ARTICLES

(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language

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Sam[1] was a typical law student — a 23-year-old white male, from the middle of America geographically and now in the middle of the class academically. Not satisfied with the B grades he had been earning in his first-year legal writing course, he came in for an appointment to discuss the objective office memorandum he was writing.

The assignment was based on a problem concerning lease agreements. Several antique store owners had leased spaces in what was promised to be an upscale antique mall.[2] When the landlord encountered difficulty filling all the mall spaces with antique stores, he decided to lease a space to a thrift store. Soon after the thrift store opened, the antique store owners experienced a downturn in sales. They complained to the landlord that the thrift store customers were changing the atmosphere of the promised "upscale" mall, and they at-

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1. "Sam" was not the student's real name.

2. We are grateful to our colleagues Laurel Oates, Judi Maier, and Connie Krontz, who designed this memo problem the fall of 2000.

tributed their lower profits to the arrival of the thrift store. As a student assigned to write a memorandum about this problem, Sam had to analyze whether leasing to the thrift store amounted to a constructive eviction of the antique stores.

Sam's memo had a promising beginning. He had correctly identified the issue and laid out the relevant rules. As he moved through his arguments, he explored whether the antique stores' lower profits were caused by the opening of the thrift store or by other factors. He used the law and the facts to develop arguments about whether the mall landlord had fulfilled his part of the lease agreement. The draft was going very well, and then it took a turn. Sam had asserted that the antique stores were being constructively evicted because the thrift store attracted a lower income clientele, thereby increasing the likelihood of crime in the antique mall.

Sam's argument assumed that people who are poor are more likely to commit crime than those who are well off, an assumption that some may say can be supported by crime statistics, but others may say is based on an unfounded stereotype about poor people. The problem, of course, was that Sam had not thought this through. For him, it was just a given: poor people would bring a criminal element to the antique mall. What he had failed to do was to question the basis for this assumption and evaluate whether it was an effective and appropriate part of his argument.

Unexamined assumptions are obviously an unreliable foundation for legal argument. Legal argument should be the result of a deliberative process, a careful construction made up of the relevant authorities as they apply to a given set of facts. Inevitably, however, students inject their own values and beliefs, and sometimes their own assumptions, into that mix. While drawing on such values and beliefs is not necessarily a bad thing, students need to think through the basis for their assumptions and, at the very least, realize that others may not share them.

Where do these unexamined assumptions come from? Along with everyone else, law students absorb these assumptions, at least some of them, from the culture they grow up in. Through years of conditioning transmitted by everything from parents to school to television, they acquire the language habits and thought habits of their culture.

Such cultural conditioning can be beneficial or harmful. It can be beneficial when it serves to pass on a society's acquired knowledge and wisdom, thereby building and enriching a sense of community. When we think alike and act in predictable ways, it smoothes the oth-

erwise rough edges of people living together. Consequently, some cultural assumptions are helpful; they hold up under close examination, and they lead to language and thought habits that are good ones to keep.

Cultural conditioning can be harmful, though, when the actions and attitudes that are passed on reflect a cultural bias based on untruths, stereotyping, or a simple lack of respect for differences. In such situations, cultural conditioning becomes the conduit for unsupported opinion and prejudice. Unexamined assumptions about gender, race, nationality, class, sexual orientation, and disability pass from generation to generation until someone identifies and questions them.

As the next generation of lawyers, law students can ill afford to blindly accept cultural biases as simply the way things are. To a much greater extent than their predecessors, today's law students will be practicing law in a diverse society. To be effective advocates in the 21st century, they must learn to recognize cultural bias in language and analysis. Realizing that words are the tools of their trade, they need to be particularly attentive to their spoken and written language and examine it for imprecision, stereotyping, and any potential for unintended offense. Realizing that legal analysis and legal argument are the professional services they will offer, they need to probe for cultural bias that leads to faulty reasoning.

