

CHAPTER FOURTEENⁱ: TEACHING ABOUT RACE

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INTRODUCTION

Over ten years ago, in our *Habits of Cross-Cultural Lawyering*,ⁱⁱⁱ 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 13, the Habits curriculum serves two useful purposes: (1) creating a practice of self-awareness and self-improvement, day-to-day, helping lawyers become thoughtful observers in cross-cultural lawyering interactions and addressing 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.^{iv}

However, these individual de-biasing tools alone 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. As we describe more fully below, students 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 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. Our goal is to add these pieces missing from 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.

Classroom and supervisory conversations about all forms of inequality, including those based on gender, sexual orientation, and disability, can be difficult. The procedures discussed in this Chapter will be useful in all conversations about inequality where students bring a broad range of knowledge and perspectives to the conversation. This Chapter focuses on teaching about ongoing racial bias first and foremost, for two reasons. First, we acknowledge that our society is nowhere near “post-racial,” despite the strides forward of recent generations. People of color, citizens and immigrants, of all classes, 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. This acknowledgement must be a critical part of our teaching until we as a society are confident that we are entering a world truly free from racial privilege, prejudice and bias. Second, our experience of teaching the Habits convinces us that

issues relating to racial inequality are the hardest around which to flag and sustain conversation, due to our country's turbulent history of slavery, treatment of Native Americans, and immigration, and must be addressed directly and firmly, with a strategy for ongoing improvement and eventual resolution.

“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 this question of Sue at the end of a rich supervision meeting debriefing the racial dynamics in an interview in which an Afro-Caribbean woman 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 under the Violence Against Women Act had bonded with a white 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 had influenced the interview. However, now 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 her prior one as well.

This student's question and our recent explicit conversations with students at Yale^v and CUNY about talking about race^{vi} 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. Students take messages 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.

Clinics may well create the optimal conditions for advancing our ability to talk constructively about race, in the classroom and in case advocacy. 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 for joint projects, and steep learning curve, might be an ideal place for teachers, students, and lawyers to take the next step in understanding how to have constructive conversations that advance racial justice.

The curriculum for learning and talking about race has three components. First, as described in Part One, teachers should ready the space for conversation by first, removing barriers to discussion and second, seeding the conversation from the earliest moments. 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, recognizes resistance to the conversation, and builds trust by establishing ground rules for conversations. Conversations about race are seeded by (1) clarifying that these conversations happen routinely throughout the semester; (2) regularly posing the question “how does race play a role in our clinic’s work?”; (3) introducing key concepts including microaggression, intersectionality, implicit bias, and equality generally and material inequality specifically; and (4) including in the curriculum updated information about the role of race in the clinic’s field, historically and currently. Finally, we discuss how the Habits of Cross-Cultural Lawyering might be used to deepen students’ understanding of the role race plays in practice.

In Part Two, 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 Three, 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.

Although we are focusing on the parts of our curriculum that center on race, it is critical to remember that these pieces are woven into the fabric of a total curriculum which also focuses on the lawyer’s role, the black letter law of the field, and the concrete work of representing clients and using legal skills. A planful teacher can sprinkle these materials throughout the curriculum as an integral part of teaching about competent, compassionate, client-centered lawyering. Thus, although these materials directly focus on race, they build upon values many clinicians naturally and organically 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.

I. READYING THE GARDEN: REMOVING THE ROCKS AND SOWING THE SEEDS OF CONSTRUCTIVE CONVERSATIONS ABOUT RACE

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 on these issues in the profession and broader society; and (4) consistent with the Habits, to enable students 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, and second, sow the seeds of these conversations from the first day of the semester. Removing the rocks involves motivating students for the conversation and creating an environment that lowers resistance to the conversation. Sowing the seeds involves a four-part process: establishing norms, posing race-related questions, introducing key concepts and including updated information about the historical and current role of race in the field. Using the Habits to teach about race can also aid us as we sow the seeds. We will discuss each step in turn.

A. *Removing the Rocks*^{vii}

Many students and teachers have deeply held positions about race, and come to these conversations with no experience talking about race in law school, or prior experiences of failed conversations about race. Some may resist the conversations as too difficult or risky; others because the conversations do 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 reasons. To remove these rocks or barriers to growing the conversation, we suggest the following:

1. *Practice nonjudgment*

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

Rumi

Throughout our discussion of conversation 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. “Nonjudgment requires an open spirit of inquiry and factfinding, bracketing our impulses to blame, evaluate, judge. From the outset of examining an experience or an event, [decide] to maintain an attitude of nonjudgment. All observations will be made in terms of facts and details witnessed, rather than conclusions or critiques formulated.” Nonjudgment 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 better approaches for naming and eliminating racial inequality through a principled process. If teachers teach and practice nonjudgment, identifying it as particularly important in settings where we are most likely to condemn harshly, students can begin to experience and practice nonjudgment themselves.

A lawyer or teacher practicing nonjudgment when talking about race and pursuing racial justice will consciously adjust her internal and external orientations.

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—i.e., the witness, the seer, who calmly abides through the constant fluctuations of internal experience and the outside world. Jon Kabat Zinn, in the context of a therapeutic method known as Mindfulness-Based Stress Reduction, suggests that this mindfulness “assum[es] 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.” In this way, nonjudgment becomes the vehicle for factfinding 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.

This approach doesn’t promote paralysis; lawyers will continue to make decisions or 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 the project of this Chapter. Pursuing racial justice requires a firm factual basis, as untainted as possible by prejudice, before we design actions to address injustice.

EXTERNALLY: Act nonjudgmentally towards others, inquiring about facts, 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 if you don’t 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 be valid. Speak your views without judgment or blame .

Focusing on fact allows one to act nonjudgmentally, decide nonjudgmentally, and choose nonjudgmentally, even evaluating nonjudgmentally. Some judges suggest it's possible to judge nonjudgmentally. Nonjudgment does not mean every viewpoint is equally valid. We make an analogous suggestion in Habit Three, parallel universe thinking, when we suggest that you follow the generation of multiple parallel universes by making an explicit choice. To do so, you have to identify the facts you weigh most heavily, assumptions you are prepared to make, or hunches you have in preferring one parallel universe over another. You pause to confirm that your hunches and assumptions are consistent with the facts you have. You also recognize in this moment of choice that you may not have chosen the accurate explanation for the facts. Clarifying these choices for yourself also allows you to be explicit in the moment of choice, to coordinate with collaborators on decisions you are all making jointly in the face of uncertainty, and even eventually to backtrack to this place, if it turns out that your 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.

Evaluating, deciding or choosing nonjudgmentally actually takes a fair amount of work. We should resist rushing to positive as well as negative judgments. It is so easy to say to the student, "you did a great job," and much less easy to articulate precise facts and data that yields that conclusion. Nevertheless, we consistently find that students, while encouraged by vague positive praise, benefit more from detailed and specific feedback, and there is no reason to shortchange those details when a student has performed with skill. Often we push ourselves to delineate our data when the student has not met our standards. This invitation to nonjudgment therefore requires a lawyer to do good lawyering: marshaling facts to support conclusions; not resting on generalization to move the conversation forward.

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. 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.

Habit Three, Parallel Universes, typifies nonjudgment. Jean remembers leaping to judgment years ago, when a state case worker 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 continue 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, she was extremely grumpy about it. 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 moment one, had been working constantly behind the scenes for return of the child, and was not at liberty to say so. How close had we come to branding as an enemy the person who, in the end, facilitated our client's dearest wish?

2. Recognize and work to overcome our own and our students' resistance to these conversations

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 swimming upstream; the context that exists to a greater or lesser extent in our classrooms, courtrooms, and our students’ future work environments, views race as largely irrelevant. In this context, those who raise issues of race often have to fight to make race part of the dialogue. More recently, those who identify racial dynamics have been labeled “racists.”^{viii} Teachers and students of color often face similar responses when they introduce issues of race in the classroom. As a result, we often view race discussions as intrinsically risky, anxiety-provoking, and unsafe.

Those who recognize the salience of race in contributing to the material inequalities 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 who see an acknowledgment of difference or bias as violating a commitment to equality (“I do not see black people, I just see people”). Law students and lawyers continue to struggle with what to do with our history of gross racial inequality; does this require more inequality to correct it, or formal equality from now on. (more to be added) (Ann’s sources)

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 action rather than awareness.

Teachers can overcome resistance 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. We can help students overcome their resistance by connecting it to their work and by planning classes and supervisions that set goals for the conversations that engage students on a broad spectrum of knowledge and experience.

