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CUTTING ACROSS THE BIAS: TEACHING IMPLICIT BIAS IN A HEALTHCARE LAW COURSE

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Law faculty train students to believe that the law is objective in development, adoption, and application. Law faculty tend to teach discrimination in the law as either a historical oddity or very infrequent occurrence. When the law deals with discrimination, it does so narrowly, focusing on discrimination driven by intent, explicit stereotypes, prejudices, and biases. As a consequence, the law and lawyers struggle to deal with discrimination that is measured by impact and not intent. The legal system does not adequately address discrimination driven by *implicit* stereotypes, prejudices, and biases. For more than twenty-five years we have made diversity an important part of our pedagogy to combat these realities, and in the last fifteen years we have been teaching about implicit bias for the same reasons. To train lawyers for the twenty-first century, it is imperative that faculty train students on implicit bias. This article discusses our process for including a conversation about implicit bias in a health care law course. In this article we focus almost exclusively on how we integrate the discussion of implicit bias. While this integration depends heavily on the substantive law discussed each week in class, because of the limited scope of this article we will only spend a little of our time discussing the substantive law and save a broader discussion for another forum.

Measuring the impact of implicit bias as an input is difficult. It is easier to see the impact of implicit bias in the disparate outcomes they create. However, relying solely on this approach is costly because it allows the discrimination we hope to avoid, to continue unabated. One approach to addressing implicit biases as an input is to treat them as a given (biases exist and have an impact on our behavior, and on the behaviors of others) and then to talk about how to address their existence and prevention.

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A health care law course that addresses implicit bias is designed to help students recognize how implicit biases may impact health care law and policy, to recognize their own implicit biases and those of others, and to begin to talk about how to prevent the influence of those biases on the law and policy.

When we teach implicit bias, the goal is to make the students active participants in a dialog. Instead of just providing texts and materials about implicit bias and testing their understanding of the material, we ask students to explore their own biases and the biases of their colleagues, faculty, and the legal system. Many students and faculty are often heavily resistant to this discussion, but the resistance is based on a fundamental misunderstanding of what implicit biases are and the relationship between implicit biases and discrimination.

I. WHAT IS IMPLICIT BIAS?

Bias is a prejudice in favor of or “against one thing, person, or group compared with another, usually in a way considered to be unfair.”¹ It is that last part of the definition that has given biases a bad rap. The truth is, without our biases, we would not be able to function.

Many estimates suggest that an adult makes about 35,000 remotely conscious decisions each day, making 226.7 decisions per day on food alone.² Human brains process 400 billion bits of information per second, but only about 2000 bits are utilized and make us aware of our surroundings.³ If we consciously reflected on every piece of data, and every choice we faced, we would quickly become paralyzed, unable to keep up with the remarkable pace of our world. Our biases are one tool that we use to deal with the deluge of information and wealth of decisions.

Biases can be either explicit or implicit. A person is aware of an explicit bias. Implicit biases are biases of which we are not aware; it is this lack of self-knowledge that makes them so dangerous.

You might know that you hate snakes. If you were to see snakes on the sidewalk in front of your house, you might take the long way around, or not come outside at all until they were gone. With a little more knowledge, you might recognize that one snake is a coral snake, and the other is a scarlet snake.

1. *Bias*, OXFORD ENGLISH DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/bias [https://perma.cc/CEV9-CCD3].

2. Joel Hoomans, *35,000 Decisions: The Great Choices of Strategic Leaders*, ROBERTS WESLEYAN COLLEGE (Mar. 20, 2015, 10:33 AM), <http://go.roberts.edu/leadingedge/the-great-choices-of-strategic-leaders> [https://perma.cc/CLG7-YNNS]; Brian Wansink & Jeffery Sobal, *Mindless Eating: The 200 Daily Food Decisions We Overlook*, 39 ENV'T & BEHAV. 106, 112 (2007).

3. *Human Brain - Neuroscience - Cognitive Science*, BK101, <http://www.basicknowledge101.com/subjects/brain.html> [https://perma.cc/JYK5-GWJC].

The coral snake is venomous and the scarlet snake is not. Knowing about the existence of your bias, and a little knowledge about snakes, would allow you to make a decision that is not influenced by your biases.

The impact of our biases on decision-making is hardwired and not exclusive to humans. Implicit in-group preferences exist even among other species, like the rhesus macaques.⁴ However, culture and environment provide the details through which we define those biases.⁵ Our early experiences and recent events, cultural biases and explicit beliefs, all combine to form our biases.⁶ Then, when a stimulus primes an existing bias, the biases act to inform our decision-making and behavior.⁷

When we talk about discrimination (or the -isms),⁸ we focus on the way explicit biases affect our behavior. However, in many institutions, implicit biases are much more likely to lead to discrimination. Implicit biases tend to be the source of discrimination because we tend to discount the extent to which we hold implicit biases and their influence on our conscious behavior. It is much easier to identify explicit biases and the discrimination that follows from them than to understand the impact of biases we did not know we had. Because we are generally unaware of our implicit biases, we cannot work to lessen their influence on our decisions. Exploring our implicit biases, in the context of substantive law and policy, is an important step in eliminating their influence on that law and policy.