This article discusses how law school, specifically through legal writing courses, can address cultural bias and its effect on legal analysis and language. Part I addresses why the law school curriculum should aid students in recognizing expressions of bias in legal analysis and language. Part II discusses how bias typically appears in legal language, as well as how it may infect legal analysis and argument, and suggests ways of teaching students to recognize it in a legal writing course. Part III addresses challenges that may be faced in teaching the material, including suggestions for handling discussions of potentially sensitive subjects.

I. WHY THE LAW SCHOOL CURRICULUM SHOULD TEACH STUDENTS TO RECOGNIZE BIAS

Numerous studies have proven that all people have deeply seated biases,[3] formed by their life experiences and absorbed from their cul-

3. Many studies have examined public attitudes regarding race. *See, e.g.*, Robert Adler, *Pigeonholed*, NEW SCIENTIST, Sept. 30, 2000, 39–40; Thomas B. Edsall, *25% of U.S. View Chinese Americans Negatively, Poll Says*, WASH. POST, Apr. 25, 2001, at A4 (citing Committee of 100, *American Attitudes Towards Chinese Americans and Asian Americans* (2001) (reporting poll finding that 25% of Americans surveyed held "decisively negative views" of Chinese Americans

ture.[4] Attorneys, judges, and legislators, no matter how enlightened or educated, may bring their biases to their work.[5] Such biases may influence how attorneys and judges express themselves, how they analyze and construct arguments, and ultimately how they make decisions. Given the potential influence bias has in the legal system, the law school classroom is curiously quiet about this topic.

This should not be so for a variety of reasons. Probing what cultural assumptions underlie an opinion or an individual argument fosters the critical thinking characteristic of good legal analysis.[6] Students will have a deeper understanding of the cases they are reading if they can recognize the cultural assumptions that those cases may contain.[7]

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and that 46% believed that "Chinese Americans passing on information to the Chinese government is a problem").

4. "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions." Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 322 (1987) (citations omitted).

5. Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 4 LEGAL WRITING 79, 79 (1998) (discussing overcoming unconscious bias on the part of a judge); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 743 and n. 42 (1995) (commenting on how legal decisionmakers possess ingrained stereotypes); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM HUM. RTS. L. REV. 1, 4 (2002) (noting how "negative racial stereotypes are deeply ingrained in our culture and history, and thus reflected in the law and government conduct"); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1018 (1988).

6. Charles Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 141–42, 147 (1995) (noting that assignments requiring students to confront issues of diversity are good vehicles for developing critical thinking, in part, because students can challenge each other to analyze the issues from different perspectives); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 544–45 (1996) (arguing that discussion of diversity issues aids substantially in the intellectual depth and breadth of the law student); Mari J. Matsuda, *Who is Excellent?*, 1 SEATTLE J. SOC. JUST. 29, 37 (2002) (arguing in support of affirmative action on the grounds that "students who learn in a context of interaction with difference, that is, in integrated, as opposed to segregated environments, develop stronger skills of cognition and reasoning").

7. Kellye Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GEORGIA L. REV. 1025, 1030–31 (2000) (explaining that "Consideration of [issues of race, gender and class] provides a richer view of law and the society it serves, providing a more nuanced, sophisticated treatment of theory, doctrine, and policy"); Sidney W. DeLong, *An Agnostics Bible*, 20 SEATTLE. U. L. REV. 295, 315–16 (1997) (reviewing ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY DOCTRINE, AND PRACTICE (3d ed. 1992) (expressing concern that "sanitizing" cases by eliminating "extraneous factors"

Moreover, students who are able to recognize the fundamental flaws in arguments that rely on unexamined assumptions will be more effective writers and advocates.

