clients will make assumptions about

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how a client defines her problems and what resources are available to her in solving them. See Leslie Espinoza Garvey, *The Race Card: Dealing with Domestic Violence in the Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 287, 290 (2003) (“Battered women are . . . invisible if they are ‘essentialized.’ Our challenge is to understand patterns without missing differences.”)

<sup>xlii</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

<sup>xliii</sup> While membership in a particular group can be the basis for discrimination and subordination, it can at the same time be the basis for a positive personal identity. See Crenshaw, *Id.* at 1297 (“[T]he process of categorizing—or, in identity terms, naming—is not unilateral. Subordinated people can and do participate, sometimes even subverting the naming process in empowering ways.”).

<sup>xliv</sup> See, e.g., Margaret Martin Barry et. al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 437 (2012); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 381-82 (2002)

<sup>xlv</sup> See, e.g., Margaret E. Johnson, *supra* note 40 (describing clinical curriculum that uses critical theory literature to enhance clinical education);

<sup>xlvi</sup> These readings include Kimberlé Crenshaw’s “Mapping the Margins: Intersectionality, Identity Politics: Intersectionality, Identity Politics, and Violence against Women of Color” and chapters from an assigned book, *Domestic Violence at the Margins: Readings on Race, Class, Gender, and Culture*. See Crenshaw, *supra* note xlii; DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE (Natalie J. Sokoloff & Christina Pratt, eds., 2005).

<sup>xlvii</sup> See Tremblay, *supra* note xlv, at 414-15 (describing models used to assist “[t]herapists and other helping professionals understand that to be effective in cross-cultural contexts they must appreciate not only larger cultural differences but also the degree to which a particular client has identified with his ethnic/racial background”).

<sup>xlviii</sup> Jean Koh Peters & Mark Weisberg, *Core Skills in Legal Education: Experiments in Listening*, 57 J. LEGAL EDUC. 427 (2007).

<sup>li</sup> Those with multiple dimensions of subordinated characteristics and histories will experience subordination “along multiple dimensions, even within historically marginalized groups.” Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 414 (2008). As clinical legal writers have noted, “Feminist legal theory, critical race theory, and poverty law theory serve as useful frameworks...” Margaret E. Johnson, *supra* note xlv, at 162 (quoting Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991)).

<sup>lii</sup> list articles for prison economics and school economics

<sup>liii</sup> RACE MATTERS, *supra* note xv.

<sup>liv</sup> Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1293-1302 (2012).

<sup>lv</sup> Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1 (1997); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

<sup>lvi</sup> This example and the insight that students need more information to fully understand the disparities that may be invisible to them comes from conversations with Sameer Ashar in preparation for the Clinical Teachers Conference 2010.

<sup>lvii</sup> Immigrants convicted of “aggravated felonies,” which include a large number of crimes that are neither aggravated or felonies, are deported without a hearing. 8 USC § 1228(c). People with permanent resident status are entitled to a hearing but few avenues of argument are available to them to defeat the deportation. See, e.g., 8 USC §1229b(a) (legal permanent residents who have been convicted of an “aggravated felony” are ineligible for a discretionary waiver of removability).

<sup>lviii</sup> FrameWorks Institute, <http://www.frameworksinstitute.org/>; RACE MATTERS, *supra* note xv; Eyer, *supra* note liv.

<sup>lix</sup> JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE

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ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 34-38 (2009).

<sup>lx</sup> DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001); ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYS., SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (2006); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009); *Race and Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options* (Jan. 28-29, 2011) (available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-index.html>).

<sup>lxii</sup> ROBERTS, *supra* note lx.

<sup>lxiii</sup> Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 BUFF. J. OF PUB. INT. L. 37 (2002-2003); Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State*, 16 IN PUB. INTEREST 1 (1997-1998); Krenshaw, *supra* note xlii.

<sup>lxiv</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

<sup>lxv</sup> Peter Elbow, *Methodological Doubting and Believing: Contraries in Inquiry*, in EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING 254 (1986)

<sup>lxvi</sup> We are grateful to Muneer Ahmad, our collaborator in a presentation for the AALS Clinical Section on “*Teaching Our Students to Challenge Assumptions: Six Practices for Surfacing and Exploring Assumptions, and Designing Action.*” Muneer worked closely with us in developing “Except When/Especially When” for use in contexts similar to the Habits.

<sup>lxvii</sup> DAVID BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF (1984).

<sup>lxviii</sup> . See, e.g., MICHAEL INZLICHT & TONI SCHMADER, STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION (2011); Sandra T. Azar & Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 533, 557-60 (2007) (discussing how aversive racism can contribute to bias); Sandra T. Azar and Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 L. & HUM. BEHAV. 249 (1994).