Parts Two and Three below suggest specific strategies for continuing difficult conversations about race despite resistance. In general, we propose that race discussions should generally be encouraged, embraced when they arise naturally, and expected to be difficult, but not impossible. We seek as a central goal of this Chapter ways to begin and important conversations about race in the face of resistance.

3. Remove distrust by building a learning community.

One barrier to the conversation, distrust in each other, can be mitigated if the teacher makes 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 that promote learning. 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 discussion.

To establish a learning community, many teachers establish ground rules for conversations that are used 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.^{ix} Groups can also delegate formulation of ground rules to a subgroup of the class. Another approach involves teachers announcing 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 conversations, or conversations where students have strong point of view, to conversations about race.

Finally, teachers should seek feedback on these conversations. Asking “how is it going?” or “how are you doing?” 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 how an initially confusing conversation proved useful over time.

B. Sowing the Seeds:

As the ground has been readied for a fruitful conversation, these conversations must also be seeded. Sowing the seeds involves a four-part process: first, establishing the norm that these conversations will happen as a valued part of the curriculum; second, regularly posing a fruitful question, that is, “What is the role that race plays in our work?”; third, introducing key concepts for discussing race in the twenty-first century; and fourth, including in the curriculum updated information about the role of race in the course’s field. Fifth, the Habits of Cross-Cultural Lawyering can prove very useful in considering race as students introspect about their own practice. We will discuss them in turn.

Note that throughout all these examples, we have initial conversations to lay the groundwork for the more difficult, intractable conversations about race and therefore, *we are already conversing about race*. These seeding moments can be shorter or more straightforward presentations of new concepts and historical material, or can in themselves be the initial conversations we seek to have. Jean, who has 26 class hours total in one semester in her clinic, tends to drop seeds quickly, but intentionally, throughout the first half of the semester. Sue, who has 156 class hours total over two semesters, can spend more time turning these initial conversations into deeper explorations with the students. We have found both of these strategies successful.

1. *Establishing the norm: “We will be discussing race.”*

In beginning the course, the teacher has unique and powerful moments 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 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 different ways to signal an openness to conversations about race. Jean seeds the norm of discussing race in five separate ways. First, in the first 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 class schedule which explicitly includes a class concerning race and its historical and current role in the field.^x 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, in a workshop in the first week of the semester that she teaches to new students entering many of the school's clinics, she asks the students speaking in role as an African-American client to speak specifically about microaggression, as defined by Peggy Davis in *Law as Microaggression*, and about their expectations for legal services from students at a prominent Ivy League law school. Fourth, in the first third of the semester, she teaches a class incorporating the Habits of Cross-Cultural Lawyering. Race issues usually surface here. In addition, in teaching the fifth Habit, the Camel's Back, concerning the need to look carefully and nonjudgmentally at one's own mistakes, she regularly tells a story involving her disrespectful actions to a black African woman client. Fifth, each of her clinics has, as one of its thirteen classes, a session specifically addressing both the historical role of race in the development of the clinic's field and current dialogues in the field about the role of race in the present day.^{xi}

While Sue also sows these seeds, her expanded seminar time allows her to plant more ideas and explore them in more depth. As illustrated in subpart 4 below, Sue often uses that time to introduce critical concepts for analyzing race and encouraging students to observe courtroom environments equipped with those analytical tools.

2. Regularly posing the question: "What role does race play in our work?"

It is critical to regularly ask: "What role does race play in our work?," not simply from the perspective of the Habits, which seek to continually rid our individual behavior of bias and

stereotype, but also to explore its role in the systems in which we practice and the law governing our work. Professor Jody Armour provides a theoretical framework for why this kind of questioning is so essential, particularly in courtroom settings. Armour recommends a practice to safeguard against implicit (unendorsed) biases. Armour's disassociation model gives justification for the practice of always examining the role race plays.

Armour's dissociation model suggests that race always plays a role, and therefore it makes most sense not to ask "Is race playing a role?" but rather "*How* does race play a role? Armour considers it a fact of life that we are socialized in a race-based society and raised with firmly entrenched cultural stereotypes of marginalized groups. These stereotypes will exist and play a role in our thinking unless we consciously combat them. Armour proposes we reduce bias by activating non-prejudiced personal belief to counteract unconscious bias and bring race to everyone's attention, inhibiting the influence of traditional stereotype. In other words, we must consciously replace stereotype with non-prejudiced views; we must also repeatedly raise the issue of race, rather than duck it. 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.

3. Introducing key concepts for understanding race

The scholarly literature provides at least four critical tools for naming and more deeply understanding dilemmas faced by people of color continuing to face bias in the twenty-first century. 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 see the microaggressions and may inadvertently create these destabilizing moments for others. Second, the concept of intersectionality refocuses discussions on multiple sites of oppression and the necessity to see 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 perspective based on that single trait. Together, these two ideas help initially superficial conversations about race to account more fully for the daily lived experience of people of color. The third and fourth concepts are implicit bias, which explains how discrimination operates to oppress in unintended ways, and material inequality, a concept that helps students to see the impact of discrimination in their clients' lives.

a. Microaggression, privilege and power; empowerment and anti-subordination.

Microaggression, privilege and power are important concepts for students to understand

in relation to themselves, their colleagues, and their clients and the legal system. How does identity shape privilege and how is power exercised in their co-counseling relationships, with clients and in courts? How does privilege arising from race, class and/or education potentially blind students' capacity to understand clients' experiences? How do we help students recognize and deal with microaggressions committed by and against them and their clients?

We assign Peggy Davis's classic article on *Law as Microaggression* to teach the concept and locate it in a legal framework.^{xii} Microaggressions, defined as a series of minor but constant indignities,^{xiii} "incessant, often gratuitous and subtle offenses" based on identity characteristics, serve to undermine confidence, reduce one's sense of belonging, and subordinate people. Identifying and using this concept often helps students of color name their life experiences,^{xiv} and helps other students see subtle examples of racism. Microaggression impairs the performance of persons of color by sapping the psychic and spiritual energy of recipients.^{xv} Derald Wing Sue subdivides microaggression into microassault, microinsult, and microinvalidation, offering concrete examples of several categories within each subdivision.

During court observations, we specifically ask students to watch for microaggressions. Students of color, especially women of color in family courts in our experience, are likely to report various comments that mistake them for litigants. 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. We also ask students to think about the microaggressions that their clients experience in the various legal systems they must encounter and how that contributes to their clients' reaction to lawyers, law, and courts.

Davis's article 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.^{xvi} The concept hopefully helps students understand 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 are largely invisible to students who have the privilege of not being subjected to them. Our goal for these students is to recognize microaggressions, to understand their impact and avoid engaging in microaggressions themselves. 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 respond differently. Students have also found it useful to acknowledge that they are, at once, victims and perpetrators of microaggression, sometimes in the same day, sometimes in the same interaction. Identifying both kinds of roles can be key to

steady improvement in eliminating microaggression, both as an actor and as a recipient.

The Habits, along with Doubting and Believing Practices, teach us that we all have bias and perspectives and that our life experiences limit what we see and how we interpret what we see. If we teach these ideas with a race-conscious approach, we address how in particular white privilege shields white students and teachers from seeing and experiencing microaggressions and other acts of discrimination. Michelle Jacobs' *People from the Footnotes* article^{xvii} can be used along with a reading about the Habits to teach students how their own microaggressions may create a harmful interaction. Similarly, our failure to name how white upper- and middle-class experiences are privileged in the law and its norms is a failure to educate all students about how to challenge these raced-based norms. For example, in criminal cases, employed defendants are generally treated more favorably in bail and sentencing determinations. Using employment as a test of trustworthiness and societal worth has a disproportionate impact on black and Latino men when one compares their unemployment rates with white men.^{xviii} The disparity between 40 percent to 10 percent unemployment rates shows how this factor is racialized.^{xix} This seemingly neutral category relies on privileging white people's experiences versus the experiences of people of color, and results in greater sentences for people of color.^{xx} 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 more systemic change to the standards for bail and sentencing.

Power and privilege are useful frames in 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.^{xxi} 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.

The clinical professor asks her students, "How do we think about power and privilege in this context between the lawyer and his clients? Between co-counsel? What do race and gender dynamics contribute to this analysis? What might be the real and perceptual issues in this scenario? How did the lawyers get to this plan? Did the lawyers discuss who would start the meeting? Were the clients consulted? Or did the white male lawyer assume that he had the power to start the meeting? If you were the woman lawyer of color how might you address power imbalances to create a space for yourself at this meeting? How can the two lawyers create space for their clients and acknowledge their

power?