Furthermore, because the law itself is an expression of social values, all law students need to be aware of the extent to which those values may be culturally biased.[8] Contrary to the old belief that the law is somehow neutral and objective, modern legal scholarship has exposed how bias in relation to gender, race, class, and other historically marginalized peoples permeates the law.[9] Consequently, an exploration of how such bias manifests itself in the law belongs in the law school curriculum. All too often, however, such exploration is confined to elective courses such as "Race and the Law" or "Gender and the Law."[10] While such specialty courses typically do an excellent job of exposing bias, only a small number of students have the opportunity to take these courses[11] and, by their very nature, such courses focus on only one type of bias. Addressing issues of bias throughout the law school curriculum has the added benefit of freeing the voices of students with diverse perspectives, particularly the perspectives of female students and students of color.[12]

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such as race, poverty, and gender may alter the fundamental meaning of the case as a source of law).

8. Dark, *supra* note 6, at 556 ("[T]he determination of a rule to resolve a legal question is really a decision about which values matter.").

9. While some may view the law as a fixed body of rules, embodying a "neutral," "objective," and common social understanding of what is "right," "just," or "moral," many would disagree. *See, e.g.*, Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 109–10 (2000) ("In converting virtually every possible event or conflict into a shared rhetoric, legal language generates an appearance of neutrality that belies its often deeply skewed institutional workings . . . "); Calleros, *supra* note 6, at 142 n.5 (1995) (identifying some of the many who "challenge the law's claim of objectivity").

10. *See infra* notes 138-140.

11. *See* Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING 63, 69 (2001) (explaining that students who do not take these upper level elective courses will benefit from an introduction to alternative legal perspectives in the curriculum).

12. Many have addressed this point. *See, e.g.*, Calleros, *supra* note 6, at 144–45; Paula Lustbader, *Teach in Context: Responding to Diverse Students Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 408 (1998) ("We are mistaken if we treat law as an objective and neutral body of rules and values, and fail to recognize how white, male, middle-class experience and values dominate the legal system. Such lack of perspective harms students of color, forcing them to put their race and experience aside because their views are not 'relevant' to the discussion, or allowing them to express their views only when the topic directly relates to issues of discrimination."); Brook Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 PERSP.: TEACHING LEGAL RES. & WRITING 51, 52 (2001); Edwards & Vance, *supra* note 11, at 68–69.

Finally, students who are in law school today will be practicing law in a world that is diverse.[13] To be effective professionals in this environment, they must be ready to communicate effectively with clients, judges, and attorneys who have completely different backgrounds from their own.[14] Ill-considered language choices or arguments based on stereotypical assumptions about groups of people may be more than ineffective; they may convey disrespect, poison professional relationships,[15] or worse.[16]

As professionals in a multicultural society, then, today's students are required to become "culturally competent";[17] that is, they must be

13. Miki Felsenburg & Luellen Curry, *Incorporating Social Justice Issues into the LRW Classroom*, 11 PERSP.: TEACHING LEGAL RES. & WRITING 75, 76 (2003)); Laurel Currie Oates, One Teacher's Story: Race, Class, and Other Risky Lessons in Teaching Legal Writing, at 2 (unpublished manuscript, on file with author) (discussing the need to bring "real world issues into the classroom to aid students in becoming good lawyers").

14. Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1810 (1993) (discussing need for attorneys to be conscious of, and sensitive to, the ways in which they are different from their clients); Pratt, *supra* note 5, at 106 (discussing how a successful advocate must know his or her audience, including understanding the judge's values and experiences).