II. TEACHING IMPLICIT BIAS: STRUCTURING THE CLASS

We like to use online fora to foster discussion on the topic.⁹ Thus, we teach blended courses, where some percentage of the work is online. Moving the discussion online allows students time to reflect on the material and points raised by their colleagues, and to respond thoughtfully rather than reflexively. Having this time is of particular importance when dealing with issues that can be difficult to discuss, like the -isms. Rather than having a separate section of

4. Neha Mahajan et al., *The Evolution of Intergroup Bias: Perceptions and Attitudes in Rhesus Macaques*, 100 J. PERSONALITY & SOC. PSYCHOL. 387, 400–01 (2011).

5. Jerry Kang, *Communications Law: Bits of Bias*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 132, 133, 138 (Justin D. Levinson & Robert J. Smith eds., 2012).

6. Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 135 (2004).

7. Priming occurs when we encounter a stimulus that later influences our response to another stimulus.

8. While generally “the -isms” refers to different belief systems, in this context we mean racism, sexism, and other kinds of discrimination based on group membership or identification.

9. Fora are websites or sections of websites that are used for public discussion of a specific topic and on which users can submit or read messages. We are partial to Moodle as a course management tool, but you will have access to a variety of tools through your institution and freely available on the internet.

the course dedicated to this discussion, implicit bias is made a part of every conversation we have through the course of the semester. Having the discussion of implicit bias as a component of every class reinforces the idea that implicit bias influences every part of health care law and needs to be explicitly considered in every component. The online format helps facilitate this discussion without taking away from the substantive topics discussed in class every week.

Your organization of the substantive material can also play a role in how students address the discussion of implicit bias.¹⁰ There are some areas of health care law where the impact of implicit bias is apparent.¹¹ There are, of course, areas where implicit biases will not be obvious to students. If one of the goals of your course plan is to maximize students' growth around their ability to understand, explore, and address implicit biases, we have found it more effective to cover topics obviously influenced by bias first. This allows students to become more comfortable with the discussion and more knowledgeable about the issues.

III. ORIENTATION TO THE COURSE

The syllabus sets the learning objectives relevant to implicit bias training.¹²

While it is hardly arguable that preparing you to be an effective lawyer is a significant goal, it is not the only one. Many of you will be lawmakers and policy makers, and training you to understand the values implicit in the law is an important goal. Another important goal is to train you to address in a systematic manner your social responsibilities as an individual lawyer and your collective responsibilities as a member of the bar. This objective includes a student's responsibility to assist the community in maintaining an accessible, effective and socially responsible legal system.

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10. *See infra* Part IV-C.

11. *See infra* Part IV-C.

12. To assure that all students are comfortable with communicating online and are aware of the expectations of the course, we do an online orientation. The course opens about two weeks before classes start, and students complete the orientation materials two to three days before the first class. That online orientation begins with a questionnaire about whether blended learning is suitable for their study habits and preferences. It includes a syllabus questionnaire to assure that they understand the requirements of the course. Finally, we introduce ourselves to the class in a forum and ask students to introduce themselves. They are expected to respond to at least three classmates whom they do not know well. We encourage them to share personal information, including pictures. We model the behavior by posting and sharing pictures of our family. The point of the exercise is to help students to connect to each other in a manner that is not threatening or high stakes (i.e. graded).

C. Teaching Objective #3: Diversity/Bias-Conscious Legal Pedagogy

Socioeconomic class, disability, gender, race, religion and sexual preference issues are such an integral part of our society (and the legal profession) that we often overlook how the law affects individuals with different backgrounds differently. In a diverse society, such as ours, understanding of how a different socioeconomic class, disability, gender, race, and sexual preference are affected differently by the law is essential. The importance of understanding the role of diversity is true whether the person is a defendant, plaintiff, lawyer, juror, judge, or law student. Diversity skills should be a normative part of the value system of the practicing attorney. The objectives of this course are to:

Explore how racial, ethnic, gender, socioeconomic class, disability, cultural, and sexual orientation are related to and impacted by the structure of law. Illuminate the connection between racial and gender issues and the values, interests, rules and theories that appear to be neutral but, are in fact a representation of the values of the dominant culture; frame discussion so that we step outside the doctrinal bounds of the law to critique the rules and legal practice; and, focuses discussion on problems, interests, and values that reflect a broad range of perspectives.¹³

IV. TALKING ABOUT AND UNDERSTANDING RACE AND RACISM

We focus on a discussion of implicit bias based on race and racism because it is the most difficult -ism to discuss. We have also found that, while students are able to take the skills developed in our discussion of implicit bias, race and racism, and apply those skills to an understanding of the relationship between implicit bias and other -isms, they have found it difficult to apply those skills in the other direction, from other -isms to race and racism. For that reason, we focus almost exclusively on implicit racial biases. By using the entire semester to engage in the most difficult conversation, we increase the students' ability to engage with other issues.