Cross-racial work between students and with clients that ignores the impact of race, power, and privilege deprives students of valuable learning. In the critical incident above, a teacher could 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. If the woman of color never engages in a conversation about asserting herself in the space or the white male never understands how his actions may be interpreted through a race and gender lens, both will have missed opportunities for learning.

Through debriefing client interviews, simulated and real, students can learn about these micro-power dynamics. Talking about cross-race and cross-gender conversations in the context of client relationships provides a “one-step removed” possibility for the discussion. Students who co-counsel across race and gender lines have additional 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. These conversations are difficult, requiring trust between the parties.

We are currently exploring how other concepts related to microaggression, including aversive racism (cite Azar and Goff) and stereotype threat, may also be useful in our curricula.

b. Implicit Bias

Understanding implicit bias – how it operates and can be addressed - equips students to engage with clients and others with an intentional approach that can eliminate a student’s bias thinking. This understanding also gives them strategies for challenging stereotype thinking in presentations to courts or other audiences. Implicit bias occurs because we all use mental shorthand techniques to organize and apply information.^{xxii} We apply these techniques to people based on a single characteristic or group of characteristics without knowing we are doing it. Implicit bias is a widespread phenomenon; research has consistently shown the existence of implicit bias in different social contexts and in different countries.

Student 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. 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, a suspect’s dangerousness and while little research has been done on judicial decision making, researchers have described how implicit bias would affect these decision makers and other legal actors.^{xxiii} 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. Some teachers ask students to take the IAT before class and use insights from the experience to discuss implicit bias.

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. 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. Additionally, the report identifies these other approaches

- Consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences)
- Routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one’s decisions are made)
- Identify sources of stress and reduce them in the decision-making environment
- Identify sources of ambiguity and impose greater structure in the decision-making context
- Institute feedback mechanisms
- Increase exposure to stereotyped group members (e.g., seek out greater
 - contact with the stigmatized group in a positive context)

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These suggestions for judges work for advocates as well. We explore with students how to use this information in their casework. We use insights generated in these discussions in class, rounds, and supervision to think about implicit bias as one explanatory theory that is operating to create disparities in the legal system and other systems.^{xxiv} We also identify fact-finding and credibility determinations as rich sites for implicit bias.

In teaching our curriculum about race and the Habits including our teaching about implicit bias, our teaching puts clients and ourselves in 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 using any one category or thinking categorically to fully define a person or a social issue can result in the 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.

c. Using and Breaking Categories: Intersectionality and anti-essentialism

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

Inter-sectionality, a related but distinct concept, explains that a given person can at once be a member of multiple different socially-constructed groups.^{xxvii} 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.^{xxviii} 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.^{xxix}

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 as a member of multiple groups.^{xxx} They can also use those categories appropriately to see systemic discrimination. In the clinical classroom, teachers can help students understand these concepts by assigning critical race scholarship.^{xxxi} For example, in a Battered Woman's Clinic context at CUNY Law School, we assign multiple readings that use intersectionality and essentialism to describe the special problems faced by women in different ethnic and racial communities.^{xxxii} The students read these articles and chapters over the course of three interviewing classes.^{xxxiii} The chapters help students see their clients and their issues multi-dimensionally. For example, while teaching students the concept of "filling," the process whereby 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,” stories that explain how the world works. These concepts improve students’ interview 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 longer articles to give students the salient ideas espoused by the reading.^{xxxiv} 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.^{xxxv} We sometimes focus the discussion narrowly on the reading by asking students to adopt a believer’s stance^{xxxvi} and identify how the author’s insights about law and lawyering. We then try to name the important lessons or approaches the article suggests for lawyers.^{xxxvii}

In addition to aiding students with individual client work^{xxxviii}, intersectionality and anti-essentialism are critical to understanding ongoing systemic discrimination faced by our clients.^{xxxix} Clinical teachers must teach their students how concepts like intersectionality “illustrate that difference is used as the organizing principle of political, economic, and social structures.” Students can gain a vocabulary, a context, and a greater understanding of how differences might operate in relationships among themselves, their clients, and society by understanding theories such as anti-subordination and essentialism.^{xl}

Consider the following class Jean teaches in an asylum clinic in which each student has been given a new asylum claim, which hopefully will be filed and considered 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,” the central theme of the class is this: . to assess how strong or weak their client’s claim is, on every important vector--the substance of the persecution, protected ground and 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 Laszlo’s, a white, educated, English-fluent, famed political dissident travelling on legal papers with his wife and pursued overtly by 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 enhance

privilege. 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, and protected refugee ground. 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, 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.xli

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.^{xlii}

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 similarly-situated others.

d. Understanding, in our field, Material Inequality and the Role Racial Bias Plays

We want students to understand is material inequality and the role that race plays in establishing material inequality. Clinic students meet poor clients who are often clients of color. If they have the empathetic skills and perspectives we teach them or if they are believers rather than doubters, they learn from their clients' narratives about struggle, disadvantage, lack of access to healthcare, foreclosures, family destruction, etc. The Annie E. Casey toolkit on talking about race posits that most Americans accept the dominant view that race is an irrelevant

explanatory theory for the distribution of social goods. If many of our students enter our classroom with this assumption, how do they interpret the facts given that their clients are people of color? For example, if a student sees injustice happening to her client, does she see her client as an exceptional person who works hard, does the right thing, yet remains materially disadvantaged?^{xliii} Our teaching goal for these students is for them to see their clients not as exceptional people but as an individual who may experience broader social inequities. For the students who already understand and for those who come to understand that race plays a salient role in determining social inequities, our teaching goals also include increasing students' capacity to recognize how racial inequality might be engaged in the context of 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^{xliv} while others bring sophisticated analysis to the observation. Classroom conversations that debrief observations move from descriptive to inquisitive and analytical modes, as illustrated by the following example:^{xlv}

In a visit to immigration court where people are challenging deportation notices, 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 as 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. Forty percent of our clients were picked up on Greyhound buses and taken into detention. Who rides and who does not ride these buses? What do we want to know about 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 are people who are convicted of a broad range of crimes. What do we know about race and criminal justice and how that impacts who is not in court?

This inquiry requires 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? And how does bringing a racial lens to the inquiry help us understand the court and the context better? 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.^{xlvi}

We are cognizant of research that shows that statistics alone do not influence people's thinking about race,^{xlvii} and our own experience confirms that students push back in class and in supervision and struggle internally against these statistics. They explain these disparities with theories based in thinking that reinforces the dominant ideology that racial inequality, if it exists, results from individual failure to work hard and accept personal responsibility. If a student shares his interpretations, we have an opportunity to explore how this thinking by focusing on our own cases to uncover assumptions we bring to the conversation and we can inquire how to examine our contrary views.

Where a clinic or clinician does not already have extensive background knowledge about 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 at first a bit confused, both because they felt that Jean often brought up issues of race and difference, taught the Habits, taught a partial class on the class- and race-based historical origins of Child Welfare and often asked if race played a role in our casework. As Jean and the group began the research, however, they found a huge body of very current, lively debate proceeding in the field.^{xlviii} Their research has continued over six semesters, memorialized in a heavily footnoted PowerPoint presentation for new students. Jean also observed that she found herself initiating discussions about race in the clinic with less frequency, perhaps because she was now more comfortable that the students would be provided a thorough presentation of the current work in the classroom. For Jean, this collaborative experience was the most successful and rewarding extended conversation in her career about the continuing role of race in affecting clinic work.

In the fields we practice in, we give students articles and book chapters that detail racial disparities created by law and practices in their fields.^{xlix} For example, we assign Dorothy Robert's work, *Shattered Bonds*,¹ 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. We assign articles that detail the paucity of services for immigrant women and non-English speakers,^{li} and articles that explore how high unemployment rates in communities of color and inadequate childcare facilities for working moms can explain why women stay in abusive relationships or have difficulty regaining custody of their children. We ask students whether these same statistics and problems identified in the articles also apply in our communities and to our clients and how we might discover that. We also find that when students do some of the

research about local conditions they are more likely to credit the results.

We can ask ourselves whether we offer sufficient information in the clinic on these critical data points:

- What roles has race played in the history of the clinic's substantive legal field?
- When and where has the field relied on overt racial categorizations in determining status, qualification, eligibility or some other legal benefit or outcome?
- How have less explicit ideas about race come into play in the history of the field?
- What are the major critical race moments in the field's history?
- How do these historical vestiges continue to affect our practice and our clients' experience in the field today?
- What new forms or forces of racial discrimination might be at work in the field?
- Is there a positive role for heightened race consciousness on the formal legal systems that govern our clients' lives?
- How can the law and practice in this field take history into account in the pursuit of racial justice?
-

In doing so, we can use a variety of pedagogical techniques. Depending on time, we can dedicate one or more class sessions; even in Jean's 13 class semester, she devotes minimum one class to the subject. We can address the issue in rounds and supervision. We can preference discussion of the issue whenever it naturally arises. Jean's ACY class has student-led classes, and students are encouraged to pursue these issues there.