15. On more than one occasion, for example, a female Asian American attorney was asked at the beginning of a hearing to explain where her lawyer was, or whether she was the interpreter for the Asian American litigant, starting the proceeding with a message of disrespect. *See* ABA Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession, *The Burdens of Both, The Privileges of Neither: A Report of the Multicultural Women Attorneys Network* 1, 16-27 (1994); Lynn Hecht Schafran, *Women of Color in the Courts*, TRIAL, Aug. 1999, at 21; Margalynne Armstrong, *Women of Color and the Law: The Duality of Transformation*, 31 U.S.F. L. REV. 967, 971 (1997); WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS, A PRE-PROGRAM INTRODUCTION 4–5 (Marilyn J. Berger & Margaret Chon eds., Sept. 15, 2000) (adapted from NAT'L JUDICIAL EDUC. PROGRAM TO PROMOTE EQUAL. FOR WOMEN AND MEN IN THE COURTS, WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS, A PRE-PROGRAM PRIMER ON COGNITIVE PROCESS, STEREOTYPING, INTERSECTIONALITY, AND THE IMPLICATIONS FOR THE COURTS (June 1998) [hereinafter WHEN BIAS COMPOUNDS]).

16. For example, consider the assumptions made by the defendant's arguments in Pennsylvania v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974). In that case, black plaintiffs brought suit alleging discrimination on the basis of race, and the defendants moved to recuse Judge A. Leon Higginbotham, Jr., from hearing the case on ground that he was black, had given a speech before black historians, and had an "intimate tie with and emotional attachment to the advancement of black civil rights." The court denied the motion as it was premised on the view that black judges, unlike white judges, could not be impartial in deciding a case involving parties of their own ethnic background. *Id.* at 157, 163–65.

17. We are grateful to Peggy Nagae for calling our attention to the need for "cultural competence" and for discussing this issue with us. *See* Matsuda, *supra* note 6, at 31–34 (discussing intercultural competence and positing: "Ask [executives at Coca-Cola] whether they would rather their managers had learned the lessons of intercultural competence before they came to work and before worker discontent had erupted into front page litigation. They will tell you that prior learning is preferable to learning on the job, at company expense, and under court order.").

cognizant of cultural assumptions that may impact their work[18] and be sensitive to the different perspectives about what is fair or persuasive. Being culturally competent, however, does not mean that law students (or for that matter lawyers and judges) should avoid bringing their personal perspectives and life experiences to their work or that they should try to become color- or gender-blind or somehow suppress their knowledge of a person's social category.[19] What it does mean is that students learn to recognize *when* and *how* their life experiences and personal views are being expressed in their analysis of legal problems so that their arguments are the result of conscious, knowing decisions.[20]

The importance of discussing how individual and cultural biases may affect the analysis of legal problems is well-illustrated by recent legal responses to the events of September 11th. Lawyers and judges are struggling with issues that involve not just neutral legal doctrine, but also cultural perceptions of persons of Middle Eastern descent. On the one hand, many have expressed concern that government actions in the war on terrorism have been based on the assumption that Muslims, Arabs, and persons of Middle Eastern descent are more prone to commit acts of terrorism than others.[21] Indeed, by many accounts, public opinion after September 11th has favored more intense scrutiny of Arabs and Arab-Americans.[22] On the other hand, others have defended the government's actions on the grounds that they are

18. Calleros, *supra* note 6, at 142-43, 146; Dark, *supra* note 6, at 554–55 (discussing how a lawyer's "personal filters" may prevent him or her from understanding a client's needs); Baker, *supra* note 12, at 52 (making the point that students need to be comfortable dealing with clients different from themselves and competent addressing legal concerns outside their immediate expertise); Felsenburg & Curry, *supra* note 13, at 76; Edwards & Vance, *supra* note 11, at 66–67.

19. WHEN BIAS COMPOUNDS, *supra* note 15, at 7.

20. Armour, *supra* note 5, at 736-737 (making stereotyped views explicit enhances the decision-making process); Cynthia Kwei Yung-Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 368–69 (1996) ("Most of us are prejudiced—some of us more or less so than others. The extent to which we act upon our prejudices, however, may depend in part on our awareness and understanding of the stereotypes that inform our daily lives.").