At the beginning, we work to make students more comfortable with talking about race. This first assignment is about teaching them how to talk about race and giving them a non-threatening opportunity to talk about their experiences with having a conversation about race. It also provides an opportunity for them to learn about others' experiences.

13. Vernellia Randall, Health Care Law Syllabus (2012) (on file with the author); *see also* Vernellia R. Randall, *Teaching Diversity Skills in Law School*, 54 ST. LOUIS U. L.J. 795 (2010).

Here is a list of assignments on *talking about race* from which you can choose. We tend to assign all the following:

- Read: How to Talk About Race¹⁴
- Read: Finding Words to Talk About Race¹⁵
- Read: The Challenges of Talking About Race¹⁶
- View: How White Americans Talk About Race¹⁷
- View: Moving the Conversation Forward¹⁸

Students read the above assignments, view the videos, and then write about their experience talking about race. We ask the following questions:

What is your experience “talking” about race? How often have you talked about race? Has it been formal or casual? Have those conversations been productive or divisive? Have they been in diverse groups? How does the conversation differ when you are in same race group or multi-racial group? In a multi-racial group does the racial make-up of the group make a difference?¹⁹

We also ask them to discuss their experience with race and racism:

Write a reflection about your experience living in a racialized society. When, did you become first aware of the concept of race? Of your race? Of others race? Have you lived and worked in a diverse community? School? Workplace? How has your “race” affected your life or the life of your family members? Describe a positive experience related to race. Describe a negative experience related to race.

You should *read everyone’s posting*. You may comment on them. Feel free to comment on how your experience is different or the same. Alternatively, how their posting helps you to understand the issues of race, racism, and the law. Remember a person’s experience is their perception of reality—it is not false, or untrue—just different and possibly incomplete.

14. ANNE E. CASEY FOUND., RACE MATTERS: HOW TO TALK ABOUT RACE (2006), <http://www.aecf.org/m/resourcedoc/AECF-racemattershowtotalkaboutrace-2006.pdf> [https://perma.cc/RP2W-E8PT].

15. Maria Luisa Tucker, *Finding Words to Talk About Race*, ALTERNET (Jan. 15, 2006), http://www.alternet.org/story/30755/finding_words_to_talk_about_race [https://perma.cc/3XWB-NZGU].

16. Harvey Young, *The Challenges of Talking About Race*, AL JAZEERA (July 30, 2013), <http://www.aljazeera.com/indepth/opinion/2013/07/2013728141028111654.html> [https://perma.cc/M6ET-3PXC].

17. Open Society Institute-Baltimore, *Tim Wise on How White America Talks About Race*, YOUTUBE (Aug. 10, 2014), <https://youtu.be/pWUc-U7FT-M> [https://perma.cc/V3CY-7YWA].

18. Race Forward, *Moving the Race Conversation Forward*, YOUTUBE (Jan. 22, 2014), <https://www.youtube.com/watch?v=LjGQaz1u3V4> [https://perma.cc/AMD9-GRWH].

19. Students are not generally required to answer every question. Rather, the questions serve as prompts, and students are allowed to respond to as many of the prompts as they feel comfortable with. Students are also given a word guideline that usually serves to limit the scope of the responses.

Finally, in preparation for the first assignment on implicit bias, we attempt to make sure that there is a shared understanding of terms like race, prejudice, stereotypes, bias, microaggressions, racism, and discrimination. This shared understanding is essential to developing skills around implicit racial bias and the law and to fostering a productive discussion because we have often found that a major source of difficulty in communicating around this and other topics is different understandings of the same idea.

Here is a list of suggested assignments you can choose from:

- Defining Race
 - Read: What is Race?²⁰
 - Read: Race: Are We So Different?²¹
 - View: The Difference Between Us²²
 - Read: Race as a Legal Concept²³
- Understanding Prejudice, Stereotypes, Bias/Racism, and Discrimination
 - View: A Shadow of Hate: A History of Intolerance²⁴
 - View: Why Do You Think Stereotypes Are True?²⁵
 - View: Understanding Prejudice²⁶
 - View: Implicit Bias and Microaggressions: The Macro Impact of Small Acts²⁷
 - View: If Microaggressions Happened to White People²⁸

20. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

21. *Race: Are We So Different?*, AM. ANTHROPOLOGICAL ASS'N, <http://www.understandingrace.org/index.html> [<https://perma.cc/FEN8-5HP4?type=image>].

22. California Newsreel, *RACE – The Power of an Illusion: The Difference Between Us*, YOUTUBE (Apr. 24, 2014), <https://www.youtube.com/watch?v=Y8MS6zubIaQ> [<https://perma.cc/R7BX-SMBW>].

23. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1 (2012).

24. THE SHADOW OF HATE: A HISTORY OF INTOLERANCE IN AMERICA (Guggenheim Productions 1995).

25. MTV News, *Why Do You Think Stereotypes Are True?*, YOUTUBE (Dec. 2, 2015), <https://youtu.be/D1-aSIUP4wM> [<https://perma.cc/P9B2-566U>].