In one recent Race & 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 explored its own family histories, located their arrivals in the historical trajectory of race and immigration, and identified critical race moments in the field's history. 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 S.B. 1070) and *Ortega Melendres v. Arpaio* (a federal case in Maricopa County, AZ challenging racial profiling alongside an excerpt of an article by Reva Siegel on discriminatory purpose doctrine (cite).

Sue is able to devote far more time to these questions, with more reading, in her two semester, seminar heavy curriculum. Examples. But even Jean's shorter semester and fewer classes can accommodate a planful approach to presenting this critical material efficiently.

Equipped with this information, students can continue to contextualize their own learned views and assumptions concerning race. The Five Habits, discussed next, offers a way to engage that sensitive inquiry.

5. *Five Habits of Cross-Cultural Lawyering*

In 1999, we developed the Five Habits of Cross-Cultural Lawyering in response to our concerns that clinical education had grown in sophistication in areas like interviewing and counseling but continued to lack substance in the area of cross-cultural lawyering.^{lii} The Five Habits are now taught in clinical curricula around the country.^{liii} In other articles, we have discussed how the Habits help students appreciate the role of culture and language more generally. Here we first identify the overarching principles that animate the Habits and focus on how to use the Habits to make sure that consideration about race are integrated into the Habits. In addition, many of the concepts discussed in part 3 above can be incorporated explicitly in the Habits instruction.

The Habits seek first and foremost to identify assumptions in our daily practice that grow from three central and essential dynamics of cross-cultural interaction: nonjudgment, isomorphic attribution, and daily practice and learnable skill. Nonjudgment requires a focus on fact and observable phenomena in the world, deferring interpretation, evaluation, and theory development.^{liv} Because our culture and language shape what we observe, cross-cultural work requires us to observe more carefully and move to meaning-making more deliberately. Isomorphic attribution requires discerning the meaning and intention of the person speaking or acting. While we normally attribute or determine meaning through our own cultural lens, isomorphic attribution asks us to create meaning by looking through the eyes and cultural lens of another. Daily practice and learnable skill requires practitioners to commit to micro implementation of the Habits and, initially, minute to minute awareness of these principles.^{lv} Taken together, the dynamics request the lawyer to suspend judgment, whether negative or positive, dedicated to the search for the authentic truth of another^{lvi}, and quotidian attention to concrete techniques of surfacing and challenging assumptions in everyday practice.

The Habits are an alternative to exorcise the ghosts of diversity trainings past, which, despite their good intentions, often inadvertently established a norm of white maleness; focused on teaching about nonwhite culture to white students rather than the learning about culture that all students needed to be better lawyers; and, placed unfair burdens on people of color to educate white students, while subjecting all to a fear of condemnation and shame. The Habits are undergirded by three principles:

- 1) all lawyering is cross-cultural;
- 2) the competent cross-cultural lawyer remains present with her client, ever respecting her dignity, voice and story; and
- 3) the cross-cultural lawyer must know him or herself as a cultural being to understand

his or her biases and ethnocentric world views.

Rather than orient cross-cultural teaching towards an unspoken white, male, hetero norms^{lvii}, the Habits sought to identify and reach the cross-cultural difference between lawyers and clients, factoring in their unique demographics, experience, and values.^{lviii}

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. The habit of examining the lawyer-client relationship through a cultural lens, Habit One invites the lawyer to impressionistically map the overlap between the lawyer and the client's worlds using a Venn diagram, with circles representing the lawyer's and client's universes. Habit One also asks the lawyer to inventory differences and similarities that the lawyer perceives between lawyer and client. Using these two methods, the lawyer focuses on the lawyer's and client's multiple identities (the inventory) and on particular identity factors that may heavily influence connection and distance (the Venn diagram.)^{lix}

Habit One allows a lawyer to compare his impressionistic views of his commonalities and divergences from his client to specific facts known about the lawyer and the client across various characteristics. Habit One allows a teacher to teach about white privilege and other forms of privilege when exploring what is on the list and left off. For example, in listing similarities and differences, white students will often fail to identify their race in the list. The privilege of not noticing one's race is one example of how privilege operates. Habit One's focus on the impact of similarities and differences on trust building allows students and faculty to explore how racial mistrust and micro-aggression might influence the relationship. Michelle Jacob's article, "People from Footnotes" and Derald Wing Sue's article on micro-aggression are useful additions to reading about the Habits to build student's understanding about how similarities and differences will effect the way clients will interpret lawyer behavior and influence fact gathering. In explaining why it is important that Habit One asks for inventories of all possible similarities and differences, teachers can also teach intersectionality.

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. Habit Two, **the Habit of the Forest and the Trees**, maps the lawyer-client similarities and differences in connection with the strength of the client's legal claim or problem approach. Habit Two asks the lawyer to take the lists and diagrams developed in Habit 1 and add a third circle to the Venn diagram, a circle representing all of the things in the universe that the law and legal decision makers reward or consider meritorious in this legal context. The three circles and accompanying lists enable the lawyer to refocus his attention to refine and strengthen the presentation in litigations or transactions of the client's legal claim by taking into account all players' cultural differences and similarities.

Habit Two helps the lawyer refocus his conscious energy on strengthening the client's

legal claim by increasing the overlap between the client's universe and the world of the law. Habit Two is often instructive as lawyers remember the ways in which their universe and the universe of the law powerfully overlap in ways that do not include the client and her world. Habit Two also helps the lawyer take into account the powerful convergent and divergent gravitational pulls from his own universe that may or may not be helpful to solving the problem or preparing the case. Implicit bias can be usefully introduced 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. They can also graphically identify whether race is considered by the law a positive or negative factor as they determine the strength of their client's case.

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. Habit Three thinking is especially important in working across cultures where attribution – creating meaning from behavior and words - may be dramatically different across cultures. Parallel universe thinking does not seek necessarily to determine the correct explanation for speech or behavior; instead, it accomplishes something more significant: it destabilizes a lawyer's premature certainty about the meaning of other people's actions. Habit Three, the paradigmatic habit, exemplifies the critical dynamic of nonjudgment, reminding the lawyer to suspend judgment and even interpretation of behavior about which she has insufficient information. Parallel Universe thinking can also help students interpret “seemingly inconsequential acts” as ones that are interpreted differently by those who are subjected to them on a regular basis.^{lx} This understanding increases students ability to recognize and use the concept of microaggressions.

Habit Four, Red Flags and Correctives, focuses on lawyer-client communication.^{lxi} 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. While knowledge about another culture's communication patterns is helpful, inevitably, a lawyer working across cultures encounters communication difficulties. When this happens, Habit Four asks the lawyer to identify concrete moments of faltering communication in the interactions, to brainstorm parallel universes to explain the faltering, and to plan possible alternative strategies to bridge the gap of communication. Habit Four accustoms the lawyer to reflect on communication while communicating and in-between client encounters, developing a repertoire for potential responses and overtures to continually improve lawyer-client communication as the relationship progresses. When focusing Habit 4 on

improving communication across race, a teacher can use both the Jacob and Sue reading described in Habit One. The readings help students brainstorm parallel universe explanations taking race explicitly into account 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. Habit Five seeks to give the lawyer a way to look thoughtfully and analytically, without negative self-judgment, at his own actions to seek future improvement. Habit Five encourages the lawyer to know himself as a cultural being and to explore the biases and stereotypes that he brings to interactions. Habit Five requires nonjudgment at home, recognizing that condemnatory self-judgment and shame are not allies in cross-cultural improvement. If students understand the concept of implicit bias, including a recognition that bias is a societal issue and not an individual failing, students may be more likely to explore their work for biases. This exploration, in turn, makes it more likely that they will function more intentionally and 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 works to reinforce a system of injustice. We suggest that these aid the student to recognize issues 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 next.

C. GROWING THE CONVERSATIONS, EVEN THE DIFFICULT ONES, IN THE CLASSROOM: THREE PRINCIPLES AND TEN TECHNIQUES^{lxii}

Once the groundwork is laid, we can be less fearful of these more 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 which might help keep the conversations on track. (To

help you keep track of the ten tips, we will follow the unconventional formatting of numbering the tips from 1-10, even where they occur under a new principle.)