21. Much has been written about these concerns. *See* discussion *infra* note 109.

22. According to a CNN/USA Today/Gallup poll taken a few days after the September 11th attacks, 58% of persons polled favored requiring all Arabs, including U.S. citizens, to undergo special and more intense security screening before boarding planes to help prevent terrorist attacks; 49% felt that Arabs and Arab-Americans should carry some form of special identification; and 32% backed "special surveillance" of Arabs and Arab Americans. *See* Mark Memmott, et al., *Poll Finds a United Nation*, USA TODAY, Sept. 17, 2001, at 4A; Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Racial Profiling*, N.Y. TIMES, Sept. 23, 2001, at 1A.

justified by national security concerns.[23] Whatever arguments are advanced, the rationale for such government actions — whether it is a factually based profile of probable suspects or the biased view that Muslims and persons of Middle Eastern descent have a greater propensity to commit acts of terrorism — must be critically examined.

Even without the charged post-September 11th atmosphere, some may be quick to dismiss the importance of teaching students about bias in legal analysis and language as little more than "political correctness." The intent of this article is not to ask students to speak or think in a certain way solely because it may be in vogue. Instead, the goal is to teach students to think and write about legal problems in ways that are both analytically sound and self-conscious of how we insert ourselves and our experience into our work. In short, it is about being professional.

All law school courses can offer opportunities for students to examine these issues.[24] Doctrinal courses include cases that may raise these issues.[25] Clinics and other practice-oriented courses can raise these issues as students prepare briefs, make court appearances, and work with clients.[26] Whatever the course, however, the professor may need to scrutinize his or her materials for the issues of bias that they may raise and re-envision how to teach those materials.[27]

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23. *See* William Glaberson, *Support for Bush's Antiterror Plan*, N.Y. TIMES, Dec. 5, 2001, at B6 ("After nearly two months of criticism by civil liberties groups about the Bush Administration's antiterrorism crackdown, supporters of the measures have begun to outline a legal defense of the actions, saying that the president has broad powers to protect national security in wartime and that accusations of rights violations have been overblown.").

24. Calleros, *supra* note 6, at 149.

25. Many have addressed ways to raise bias issues in doctrinal courses; we can mention only a few here. *See, e.g.*, Dark, *supra* note 6, at 57–74; DeLong, *supra* note 7, at 311–16 (Contracts); Kellye Testy, *Intention in Tension*, 20 SEATTLE U. L. REV. 319, 334–40 (1997) (reviewing RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1995) (Contracts); Testy, *supra* note 7, at 1031–44 (Corporations); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEG. EDUC. 101, 103–13 (1988).

26. Calleros, *supra* note 6, at 147–48 ("'Live client' clinical offerings can best introduce students to multicultural legal issues and clients."); Brook K. Baker, *Language Acculturation Processes and Resistance to In"doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131, 153–54 (2000).

27. Kathryn Stanchi makes the point, for example, that legal writing professors may need to rethink their conventional approaches to their courses as they seek to incorporate issues of bias into their courses: "[L]egal writing pedagogy . . . both reflects and perpetuates the biases in legal language and reasoning through its focus on audience and assimilation to conventional practices." Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9, 20–23 (2001).

It is particularly fitting to discuss bias in language and legal analysis in a legal writing course.[28] The core of these courses is to teach students to create and draft legal analysis and legal argument. Part and parcel of those skills is to critically examine the bases of legal analysis and argument; to communicate effectively with the intended audience; and to write and analyze with precision, all skills that might be colored by individual or cultural bias. The discussion that follows focuses on raising issues of bias in language and legal analysis in the Legal Writing class.