26. UNDERSTANDING PREJUDICE: GRIPES AND COMMON GROUND (Cambridge Research Group 1996).

27. Stanford, *Implicit Bias and Microaggressions: The Macro Impact of Small Acts*, YOUTUBE (Apr. 23, 2015), <https://youtu.be/Nrw6Bf5weTM> [<https://perma.cc/N5HZ-A7Q2>].

28. MTV News, *If Microaggressions Happened to White People*, YOUTUBE (July 22, 2015), <https://youtu.be/KPRA4g-3yEk> [<https://perma.cc/N7HC-QVAT>].

- View: Define Racism²⁹
- View: The System of Racial Inequality³⁰

All this is done as an “orientation” exercise designed to be completed before the course starts. It is not graded, but students do get extra credit for making a good faith effort before we begin meeting.

A. *Implicit Bias: First Assignment*

Students do the first assignment in four parts. First, students are asked to discuss in at least 150 words whether they believe they have an implicit racial bias, including why they think they do or do not have implicit bias. Second, students complete three of the Harvard implicit bias tests: one on race or color, one in an area where they think they have no bias, and one in an area where they know they have explicit biases.³¹ As of the writing of this article, Project Implicit Association has Implicit Association Tests (IAT) on the following areas:

- Age³²
- Arab-Muslim³³
- Asian American³⁴
- Disability³⁵
- Gender-Career³⁶
- Gender-Science³⁷
- Native American³⁸
- Presidents³⁹

29. Vernellia R. Randall, *Colorblind Racism and Black Health*, YOUTUBE (Feb. 25, 2009), <https://youtu.be/ezA6Z2cy2nM> [https://perma.cc/ZHB6-BZAM].

30. CRACKING THE CODES: THE SYSTEM OF RACIAL INEQUALITY (Shakti Butler 2013).

31. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> [https://perma.cc/3H4F-L2LX]; see MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

32. Age IAT (‘Young – Old’ IAT) measures preference for old faces versus young faces.

33. Arab-Muslim IAT measures preference for Arab-Muslims versus people of other nationalities or religions.

34. Asian American IAT (‘Asian – European American’ IAT) measures preference for white and Asian-American faces and images of places that are either American or Foreign in origin.

35. This IAT measures preference for abled and disabled individuals.

36. Gender – Career IAT measures preference for family and females and between career and males.

37. Gender – Science IAT measures a preference for liberal arts and females and between science and males.

38. Native American IAT (‘Native – White American’ IAT) measures preference for white and Native American faces in either classic or modern dress, and the names of places that are either American or foreign in origin.

- Race⁴⁰
- Sexuality⁴¹
- Skin-tone⁴²
- Weapons⁴³
- Weight⁴⁴

We do not grade this assignment on the content, only on whether the students made a good faith effort to complete it. We do not share this assignment with other students. Students are asked to talk about their reaction to the results and what that means for them as a person and professional. Further, students are asked to assume that implicit biases exist and to discuss what that means for the legal system and the health care system.

Step 1:

Complete this Assignment in One Sitting

Please Note: While there is no right/wrong effort, I do expect a good faith effort.

BEFORE DOING the IAT write a short paragraph (no more than 150 words) on whether you think you have biases based on race? How do you know whether you do or do not have biases? Why do you think you do or do not have any implicit bias?

Step 2:

Right-click on the link and open in a new tab.

<https://implicit.harvard.edu/implicit/takeatest.html> [<http://perma.cc/PHM2-LCWV>]

The IAT presents several different tests based on race, religion, and sexual orientation. From the selection offered do three tests. In addition to Black-white/race, select a test in an area where you believe that you have little or no biases and select a test in the area where you believe you have biases.

Step 3:

AFTER COMPLETING the IAT write a short paragraph. Answer the following questions: did you have any implicit bias? What do you think about

39. Presidents IAT ('Presidential Popularity' IAT) measures preference for Barack Obama and one or more previous presidents.

40. Race IAT measures preference of white and black faces.

41. Sexuality IAT ('Gay – Straight' IAT) measures preference for words and symbols representing gay and straight people.

42. Skin-tone IAT ('Light Skin – Dark Skin' IAT) measures preference for light and dark-skinned faces.

43. Weapons IAT ('Weapons – Harmless Objects' IAT) measures preference for white and black faces and images of weapons or harmless objects.

44. Weight IAT ('Fat – Thin' IAT) measures preference for faces of people who are obese and people who are thin.

the results? Assume that there is a fair degree of accuracy in the IAT, what do the general results mean for legal justice? I am not asking what your results mean. The question is what does the presence of implicit bias in people mean for the administration of justice and the practice of law.

Responses from the students are as diverse as the students themselves. Most students find the results surprising. For students whose test result reveals an implicit racial bias, many are very resistant to the idea (students often equate the lack of explicit bias with the lack of bias). Many argue, "I am colorblind. I do not use color in my decision-making," and will argue against the validity of the tests.⁴⁵ Others find the results disheartening or disturbing. It can be especially hard for students when the test reveals an intra-group bias.