It is worth noting again that, while this seems 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 surely have to note that we do not view every opinion as not equally valid. As noted below, Principle Three does require the teacher to make choices and amplify voices that, in her view, better advance racial justice in the context of this conversation, and to take responsibility for that choice. This choice is consistent with nonjudgment in two separate ways. First, we will encourage 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, we will encourage the teacher to take responsibility for the parallel universes that inform her choice to act and advance a conversation. 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 learned that her assumptions were in fact erroneous.

As we identified principles and techniques critical to cultivating constructive, if difficult, conversations about race, we realized that most were familiar to teachers conscientious in their pedagogy about teaching through discussion, and sophisticated about negotiation and good communication. Although some of the ideas may be novel, all stem from solid grounding in 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*^{lxiii}

In conversations about race, we ask students to take risks. We need to acknowledge that all intercultural learning and especially conversations about race are often stressful precisely because they are change-oriented. We are training students to be nonjudgmental and to develop new levels of tolerance, new modes of thinking and valuing, as well as new behavior. Students may experience this as a threat to their cultural and racial identity. In addition, some students may experience stress because classmates articulate worldviews that are painful. Other students may experience stress because they have done 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. We suggest the following approaches to maximize learning in situations where there may be disagreement or tension.

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 value of the conversation 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.^{lxiv} 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 sometime; the moment has now come and we are about to learn important things for moving forward, for our clients and for our society.

It may be useful to note that every participant in a conversation about race and privilege has unique gifts and challenges. A white teacher can model humility about the experiences of people of color, can show interest in learning more about white privilege; that same teacher, 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. A student of color draws on a base of experience critical to deepening the law's understanding of all people's experiences, and can speak with authority about micro-aggression and the challenges of intersectionality; that same student may also feel vulnerable to being seen as a recipient of affirmative action, or suspect in raising race issues because it may serve their self-interest, or burdened by the ongoing challenge of helping white peers understand her experiences better. A teacher may decide to make these differential starting places explicit or even design a classroom exercise around it. Whether explicit or unstated, a teacher must remain keenly aware of these differential locations among classroom participants.

Race discussions often draw on ground rules or established patterns set in other discussions. If those patterns have not developed along conducive lines, teachers might want to revisit ground rules before these more difficult race discussions take place.

2. Articulate a clear discussion prompt.

A teacher can improve the quality of these discussions by, first, formulating a clear

prompt for the conversation, taking special care to use factual, unfreighted language and, second, not deliberately or inadvertently creating a *de facto* cultural norm of experience for the discussion. First, think through the phrasing of your discussion prompts, posing questions consistent with the database available to the participants. Keep the prompt as simple as possible, using terms which have been clearly defined and are understood by all participants. Watch in particular for coded language, that is, language which may appear to conform to or invite stereotype, or which appears to allude to other, freighted conversations. Consider distributing the prompt before class to give students time to contemplate their ideas on their own before class. 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.

Second, beware of creating or suggesting 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 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.

Time out for writing is also 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 using some of the other techniques described here to move the the conversation forward after the quick write. The teacher may also decide to refine the prompt to move the remaining discussion along a particular path. As Principle Three below notes, teachers must use their plenary prerogative to organize class time to make sure the difficult conversation bears fruit.

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

B. ***PRINCIPLE TWO: Employ nonjudgment and isomorphic attribution and give everyone an opportunity to be heard.***

We suggest the following approaches to creating an environment that can both challenge and

support students in these difficult discussions

4. *Co-Reconstruct the facts*

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 role race plays in their 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 4 of *Sowing the Seeds*, above.

Especially when students and/or teachers reach different conclusions about whether or how race plays a role, teachers should teach students how to search for data that explains different attributions of meaning from the same facts or a different understanding of what facts exist. 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. A teacher can ask for clarification and information, and in so doing, encourage others to do the same as well.

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 experience is 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.^{lxv}

5. *Use Methodological Belief and Doubt*

In a class discussion where participants hold very diverse views about the role of race in the particular context being discussed, the teacher has a dilemma. What to do 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 Doubt and Belief: time-limited group exercises in fully crediting one perspective, even within conversations largely focused on exploring conflicting perspectives.

In his essay entitled *Methodological Doubting and Believing: Contraries in Inquiry in Embracing Contraries: Explorations in Learning and Teaching* 254 (Oxford U. Press) (1986), Peter Elbow provocatively asks: “How shall we describe the mental activity that permits us while operating alone to see that we are wrong and come to a new and better conclusion?” He argues that “we can improve our understanding of careful thinking or reasoned inquiry (and therefore improve our practice) if we see it as involving two central ingredients: what I am calling methodological doubt and methodological belief.”^{lxxvi}

Elbow defines methodological doubt as the “systematic, disciplined, and conscious attempt to criticize everything no matter how compelling it might seem—to find flaws or contradictions we might otherwise miss.”^{lxxvii} But this “serious intellectual work”^{lxxviii} also “helps explain the tendency toward critical warfare in the intellectual and academic world—the fact that intellectuals often find it surprisingly difficult simply to hear and understand positions they disagree with.”^{lxxix} Thus, methodological doubt is “only half of what we need.”^{lxxx} For “thinking is not trustworthy unless it also includes methodological belief: the . . . systematic, disciplined, and conscious attempt to believe everything no matter how unlikely or repellent it might seem—to find virtues or strengths we might otherwise miss.”^{lxxxi} These are both “methods, [because] they help us see what we would miss if we only used our minds naturally or spontaneously.”^{lxxxii}

Because methodological doubt pervades the intellectual life, Elbow, as we will do, focuses more on methodological belief.^{lxxxiii} “Indeed I cannot resist sometimes arguing against methodological doubt.”^{lxxxiv} Elbow regrets that “[w]e tend to assume that the ability to criticize a claim we disagree with counts as more serious intellectual work than the ability to enter into it and temporarily assent.”^{lxxxv} Methodological belief is a process in which “we are not trying to construct or defend an argument but rather to transmit an experience, enlarge a vision.”^{lxxxvi} Methodological belief “forc(es) us genuinely to enter into unfamiliar or threatening ideas instead of just arguing against them without experiencing them or feeling their force. It thus carries us further in our developmental journey away from mere credulity.”^{lxxxvii} Elbow finds methodological believing to provide a safeguard for trustworthy knowledge: “A belief is a lens and one of the best ways to test it is to look through it.”^{lxxxviii}

Elbow describes “the believing game”^{lxxxix} as “the disciplined procedure of not just listening but also actually trying to believe any view or hypothesis that a participant seriously wants to advance.”^{lxxx} Elbow proposes that a group adopt a “five minute rule” in which “[a]

group can simply agree that whenever any participant feels that some idea or view is not getting a fair hearing, she can invoke the rule: for five minutes no criticism of the idea is permitted, and everyone should try to believe it."lxxxix Elbow suggests three questions are useful in the believing game:

- 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?lxxxix

Transferred to discussions about race, Methodological Doubt and Belief can play a critical balancing role. Even if a teacher 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 which believes that race is not important here to consider for five minutes that it is critical and transformative, and explore that as a group.

6. *Require all to be able to restate accurately others's positions*

As we listen carefully in these conversations about race, we should ask ourselves to be able to recap, accurately and without distortion, the views expressed by others. As lawyers, we regularly ask ourselves to do this about our client's 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 fully recite, to the speaker's satisfaction, her stated views, instills a discipline which will be critical for these conversations to continue. It is not necessary for every comment to begin this way, but the discipline will create less polarized, more nuanced give-and-take as discussions deepen. It will also create a way to determine where conversations and understanding go awry, and to keep 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.

C. ***PRINCIPLE THREE: Choose the Discussion Direction and Amplify The Voices That,***

In Your View, Most Further Racial Justice; Take Responsibility For This Choice.

Difficult conversations about race often require teachers to do more than make sure every opinion is fairly aired. After seeding these conversations all semester and trying to create the proper conditions for them to take place, when they finally occur, these conversations must yield fruit—move us along in our understanding of the roles that race plays in our practice and, we hope, advance racial justice. For this reason, we cannot simply aim to air the diversity of views. Teachers must be prepared to weed out unproductive lines of inquiry and amplify the voices which they deem most likely to move the understanding and 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.^{lxxxiii}

Again, teachers choose the direction of and use of class discussion routinely; in some ways, this is no innovation. In race discussions, teachers must model a transparent, undefensive, and fact-based authority, prepared to justify the chosen direction of the discussion and use her prerogatives to carry it out. Teachers assert their carefully deliberated teaching objectives for the class, seeking to advance our understanding of how to serve racial justice, and can perform key messages in this choicemaking.