II. BIAS IN LANGUAGE AND LEGAL ANALYSIS

Before addressing how to raise issues regarding bias in language and legal analysis, it may be helpful to say a few words about planning class discussions on these topics. Because discussions about issues of race, class, gender, or similarly controversial issues can sometimes be difficult, the professor may need to give some thought as to how to make the discussion as safe, positive, and useful as possible.[29]

First, the issues must be raised in a manner relevant to the overall course of study.[30] The focus should be on how issues of bias appear in what the students are studying and should not devolve into a rambling discussion of personal political views.[31] In legal writing courses,

28. Calleros, *supra* note 6, at 149 ("It is the legal writing courses that provide especially rich opportunities to work intensively on realistic problems with fully developed characters. Moreover, first-year legal writing is typically part of the required curriculum and thus, will reach more students than clinical offerings and other elective courses."); Donna Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889, 889 (1999) (suggesting that the Legal Research and Writing course is an appropriate place to discuss issues of civility in the legal profession, including the need to avoid personal or ethnic slurs); Elizabeth Mertz, *supra* note 9, at 117 (2000) ("Law students learn their craft across multiple settings, including the legal skills classroom, clinics, and externships. It is precisely these settings that require forms of speech more sensitive to context and tailored to the specific situation at hand . . . .[L]law schools may have to look to those areas of legal education sometimes deemed to be on the 'fringes' in order to locate their teaching more centrally in this diverse and changing world to which lawyers must respond.").

29. *See also* further discussion of these points in Section III, *infra*, and notes 160–73.

30. In the Seattle University School of Law Legal Writing program, issues related to bias in both language and legal analysis have been raised in separate workshops for first-year students on those topics, as well as incorporated into the regular legal writing curriculum. Our experience is that the most effective way to discuss this material is to incorporate it into the regular legal writing curriculum through assignments that raise bias issues and through discussions about good lawyering skills. See the text of the article for specific suggestions on ways to incorporate the materials into a Legal Writing course.

31. Oates, *supra* note 13, at 10 (explaining that discussions about race, class, and gender are more effective when they are "professionalized," that is, cast in terms of how attorneys serving in different roles might handle the issues, as opposed to a discussion of personal views).

examination of cultural bias can be naturally woven into the course structure in a number of ways.

The most effective way is to incorporate bias issues into the design of assignments on which students are working.[32] For example, assignments can be based on causes of actions that allege discrimination against a member of a protected class[33] or that involve an analysis in which stereotypes may come in to play, even when the underlying cause of action itself does not involve a discrimination claim.[34] Opinion letter assignments can raise questions about precision, effective communication between lawyer and client, and how bias in language affects both.[35] Even if students are not working on an assignment that directly raises bias issues, however, such issues can be addressed in the context of more general discussions about good lawyering skills, such as how to most appropriately address counsel and the court during oral argument.[36]

Second, the professor may want to engage students in easier, or more familiar, topics before moving on to more challenging ones. For example, starting the discussion of bias in word choice is easier and more accessible to students than jumping straight into the more challenging topic of how bias affects legal analysis and argument.

A. Teaching Students to Recognize Bias in Language

Because gender bias in language is likely to be a familiar and relatively accessible topic for most law students, it can provide a good

32. For a discussion of ways to incorporate social justice and diversity issues into assignments, *see* Edwards & Vance, *supra* note 11, at 71–73; Calleros, *supra* note 6, at 151–56; Baker, *supra* note 12, at 53–54; Felsenburg & Curry, *supra* note 13, at 78-79; Oates, *supra* note 13, at 3–5, 7–9. For a collection of legal writing assignments that require students to confront issues of diversity, *see* Nancy Wright, *Summary of Legal Writing Problems Raising Diversity or Social Concerns*, in Calleros, *supra* note 6, at app. 298.

33. Some of the problems used in our Legal Writing program have involved the validity of gender-based price discounts; the validity of English-only policies in the workplace under Title VII, *see* 20 NEW YORK UNIVERSITY SCHOOL OF LAW, MOOT COURT CASEBOOK § 2 (1996); and the issue of bias and stereotyping in the use of peremptory challenges in jury selection.

34. For example, students can be given a problem involving a claim of undue influence in the making of a will, which might raise ageism issues, or a problem involving the validity of a Terry stop when the suspect is black, discussed *infra* notes 116-126.