Students' statements that they are colorblind represent an opportunity to introduce the idea that a person can have no explicit biases in a particular area and still have implicit biases in that area; a person can work on not having explicit biases and still have implicit biases that are affecting their behavior. In fact, the person without any implicit biases is a lot like "the reasonable person," a convenient standard to measure behavior against, but rarely found in the wild.

The second group of students represent those who do not demonstrate an implicit bias against the marginalized group; of course, these students feel validated. We use these results as an opportunity to reinforce that validation. However, these results also represent an opportunity to start a discussion about the fluidity of implicit biases. Implicit biases are not static. They are subject to constant modification as a person develops new stereotypes and new prejudices about a particular group or works to abandon old negative thoughts and beliefs. Furthermore, without constant vigilance, old biases can resurface based on current events in a person's life and in the world at large.

Finally, the third group of students consists of members of a racially oppressed group who have an intra-group, negative, implicit bias. For instance, black students who have an implicit bias against black people. These students often face their results with shock, disbelief, and even depression. However, this kind of intra-group negative implicit bias is not uncommon. In fact, research tends to show that many members of a group will have an implicit

45. See T. ANDREW POEHLMAN ET AL., *RUNNING HEAD: PREDICTIVE VALIDITY OF THE IAT: UNDERSTANDING AND USING THE IMPLICIT ASSOCIATION TEST: III. META-ANALYSIS OF PREDICTIVE VALIDITY* 6-7 (2005), <http://faculty.washington.edu/agg/pdf/IAT.Meta-analysis.16Sep05.pdf> [<https://perma.cc/54TJ-STC5>]. This meta-analytic review included sixty-one studies with eighty-six independent samples and 6282 subjects. *Id.* at 11. The meta-analysis found that the IAT measures significantly predicted criterion measures, such as judgments, choices, physiological responses, and behaviors. *Id.* at 2, 20, 62. IAT measures outperformed self-report measures in the domain of stereotyping and prejudice. *Id.* at 2, 62.

bias against members of their group, the same implicit bias that the majority holds.⁴⁶

The fact that people can hold negative stereotypes and biases about their own group should not be surprising because implicit biases are learned reactions to environmental stimuli. That environment includes not just the communities we live in but the media we consume. All aspects of our culture contribute to the forming and maintaining of implicit biases. Consequently, it is not surprising that anti-black animosity persists across all groups, including black people. Being oppressed is not enough to eliminate biases against someone who is similarly oppressed, even someone from the same oppressed group.

The fourth part of the assignment is assigned readings and videos. Here is a list of suggested assignments you can choose from:

- View: Brain Tricks: This is How Your Brain Works⁴⁷
- View: Immaculate Perception and Implicit Bias⁴⁸
- View: Thinking - Fast and Slow⁴⁹
- Read: Implicit Racial Bias: A Social Science Overview⁵⁰
- Read: Racial Disparities, Social Science, and the Legal System⁵¹
- View: The Neuroscience and Psychology of Decision-making
 - Part 1: A New Way of Learning⁵²
 - Part 2: The Media, the Brain, and the Courtroom⁵³

46. See, e.g., Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GRP. DYNAMICS: THEORY, RES. & PRAC. 101 (2002); PEW RES. CTR., EXPLORING RACIAL BIAS AMONG BIRACIAL AND SINGLE-RACE ADULTS: THE IAT, 7 (2015), http://www.pewsocialtrends.org/files/2015/08/2015-08-17_IAT.pdf [<https://perma.cc/E7G8-RASG>].

47. AsapSCIENCE, *Brain Tricks: This Is How Your Brain Works*, YOUTUBE (Jan. 31, 2013), <https://youtu.be/JiTz2i4VHFw> [<https://perma.cc/WVZ2-V8W3>].

48. Tedx Talks, *Immaculate Perception: Jerry Kang at TEDxSanDiego 2013*, YOUTUBE (Jan. 28, 2014), <https://youtu.be/9VGbwNI6Ssk> [<https://perma.cc/SFC8-674D>].

49. Charlie Rose, *Daniel Kahneman on Thinking, Fast and Slow*, YOUTUBE (Oct. 17 2012), <https://youtu.be/mWaIE6u3wvw> [<https://perma.cc/YXV2-UR7K>].

50. Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012).

51. Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012); see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Ronald M. Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community*, THE COLORADO LAWYER, Feb. 2016, at 49.

52. THE NEUROSCIENCE AND PSYCHOLOGY OF DECISIONMAKING, PART 1: A NEW WAY OF LEARNING (Judicial Council of California 2009), <http://www2.courtinfo.ca.gov/cjer/857.htm> [<https://perma.cc/PXH3-XFVB>].