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 and to lessen premature problem definition. Because it uses a process that allows for hypothetical thinking and further exploration of facts, 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 the question, “what role is race playing?” approached in a rounds conversation format allows for multiple and contradictory responses without a firm commitment to the answer. This 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. Rounds 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^{lxxxiv}

One promising technique adapts Binder and Bergman’s “Except When/Especially When” framework from their work on Fact Investigation 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 when” 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 when”: “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 which may be motivating discussions, and give them more nuance and refinement. 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 additional data-gathering can be sought 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, Part Four demonstrates that even 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 legitimate 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

A crucial aspect of all teaching is to reflect on the experience and learn from it how to be better teachers. Teachers can engage in this process by themselves, or, as Epstein’s essay following Chapter Six points out, in rounds conversations with other teachers. As with Habit Four, Red Flags and Correctives, a teacher can look carefully at places where conversation flourished and where it died on the vine. Whether alone or in conversation with others, teachers should strive to describe what happened and explore what the teacher and students did that that caused the conversation to move in the direction it did. Teachers should identify what different students in the class got out of the class? What worked in the class? How will clients profit from the conversation? Clinical teachers should also see if these conversation take root outside the classroom; supervisions and other followups provide both opportunities to continue

productively, or to be rectified after thoughtful debriefing has taken place, outside of the heat of the garden.

IV. 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. Therefore, our goals for this curriculum 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 courthouse, 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 looking for even the smallest fertile opportunities.

While we continue to work on how to integrate the principles into their 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 5 Key Questions to Aid the Conversation:

STEP ONE: CONTINUE AMID CONTROVERSY: Acknowledging that the conversation is moving into the difficult context of contending with conflicting issues about race while at starting a conversation that we must have to move forward from the stalemate that we are currently in. Perhaps we can start in some cases by agreeing that both sets of clients need us to “go here”, to move into this complicated inquiry.

STEP TWO: CO-RECONSTRUCT THE FACTS: Asking for additional facts, with an invitation to co-reconstruct the facts, 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 narrowing the area of disagreement. If in these case conversations, we can reduce the area of conflict, and even pinpoint the contested facts that divide us, these discussions may already bear fruit even in this early phase. 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: Being willing to listen to 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: Recapitulating 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. Even holding yourself to the discipline of being able to do this, on a moment's notice, can restrain careless, angry shorthand and promote better understanding. It may not be necessary actually in each instance to repeat and recapitulate, but at key moments, it may be the difference between moving forward and 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: Even where disagreement continues, enunciating adjustments in your review based on the conversation, and, where your analysis is complete, taking full responsibility for your ongoing position. As in the stage in the classroom conversation where the teacher transparently chooses in which direction the conversation will proceed, this phase of a conversation with an adversary would acknowledge any shifts in position, and also reaffirm deeply held positions, ideally with reference to the jointly co-reconstructed facts. As in the classroom, the lawyer would take 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 non-judgment, of speaking the truth without judgment or blame. This is more than just vaguely "agreeing to disagree;" be detailed, precise, and upfront about the remaining

areas of disagreement, where that is consistent with your client's interests.

While the interlocutors may remain at odds, again this sort of refinement, the signaling of openness to hearing the other side's point of view, the adjustment of position based on the conversation, and the remaining clarity 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? 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 both 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 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 case using this methodology can offer alternatives to warring parties who seek something besides heavily litigated conclusions. As each individual lawyer gets better at starting these conversations, they will become less unusual, and more part of the courthouse 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 you hope would someday take place even in your 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 beliefs and ultimately outcomes.

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 also are 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 which continues to manifest in our national policies and fact-finders throughout our legal systems, replicating historical racial discrepancies which have long lost any articulated legitimacy. We can now chart a path of starting these conversations regularly, learning from history, statistics, 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 residual 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.

ⁱ This chapter will form part of a book on clinical education co-authored by Susan Bryant, Elliott Milstein and Ann Shalleck, two clinical colleagues at American University Washington College of Law.

ⁱⁱ Susan Bryant is a Professor at the City University of New York School of Law. Jean Koh Peters is the Sol Goldman Clinical Professor of Law at Yale Law School. We gratefully acknowledge the research and insight of Daniel Bousquet, Carlton Forbes, Emma Grunberg, Scarlet Kim, Alexandra Lu, Jessica Marsden, Edward Ramos, Eva Rigamonti, Robert Schmidt, Rupali Sharma, Timothy VanderKamp, and Jessica Vosburgh who each, during their times as students at Yale generously supported this work. We have also been grateful to present earlier versions of this Chapter at New York Law School, CUNY Law School, Yale Law School, and Quinnipiac Law School. We thank our families, our students, and our clients, our infinite sources of inspiration.

ⁱⁱⁱ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clin. L. Rev. 33 (2001)

Jean Koh Peters, “Representing the Child-in-Context: Five Habits of Cross-Cultural Lawyering” in *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS*, 3d Ed. (2007)

Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 Wash. U. J.L. & Pol’y 17 (2001)

Bryant and Peters, *Six Practices for Connecting with Clients Across Culture: Habit Four, Working with Interpreters and other Approaches* in Marjorie Silver, *THE AFFECTIVE ASSISTANCE OF COUNSEL* (2007)

Bryant and Peters, *Five Habits for Cross-Cultural Lawyering*, in *RACE, CULTURE, PSYCHOLOGY & LAW* (2005).

Teaching materials, articles, and discussions of the Habits can be found at www.law.yale.edu/***** (static website should be in place by June 8; an interactive website by June 2012).

^{iv} Margaret – introduced conference to ladder of inference – thought bubbles, hope they will write about. Tirien’s perception exercise another.

^v Insert Jean’s conversations about whether to include some critical race material and peggy davis article?

^{vi} Insert info about students workshop on race

^{vii} Whether the teacher's goal is developing awareness of the impact *79 of culture or skill in cross-cultural interactions, a lawyering focus will increase the likelihood of student receptivity to the material. [FN152] If the teacher uses primarily materials that contain examples of lawyering issues, students will be less likely to think that they are simply being asked to be a different (better) person. If the students see these skills as important to good lawyering, they will be more open to including them in their repertoire of skills. As I discussed earlier, resistance to

this subject is to be expected [FN153] and may arise for different reasons. Identifying the potential resistance and ways to address it are important aspects of planning classes and supervision.

On one occasion after teaching Habit One, I asked my students whether this Habit makes sense and I received two different and polar reactions. One student, a white feminist, female student in her late twenties, said, “This is CUNY, we do not really need to talk about differences and similarities. We do this kind of analysis all the time.” The other student, a white male in his mid-twenties committed to becoming a public defender, commented that it was counter to the way he thought. He thought that by focusing on differences at all, we were denying the equality of all people. He did not think of people in terms of identity and culture, he said. Instead, he argued, all people are the same.

Both of these students were expressing a resistance to the teaching, but it was coming from different vantage points. The second student was articulating a view held by many students that, in a society with a history of discrimination and a current articulated commitment to equality, acknowledgment of difference violates that commitment. This student had little experience assessing the current impact of discrimination and lack of privilege of his clients in the criminal justice system. He also had little understanding of his clients' lives and how lack of understanding might impact his relationship with clients. Overcoming resistance of this sort requires teaching models that will allow the student to appreciate that equality is not inconsistent with difference and that will nourish the student's commitment to commonality*80 with his clients. By explicitly addressing his concerns over time, we could hopefully help the student see that a failure to address issues of difference may in fact result in inequality or at the very least in misunderstanding. [FN154]

The first student may have been raising several different points of resistance in her comments. The first was that cross-cultural training was not necessary for progressive, well-meaning people. The teacher was, in a sense, “preaching to the choir.” Or, secondly, if the student did need this information, the instruction was too elementary for her. If the material for instruction is only designed to develop awareness and is targeted to a specific group, some students may view the instruction as unnecessary. However, if the material is designed to focus on teaching multicultural analysis and skill and on helping each student identify their ethnocentrism, then all students have something to learn. Finally, the student's comment reveals an assumption of similarity that all of her classmates think like she does, which itself reveals possible learning opportunities.

viii For example, Justice Sonia Sotomayor was called a “racist” for opining that her experiences as a Latina shape her thinking by stating “a wise Latina might make a better decision.”viii President Obama was also labeled a “racist” when he referenced the difficult relationship between black men and the police in his comments about the arrest for disorderly

conduct of a prominent African-American professor at Harvard University.viii

ix Brookfield and Preskill, 53-57

xx Refer to Jess V's section below

xi . TO BE CONTINUED

(Sue, can you draft a companion paragraph to this one?) include Model Inclusive language that takes responsibility for individual views

I Statement

He/She; use examples that include; have simulations that have diverse populations; watch for inadvertently stigmatizing; don't restereotype in the process of trying to educate

Prepare for the sensitive issues e.g. article assigned criticizing feminist scholarship which deemphasized women of color's distrust of police; teachers assigned, and hadn't prepared for it to explode along racial lines. Went exactly the opposite way than expected. Expect diverse views.