35. Students can see immediately that they must be aware of the appropriate ways to address a client so as to avoid offense or insensitivity and to be accurate. For example, one cannot assume that a woman has the same name as her husband or children or that she uses the title "Mrs." A mistake on those points may not only be inaccurate, it can also cause offense.

36. For example, the materials on language presented later in the article can be relevant in teaching students about courtroom decorum when making oral argument. Addressing a female judge as "ma'am" while addressing a male judge on the same panel as "your honor" sends a message that the female judge is not entitled to the same respect as the male judge.

starting point for discussing bias in language. To begin a conversation about gender-neutral language,[37] it is often effective to start with a simple exercise such as asking students to brainstorm what terms could be used for a male or female parent. Students will quickly develop lists like the ones below.

male parent	female parent
father	mother
dad	mom
daddy	mommy
pa	ma
papa	mama
pop	mum
old man	old lady

When asked to describe the differences between any two terms, *e.g.*, "daddy" and "pop," students immediately see that some terms carry connotations of the parent's age, relationship to the child, ethnicity, etc. When asked which terms are commonly used in the law, students inevitably and correctly say "father" and "mother." But when asked why these are the preferred terms for legal writing, students are likely to say that "father" and "mother" are more "neutral," more "objective," more "professional," or more "formal." What many students may not immediately recognize is that even though these two terms are the ones commonly used in the law, these words have connotations and cultural bias buried just below the surface. To demonstrate that bias, the professor can use the words as verbs, as in "fathered a child" and "mothered a child."[38] To "father" a child generally means that a man has impregnated a woman; it suggests a single act more than an on-going involvement. To "mother" a child, how-

37. The term "gender-neutral language" describes word choices that are "unmarked for gender—*police officer* and *flight attendant*, for example, as contrasted with the marked terms *policeman* and *stewardess*." MARILYN SCHWARTZ, GUIDELINES FOR BIAS-FREE WRITING 1 (1995).

38. Professor Kathryn Stanchi points out that some ideas or perspectives are "muted" simply by the fact that there is not a word to express a particular idea. "There is no word that connotes negative feelings about motherhood—which many women have—so, implicitly the language has not only made invisible negative feelings about motherhood, but has also implicitly marked them as deviant by excluding them from the linguistic community." Kathryn M. Stanchi, *supra* note 27, at 18–19 (2001); *see also* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989).

ever, suggests caring for, nurturing, and protecting a child over a longer period of time. While the nouns "father" and "mother" may have initially appeared to have the same emotional weight, the verbs "father" and "mother" reveal cultural stereotyping and different expectations about how men and women fulfill their roles as parents.

To further demonstrate the cultural bias in words related to parenting, the professor can note that the earlier two lists that the class developed convey a cultural expectation that there will be a male parent and a female parent.[39] This observation can lead to a discussion of what terms to use for same sex parents. A few students may be familiar with the debate in the gay and lesbian community over terms like "co-mother," "non-legal mother," and "non-biological parent."[40] If not, the professor can ask the students to research what terms are used and why. The point here, of course, is for students to realize that they cannot select terminology unthinkingly. They need to know which terms precisely convey their intended meaning, and they need to know if any term is controversial, potentially offensive, or preferred by the members of a given group or the individual being named.

Gender bias language issues can be built into legal writing assignments in a number of ways. For example, by creating factual scenarios in which a nurse is male or a firefighter (not fireman) or a police officer (not policeman) is female,[41] legal writing professors can raise students' awareness of gender stereotyping and encourage them to learn gender-neutral terminology.[42]

These early discussions about gender bias in language not only set the tone for an ongoing class conversation about bias in language, they also lay a foundation based on two points: (a) to be culturally competent lawyers, law students need to be aware of the bias embedded in word choices, and (b) just as lawyers must be vigilant about

39. The authors are indebted to Katrina Anderson, who made this point when we used the preceding exercise in a workshop on bias in legal writing.