- Part 3: Dismantling and Overriding Bias⁵⁴
 - Overcoming Implicit Bias: Guidance for Court Personnel⁵⁵
 - Cultural Competency and the Law in the 21st Century⁵⁶
 - Seeing through Colorblindness: Implicit Bias and the Law⁵⁷
 - Read: An Introduction to Structural Racism for Lawyers⁵⁸
 - Read: Implicit Bias in the Courtroom⁵⁹

This first assignment sets the stage for the rest of the semester. After providing comments to each student individually and privately, we aggregate the comments and weave them into a general post for the entire class that discusses the variety of responses received, the class's aggregated results on the IAT and our own comments on how those results can be interpreted.

B. *Identifying Stereotypes Assignment*

The next task students are asked to complete is to identify specific stereotypes that might lead to a biased reaction or action. At this stage, we want students to select a particular racial group and identify as many stereotypes about the group—good and bad—as they can. For each stereotype, they are to explain why it is problematic in the administration of justice. This exercise tends to make some students very uncomfortable. Many do not want to acknowledge the existence of stereotypes or admit to their own knowledge about them. However, recognizing the stimulus that can prime an implicit bias is central to eliminating those biases, and stereotypes are a primary source of this priming. We present as an example to students the following:

Stereotype: Black people are less compliant with medical treatment.⁶⁰

Impact: Judges might be more likely to force treatment on black defendants than non-black defendants.

53. THE NEUROSCIENCE AND PSYCHOLOGY OF DECISIONMAKING, PART 2: THE MEDIA, THE BRAIN, AND THE COURTROOM (Judicial Council of California 2010), <http://www2.courtinfo.ca.gov/cjer/863.htm> [<https://perma.cc/2RVV-MV7Y>].

54. THE NEUROSCIENCE AND PSYCHOLOGY OF DECISIONMAKING, PART 3: DISMANTLING AND OVERRIDING BIAS, (Judicial Council of California 2010), <http://www2.courtinfo.ca.gov/cjer/864.htm> [<https://perma.cc/PU6V-NLZU>].

55. OVERCOMING IMPLICIT BIAS: GUIDANCE FOR COURT PERSONNEL (Judicial Council of California 2013), <http://www2.courtinfo.ca.gov/cjer/939.htm> [<https://perma.cc/HXE8-PND7>].

56. See Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, PROB. & PROP., March/April 2016, at 29.

57. Kang & Lane, *supra* note 51.

58. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1 (2012); see Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930 (2014).

59. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

60. René Bowser, *Racial Bias in Medical Treatment*, 105 DICK. L. REV. 365, 373 (2001).

In addition to allowing us to discuss the manner in which stereotypes can prime implicit bias, this assignment also allows us to discuss the pernicious nature of ostensibly “positive” stereotypes.

C. The Weekly Discussion Assignment

Each week, in addition to their substantive reading, students are assigned materials related to implicit bias,⁶¹ asked to complete one of Harvard’s IATs, and write a reflection about the content and/or their experiences related to the material covered. Students are asked to reflect the relationship between the substantive discussion of the week and the impact of implicit biases and stereotypes on that area of the law being studied.

We require students to write a minimum of 150–200 words. The minimum is set to assure that students do a significant reflection. Many students write significantly more than the minimum. We do not usually put a maximum but have on occasion had to ask students to limit their comments to 500 words. However, we do not tell them that unless a problem develops. Students are placed in groups of six. This is one place where your choice of learning management system will be important. We like to use Moodle because not only does it enable us to randomize groups on a weekly basis, but it also makes it possible to restrict access to reading other students’ posts to those students who have first submitted their own post. Unlike traditional Socratic method in an in-person classroom, this makes it possible to assure that every student participates in original critical thinking.

We then task students with reading all the posts in their small group and responding to at least three. The responses have a fifty-word minimum to avoid “me too” and “I agree” responses. As in the original postings, many students far exceed this requirement.

In the beginning, students frequently want to say there is no way implicit bias can have an impact. We overcome this by discussing how implicit biases might affect the law. The key to effectively identifying areas in the law where implicit bias might have an impact is to determine where discretion can be exercised. All actors (legislators, administrators, judges, attorneys, clients, staff, witnesses) potentially have discretion, and the existence of discretion allows for the introduction of bias. Each week we ask students to think about the actors involved, look at what discretion they have, what stereotypes exist, and how those stereotypes might be translated into bias.

61. When we first started doing this work, there were very few supplemental readings specifically on implicit bias stereotypes or prejudice. However, now, articles related to race gender, religion, disability, and sexual orientation while not in abundance can be found. This is especially true if the readings encompass more than health care law. Expanding the reading beyond health care law helps the student see that this training is a transferrable skill.

We have to keep reminding students that when they argue that bias cannot play a role in a particular area of the law, they are necessarily making an argument that no one in that area of law has any discretion. Students may also argue that while discretion might exist, it cannot be exercised in a way influenced by the actor's bias. When a student raises this argument we ask for the student to provide examples; that allows us to again discuss the nature of decision-making, discretion, and the relationship between discretion and bias. Finally, some students may argue that while discretion may exist, the substantive law we are discussing that week cannot be impacted by the stereotypes or the discretion of the actors. This argument usually represents a fundamental misunderstanding of the reading, either on our part or the students. We recommend that the student revisit the reading, and we do so ourselves. We have yet to discover that we have so fundamentally misunderstood the reading, while the student can at that point find a way in which stereotypes might lead to decisions influenced by implicit bias in that week's particular reading. Every class has some students who are so opposed to the idea of the impact of implicit bias on law and policy that they will make all three arguments over the course of the semester, often repeatedly and sometimes in the same post.