Ways to prepare:

Set some ground rules

Goal of class: each person can accurately and fully reiterate a viewpoint that was not their own.-a helpful but insufficient final goal

Use a lineup and a listening exercise

Where does your belief come from? Experience, study, observation of client case?

xii Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1559 (1989). In our work on the Habits we understood the importance of these concepts, as the Five Habits article noted. Thus, a competent cross-cultural lawyer acknowledges racism, power, privilege and stereotyped thinking as influencing her interactions with clients and case planning, and works to lessen the effect of these pernicious influences. A cross-cultural framework that asks students to look at a variety of similarities and differences allows those students to examine the "isms" and power issues from a different perspective. The cross-cultural perspective helps explain why we use stereotypes and think in ethnocentric ways as well as identifying new ways of thinking and behaving. However, we did not address how to teach these topics.

xiii Cite Sue, Davis and quote Davis

xiv also helps white women

xv Derald Wing Sue Microaggression article, at 273.

xvi Sue

xvii Michelle S. Jacobs, People from the Footnotes: The Missing Element in Client-Centered Counseling, 27 Golden Gate U. L. Rev. 345 (1997).

xviii See if Pautette Caldwell has any cites on this

xix get statistics for young men

xx One of many reasons for disproportionality of incarcerated. Every defense attorney knows that those who are bailed are less likely to serve time for similar acts

xxi **Carmen cite for example

xxii page 206 Psychological studies have repeatedly confirmed that individuals may harbor unconscious stereotypes, beliefs, biases, and prejudices.¹²⁹ In addition, other psychological processes such as framing effects and confirmation bias, may impact decision-making. ¹³⁰ See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000) (discussing psychological processes in the work of judges and lawyers); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 784–821 (2001) (presenting a study of magistrate judges and concluding that judges rely on the same cognitive decision-making processes as laypersons and other experts, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias, leaving judges vulnerable to cognitive illusions that can produce poor judgments); Rachlinski, *supra* note 127, at 99–100 (“Courts identify cognitive illusions that might affect juries and adapt to them, but fail to identify cognitive illusions that affect judges and fall prey to them. . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment.”); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571, 595–602 (1998) (discussing hindsight bias and its effects on the judiciary).

131. See ABRAMSON, *supra* note 70, at xi (“[I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary.”); see also Leubsdorf, *supra* note 84, at 277 (noting that “even honest judges . . . may be swayed by unacknowledged motives”); Nugent, *supra* note 124, at 3 (“[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process.”); W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 *MCGEORGE L. REV.* 35, 41 (2010) (noting that “a judge with the best of intentions may believe herself to be making her best efforts to put aside feelings of partiality or loyalty, but may be unable to override the influence of unconscious biases”).

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The same phenomenon of objectivity bias occurs with judges. “People believe they are objective, see themselves as more ethical and fair than others, and experience a ‘bias blind spot,’ the tendency to see bias in others but not in themselves. . . . These tendencies make it difficult for judges to identify their own biases.”¹²⁴ Jennifer Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*,

MONITOR ON PSYCHOL., Feb. 2010, at 24, 24 (citations omitted); see also FLAMM,

supra note 4, § 1.7, at 18 (noting that judges “are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality”); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) (“[J]udges are typically appalled if their impartiality is called into question[,] . . . believ[ing] themselves to be consistently objective, impartial and fair.” (footnote omitted)). See generally Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or*

Adaptation?, 79 OR. L. REV. 61 (2000) (noting that judges are susceptible to various biases).

that low-prejudice responses require controlled inhibition of the automatically activated stereotype”

Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are “automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype”);

John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that “[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways” (citations omitted))

A detailed history of the federal law concerning judicial disqualification is found in

Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223–29 (2002).

xxiii (e.g., Bertrand & Mullainathan, 2004; Rooth, 2010; Ziegert & Hanges, 2005), medical treatment (e.g., Green, Carney, Pallin, Ngo, Raymond, Lezzoni, & Banaji, 2007), a suspect’s dangerousness (Correll, Park, Judd, & Wittenbrink, 2002; Correll, Park, Judd, Wittenbrink, Sadler, & Keesee, 2007; Plant & Peruche, 2005), and nominees for elected office (Greenwald, Smith, Sriram, Bar-Anan, & Nosek, 2009; Payne, Krosnick, Pasek, Leikes, Akhtar, & Thompson, 2010). From report Conference on state courts.

xxiv Cite implicit project and critical stance on implicit bias

xxv 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.”).

xxvi For example, in a battered woman’s clinic, students need to understand that while a

group of battered women share being a woman and being battered, the fact that they share those characteristics does not mean they share the same needs. A lawyer who fails to recognize significant differences among clients will make assumptions about 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.”)

xxvii See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1245 (1991) (noting that a focus on intersectionality “highlights the need to account for multiple grounds of identity when considering how the social world is constructed”)[Quote Crenshaw here] A focus on intersectionality “highlights the need to account for multiple grounds of identity when considering how the social world is constructed” (1245). Kimberlé Crenshaw, who first wrote about intersectionality in legal settings, conceives of intersectionality as a reconceptualization of identity, but not “some new, totalizing theory of identity.” Crenshaw at 1244. She acknowledges that intersectionality still recognizes and refers to pervasive social categories. She emphasizes that it is critical to recognize that “identity politics takes place at the site where categories intersect” and that “the organized identity groups in which we find ourselves in are in fact coalitions, or at least potential coalitions waiting to be formed.” Crenshaw at 1299. Intersectionality accommodates distinction between “two separate but closely linked manifestations of power. One is the power exercised simply through the process of categorization; the other, the power to cause that categorization to have social and material consequences.” Crenshaw at 1297.

xxviii Kimberle Crenshaw explains this point with an analogy to a four-way traffic intersection: “Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.” Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139, 149 (1989).

xxix It should also be noted that 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. A Latina may proudly embrace herself as a Latina and as a feminist. Those same categories, Latina, feminist, and Latina feminist can also be used through stereotype and bias to discriminate. See Crenshaw, *Mapping the Margins*, 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.”).

xxx See, e.g., Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. Rev.* 373, 381-82 (2002) (“[T]he risks of misapplying cultural

generalizations to any individual client are obviously a source of some worry....[N]ot only does one learn that culture is ‘socially constructed, evolving, emergent, and occurring in language, but intersectionality renders many cultural designations suspect.”); 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); Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1250 (“Women of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged....[U]niform standards of need ignore the fact that different needs often demand different priorities in terms of resource allocation, and consequently, these standards hinder the ability of counselors to address the needs of nonwhite and poor women.”). Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. Rev.* 373, 381-82 (2002) (“[N]ot only does one learn that culture is ‘socially constructed, evolving, emergent, and occurring in language, but intersectionality renders many cultural designations suspect.”) 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); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1250 n. 31 (1991) (“[A] woman may come in or call in [a rape crisis hotline] for various reasons. She has no place to go, she has no job, she has no support, she has no money, she has no food, she's been beaten, and after you finish meeting all those needs, or try to meet all those needs, then she may say, by the way, during all this, I was being raped. So that makes our community different than other communities. A person wants their basic needs first. It's a lot easier to discuss things when you are full.”) (quoting Nancy Anne Matthews, *Stopping Rape or Managing its Consequences? State Intervention and Feminist Resistance in the Los Angeles Anti-Rape Movement, 1972-1987*, at 287 (1989) (Ph.D. dissertation, University of California, Los Angeles)) (cited in Barry et al.).

xxxi See, e.g., See Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 *Am. U. J. Gender Soc. Pol’y & L.* 161 (2005) (describing clinical curriculum that uses critical theory literature to enhance clinical education).

xxxii These readings include Kimberle Crenshaw’s *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991), and chapters from an assigned book, *Domestic Violence at the Margins: Readings on Race, Class, Gender, and Culture* (Natalie J. Sokoloff & Christina Pratt, eds., 2005).