As an important note, we do not respond to students' postings until after all the students have responded. It is our experience that other students will raise the appropriate points. Waiting increases the opportunity for students to take responsibility for their own learning and growth. We have also found that comments from other students can often resonate more than comments from the professor. And, finally, waiting allows us to learn from the students' unique experiences and perspectives.

Students are expected to read everyone's posting in their assigned group. We assign a randomized group of six. The platform that we use (Moodle) does that automatically. Students cannot read other students' responses until they post their own (again, a feature in Moodle). This forces every single student to do their analysis and not just play off someone's postings.

Students have to write an initial posting of at least 150 words. Typically, most students do a good job, and many students write significantly more. A student who writes only 150 words is actually writing the bare minimum. If a student wrote the bare minimum and made a good faith effort, we graded them sixteen out of twenty points. The more they write and the more thorough their analysis, the higher the grade.

Initial postings are due at the beginning of the week, generally Monday mornings at 9:00 a.m. without regard to when class meets. We do this so that we can space the various components of the assignment. Having a required written assignment every week before we meet has resulted in students who are generally better prepared for class.

Students are required to read the postings of everyone in their group.⁶² Students are expected to write a response to three different postings. Their response has to be at least fifty words. We make this minimum because we do not want, “Me too,” and “I agree,” responses. By requiring minimum words for the response to students, the responses tend to be more thoughtful and analytical. The responses to the initial postings are due by Wednesday at 11:30 p.m. Students are encouraged to continue the conversation at least until Friday at 11:30 p.m. when the discussion forum for the week closes.

Many faculty might want to start slowly, that is, start by not doing every single class or topic but beginning to identify areas where faculty can have a straightforward discussion about implicit bias and only have that discussion four or five times during the semester. For instance, faculty can have an easier discussion about implicit bias in the area of medical error,⁶³ access to health care,⁶⁴ quality control,⁶⁵ distributive justice,⁶⁶ quarantine and isolation, regulation of health care professionals,⁶⁷ professional-patient relationship,⁶⁸ informed consent,⁶⁹ the liability of health care professionals,⁷⁰ liability of

62. Moodle allows us to track whether students have “opened” each of the postings. Of course, students could game the system by opening an assignment without reading them.

63. See Mithila Jegathesan, et al., *A Survey of Mindset Theories of Intelligence and Medical Error Self-Reporting Among Pediatric Housestaff and Faculty*, BMC MED. EDUC. (Feb. 11, 2016), <http://bmcmmededuc.biomedcentral.com/articles/10.1186/s12909-016-0574-8> [https://perma.cc/WX6Z-ETSF].

64. See Ruqaiyah Yearby, *Sick and Tired of Being Sick and Tired: Putting an End to Separate and Unequal Health Care in the United States 50 Years After the Civil Rights Act of 1964*, 25 HEALTH MATRIX 1 (2015).

65. See Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956 (2016) (reviewing EULA BISS, ON IMMUNITY: AN INOCULATION (2014)).

66. See Yearby, *supra* note 64.

67. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005) (discussing the relationship between implicit bias against racial minorities and media regulation); Martin H. Malin & Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. PA. J. BUS. L. 175 (2008); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013). The classic work introducing this area of psychological research to the law is: Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52 (2008).

68. See Lu-in Wang, *Race As Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004); Tess M. S. Neal & Thomas Grisso, *The Cognitive Underpinnings of Bias in Forensic Mental Health Evaluations*, 20 PSYCHOL. PUB. POL’Y & L. 200 (2014); Kimani Paul-Emile, *Patients’ Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462 (2012).

69. See Dayna Bowen Matthew, *Health Care, Title VI, and Racism’s New Normal*, 6 GEO. J. L. & MOD. CRIT. RACE PERSP. 3 (2014).

health care institutions,⁷¹ regulation of health care institutions,⁷² health disparities,⁷³ health care disparities,⁷⁴ discrimination,⁷⁵ and the discussion of bioethical issues,⁷⁶ such as reproduction and birth,⁷⁷ death and dying and genetics,⁷⁸ abortion,⁷⁹ regulation and research involving human subjects, and cultural competency.⁸⁰

The discussion of implicit bias may be somewhat harder for students to identify in the areas of antitrust,⁸¹ Medicaid,⁸² Medicare, insurance,⁸³ the

70. See Michele Goodwin & Naomi Duke, *Health Law: Cognitive Bias in Medical Decision-Making*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 95–112 (Justin D. Levinson & Robert J. Smith eds., 2012); Matthew, *supra* note 69.