xxxiii Later in the semester, the students read articles about the special problems of limited English speakers in getting language appropriate services^{xxxiii} and of lesbians in the criminal justice system.^{xxxiii} We assign these when students are engaged in case theory development and problem solving. The readings document the discrimination faced by women who are refused entrance to shelters because they fail to speak English. The readings alert the students when they are engaged in problem solving to not presume that clients will have equal

access to services. They also alert students to the special discrimination faced by lesbians who have difficulty getting the court to see them needing the same protection as other battered women.

xxxiv It might be useful here to provide an example of such an excerpt, perhaps from Crenshaw's piece. (as an appendix?) On the Habits website?

xxxv See Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. Rev.* 373, 414-15 (2002) (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.").

xxxvixxxvi Fn to meth doubt and belief—Mark and Jean article? JLE, *Experiments in Listening*.

xxxvii For example, after reading Kimberle Crenshaw's article *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, we identify how a lawyer who uses an approach informed by an intersectionality might interview a battered woman client.. Students identify the importance of understanding the client's perspective more expansively and understanding how the client might be experiencing multiple problems beyond just battering. Students who thought of clients as "wandering all over the place" sometimes are able to see the connections their clients are making to multiple sites of oppression. Crenshaw's insights about how women of color view the criminal justice system help students understand their clients' reluctance to use the criminal justice system. This understanding, in turn, enables students to engage clients differently about safety planning and goal setting.

xxxviii Reference Habit one [AL: this endnote might make more sense in the paragraph on Habit One—I moved it there for now]

xxxix 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 to enable students to deconstruct assumptions they, persons within institutions, and broader society make about clients and their lives. Critical race theory highlights the importance of looking for both the 'obvious and non-obvious relationships of domination.'" Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 *Am. U. J. Gender Soc. Pol'y & L.* 161, 162 (2005) (quoting Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 *Stan. L. Rev.* 1183, 1189 (1991))

xl JohnsonId. at 169.

xli

xlii Another approach we use is to integrate the insights from the readings as we address different aspects of lawyering theory. For example, while teaching students the concept of “filling,” the process whereby 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 also use Habit 1 as a tool for incorporating intersectionality and anti-essentialism concepts into practice. By asking students to identify the salient identity characteristics for themselves and their clients, they identify the multiple and overlapping groups that clients and they belong to. This helps them avoid assuming that because they share a characteristic with a client, for example that they are women, that they are “essentially” the same. Additionally, they have identified multiple, intersectional sites for their own bias and the legal system’s bias.

xliii Site aiken, Quigley for transformative learning literature; race crit

xliv For that reason, we often do at least one structured observation in which we ask them to address the racial dynamics of the courtroom as they observe them.

xlv This example and the insight that students need more information to fully understand the disparities that may be invisible to them during this observation occurred in conversations with Sameer Ashar in preparation for the Clinical Teachers Conference 2010.

xlvi list articles for prison economics and school economics

xlvii frameworks Institute, race matters tool kit

xlviii Roberts, Bartholet and the statisticians; the Harvard conference.

xlix Document disparity articles Jenny’s article – disparate health rates; school dropout rates; wealth rates; life expectancy – same as 20 years ago – progress for some/many – but many most – left behind how do we have such divergent views? About racial progress –majority benefits from this or we do not have shared experiences -- where 8 – 1 difference in black/latino to white incarceration rates and then connection between arrest and immigration But also in foreclosure rates; health care disparities; educational opportunities; potentially in bankruptcy rates; immigration quotas

l Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2001).

li Jenny’s work, Krenshaw, high unemployment rates in communities of color.

lii refer back to comprehensive footnote on sources about Habits of cross-cultural learning. (Something here about challenging assumptions and its relationship to culture language? Six practices) WEBSITE!

liii Insert articles about the teaching of the Habits or citing the articles (112 or so at last count).

liv Might we want to put ladder of inference reference here ?

lv cite from original article on thought that this is learnable

lvi citation?

Ivii Poverty, citizenship, etc.

Iviii Answer to Mike's question—translation of the habits to group work

lix Students can use Habit 1 analysis in their work with groups by using the analysis to map similarities and differences between them and the group leaders as well as among the group members.

lx Sue

lxi Cite to six practices article from Marjorie Silver, editor, *The Affective Assistance of Counsel*.

lxii Sue: somewhere in the draft, we must acknowledge significant racial mistrust. Note that Nonjudgment may demand much more from some than others. Sue Might be hesitant to use a lineup.

lxiii We recognized early on that, if we were to educate students to be less judgmental about their clients, we needed to create an environment that was less judgmental towards the students. [FN88] Cross-cultural training theorists have noted the importance of creating supportive learning environments that challenge the learners to address issues of bias and power. The “support/challenge” components are both critical pieces of the overall goals of cross-cultural training. [FN89] Support is important because it lowers resistance to learning and helps students deal with what can often be a very challenging experience. [FN90] Challenge*59 is important because, as teachers preparing lawyers for practice, we must be careful to educate our students to do no harm. If we allow unchallenged racist, sexist or ethnocentric comments to go unchallenged, our students may in fact do harm to their clients. In addition, in ethnically and racially mixed educational groups, students who are members of oppressed groups may not comfortably accept a learning environment that does not include challenge. [FN91]

One of the difficulties faced by teachers planning a class or supervision designed to teach cross-cultural topics is the ability to strike the appropriate support/challenge balance for the class as a whole. Teachers have to recognize that different students have different needs and that, as teachers, we also have different needs. [FN92] In planning, teachers can begin to identify the risks to the students and the potential resistance that might occur. Teachers can also plan for challenge.

In thinking about the risks that we ask students to take, we need to acknowledge that intercultural learning is often stressful precisely because it is change-oriented. We are training students to be non-judgmental and to develop new levels of tolerance, new modes of thinking [FN93] and valuing as well as new behavior. [FN94] Students may experience this as a threat to their cultural identity. In addition, some students may experience stress because classmates articulate world views that are painful. [FN95] Other students may experience stress because they *60 have done something that exposed biases that they are embarrassed to acknowledge.

Reduction of the risks associated with cross-cultural learning requires the creation of a supportive environment in which an atmosphere of trust exists among the students and between the teacher and the students. An atmosphere of trust allows students and teachers to lessen resistance, take more risks, and increase learning. An atmosphere of blame and judgment often leads to learner withdrawal, avoidance and ultimately hostility.

Ixiv Recognize resistance in ourselves and others – the discomfort of conscious incompetence

There is value for everyone in understanding perspectives because those whom we must persuade to take action on behalf of clients have a range of perspectives

SBWhen possible, give notice of the impending conversation

Voluntary

People can sort their thoughts, make good choices about language

Use your leadership to put issues on the table

Encourage students to raise race themselves

I xv Eg. Disproportionate number of children of color in foster care; 2) no women on YLJ

Assume that students have different data that they bring to an inquiry. Act to equalize and share data. Level the playing field of knowledge.

teach students to do careful analysis and presentation

(challenge assumptions with facts) especially where differences occur - ask what do I assume? what data do I have?

Everyone starts in a unique place, and will leave with different messages. What do the students who have a fairly sophisticated understanding of the role race plays get out of the class—not just to be the educator. What does the student who doesn't think about race much—get out of the class? An active hostility to the idea that racism still exists.

I xvi Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* 255 (Oxford U. Press) (1986).

I xvii Id. at 257.

I xviii Id. at 258

I xix Id. at 258,

I xx Id. at 257.

I xxi Id. (emphasis added to “methodological belief”).

I xxii Id. at 258.

I xxiii Id.

I xxiv Id.

I xxv Id.

I xxvi Id. at 261.

I xxvii Id. at 263.

lxxviii Id. at 283.

lxxix Id. at 273-76.

lxxx Id. at 260.

lxxxii Id. at 274.

lxxxiii Id. at 274-75.

lxxxiii Principle: design and monitor class so that all students profit - (eliminate ghosts of diversity past)

Make sure class is not geared for denying students(reference habits)

if all you do is enhance learning that racism exists when many students of color already know this WE have not advanced their education. Instead you have potentially put them in a space to be stereotyped and harmed by stereotype threat.

Classwork must advance racial justice by helping students figure out how to intervene to help clients and address inequality.

assume different knowledge

“In this database of facts,” I think one explanation fits the facts better? Nancy Gertner’s idea that you can connect the facts to the criteria without making a “judgment.”

Think systemically – look at the same issues at the next level of generality

^{lxxxiv} We are grateful to Muneer Ahmad, our collaborator in a presentation for the AALS Clinical Section on Six Practices for Surfacing our own Assumptions, who worked closely with us in developing except when/especially when for use in contexts similar to the Habits.