71. See M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 *YALE J. HEALTH POL'Y, L. & ETHICS* 95, 99 (2001).

72. See Jenna R. Feldman, *Medical Malpractice Liability and Accountability: Potential Legal Ramifications and Solutions for Florida Accountable Care Organizations*, 69 *U. MIAMI L. REV.* 1073 (2015); Engstrom, *supra* note 67; Harris, *supra* note 67.

73. See Maxwell J. Mehlman, *Why Physicians Are Fiduciaries for Their Patients*, 12 *IND. HEALTH L. REV.* 1 (2015).

74. See Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 *J. GEN. INT. MED.* 1504 (2013); Matthew, *supra* note 69; Barbara A. Noah, *The Role of Race in End-of-Life Care*, 15 *J. HEALTH CARE L. & POL'Y* 349 (2012); Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 *VILL. L. REV.* 195 (2003); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework To Remedy Racial Disparities in Medical Care*, 90 *CAL. L. REV.* 2047 (2002).

75. See Vernellia R. Randall, *Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law*, 10 *DEPAUL J. HEALTH CARE L.* 1 (2006); Sidney D. Watson, *Reforming Civil Rights with Systems Reform: Health Care Disparities, Translation Services, & Safe Harbors*, 9 *WASH. & LEE RACE & ETHNIC ANC. L.J.* 13 (2003).

76. See Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 *ST. LOUIS U. PUB. L. REV.* 191 (1996).

77. See Dov Fox, *Racial Classification in Assisted Reproduction*, 118 *YALE L.J.* 1844 (2009); Elizabeth J. Chen, *Restoring Rights for Reproductive Justice*, 22 *AM. U. J. OF GENDER SOC. POL'Y & L.* 281 (2014).

78. See John Pyun, *When Neurogenetics Hurts: Examining the Use of Neuroscience and Genetic Evidence in Sentencing Decisions Through Implicit Bias*, 103 *CAL. L. REV.* 1019 (2015).

79. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L. REV.* 989 (1991).

80. See Camille M. Davidson, *My Aging Minority Rural Grandparents: Disparities in the Health and Health Care of the Rural Elderly Minority Population and the Need for Culturally Competent Health Care Providers*, 21 *AM. U. J. GENDER SOC. POL'Y & L.* 57 (2012); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33 (2001); Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching About Identity, Culture, Language, and Difference*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* (Susan Bryant et al. eds., 2014).

81. See Tanya Katerí Hernández, *One Path for "Post-Racial" Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 *LAW & INEQ.* 309 (2014); *United States v. Vandebroke*, 771 F. Supp. 2d 961 (N.D. Iowa 2011).

structure of the healthcare industry,⁸⁴ Indian Health Services,⁸⁵ and Medicare fraud and abuse. Consequently, placing these topics toward the end of the course helps, as students will have had several weeks of practice.

D. Final Assignment: Learning Objective

This assignment has two parts. The first part is due the first week of class. Students have to develop ten to fifteen learning objectives that are measurable and based on Blooms Taxonomy. Students have to make a learning objective for each major component of the class. One of the learning objectives has to be related to implicit bias.

At the end of the course, we have them write a 1200 to 1500-word essay on whether or not their learning objectives were met, including a reflection on why they failed to meet those objectives they did not meet.

E. Grading

To ensure full participation, we base part of the student's grade for the course, usually fifteen percent, on their participation in the implicit bias exercises. The weekly discussions are graded on a scale of one to twenty. Generally, the grades fall between sixteen to nineteen. The learning objectives assignment is worth ten to fifteen percent of their grade with the implicit bias objective being a small component.

CONCLUSION

This paper serves as a brief guideline for how and why we integrate a conversation about race, racism, and implicit bias into a course like Health Care Law. As we are writing this, our country is embroiled in a difficult conversation about race, racism, and the law. Addressing the impact of implicit bias on law and policy presents significant challenges. We can begin to meet those challenges by educating law students on implicit bias and the way those biases influence the law. While a health care law course might not seem like a

82. See Ruqaiyah Yearby, *When Is a Change Going to Come?: Separate and Unequal Treatment in Health Care Fifty Years After Title VI of the Civil Rights Act of 1964*, 67 SMU L. REV. 287 (2014).

83. See Daryll C. Dykes, *Health Injustice and Justice in Health: The Role of Law and Public Policy in Generating, Perpetuating, and Responding to Racial and Ethnic Health Disparities Before and After the Affordable Care Act*, 41 WM. MITCHELL L. REV. 1129 (2015).

84. See Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System To Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127 (1993); Sara Gronningsater, *A Patient's Right to Choose Is Not Always Black and White: Long Term Care Facility Discrimination and the Color of Care*, 26 ST. JOHN'S J. C.R. & ECON. DEV. 329 (2012); Peter J. Hammer & Charla M. Burill, *Global Health Initiatives and Health System Development: The Historic Quest for Positive Synergies*, 9 IND. HEALTH L. REV. 567 (2012).

85. See Dykes, *supra* note 83.

natural fit for this conversation, the fact is that there is no area of American society untouched by the influence of bias. Exploring implicit bias in a course like Health Care Law pays significant dividends both for students' understanding of health care law specifically and in their education as future attorneys generally.