40. For a discussion of these terms, *see* Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 22 n.27 (1999).

41. Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 282 (2000) (recommending embedding diversity in hypotheticals, problems, and assignments).

42. For extensive discussion of gender-neutral language, *see, e.g.*, CASEY MILLER AND KATE SWIFT, THE HANDBOOK OF NONSEXIST WRITING: FOR WRITERS, EDITORS AND SPEAKERS (2d ed. 1988); LAUREL CURRIE OATES, ANNE ENQUIST, AND KELLY KUNSCH, THE LEGAL WRITING HANDBOOK 708-13 (3d ed. Aspen L. & Bus. 2002) (1993); ROSALIE MAGGIO, THE BIAS-FREE WORD FINDER: A DICTIONARY OF NONDISCRIMINATORY LANGUAGE 7–10 (1991); SCHWARTZ, *supra* note 37, at 1–42.

updating their legal research, they must also research and update their knowledge about language.

These initial discussions about gender bias also introduce two of the key principles about language and the law. First, language can shape perception.[43] Labels can define a person and determine how these people are viewed by others and even how they view themselves. Because most groups are fully aware of the power words have in shaping how they are perceived, they have carefully chosen the labels they want used to describe themselves. These self-chosen labels should be respected. Second, legal writing requires a high standard of precision in word choice. Careless use of language can cause all kinds of problems, including legally significant inaccuracies and the possibility of offending clients and decision-makers.

In addition to setting the tone and introducing some of the key principles, discussion of gender bias in language can pave the way for potentially more controversial bias-in-language issues related to race, ethnicity, national origin, sexual orientation, and disability. For example, factual scenarios that involve clients, plaintiffs, defendants, witnesses, or attorneys from diverse racial and ethnic groups naturally raise the important issue of whether mentioning the person's race or ethnicity is appropriate.[44] Obviously if the person's race is a legally significant fact,[45] such as in an employment discrimination case, there is no question that it should be included. If, on the other hand, it is not a legally significant fact that a client is say, African American, the professor can raise the question of whether the writer should omit or include this fact. While some scholars argue that to include race when it is not legally significant works to perpetuate racial tension,[46] others

43. HAIG A. BOSMAJIAN, THE LANGUAGE OF OPPRESSION 5, 8 (1974) (noting that "[j]ust as our thoughts affect our language, so does our language affect our thoughts and eventually our actions and behavior").

44. The same is true, of course, of a person's gender, age, sexual orientation, income level, physical and mental health, etc. One test of whether or not to include this information is to ask whether you would include the same information about an affluent, white, able-bodied, heterosexual, adult man. BRIAN S. BROOKS, JAMES L. PINSON, JEAN GADDY WILSON, WORKING WITH WORDS 191–92 (1997); MAGGIO, *supra* note 42, at 50; *see also* Oates, *supra* note 13, at 4–5 (describing a class discussion about whether the race of a black defendant should be discussed in drafting a statement of facts and in crafting argument).

45. A "legally significant fact" is defined as "a fact that a court would consider significant either in deciding that a statute or rule is applicable or in applying that statute or rule." OATES, ENQUIST, & KUNSCH, *supra* note 42, at 910.

46. THE REDBOOK: A MANUAL ON LEGAL STYLE 272–73 (Bryan A. Garner ed., 2002) [hereinafter THE REDBOOK] (arguing that unwarranted distinctions "may suggest that the distinction is important. . . .For example, a needless reference to a criminal defendant's race may suggest that race is somehow related to and predictive of behavior. And a pointless mention of a

argue that race is always relevant in a racially charged culture like the United States.[47] In any case, students should think through why they are or are not including such a fact rather than unthinkingly including or omitting it.

When students determine that a descriptive label should be used, that raises another question: what term to use when there are differing preferences among members of a group.[48] This question tends to arise when there has been a rapid progression of terms, such as the following:

colored person -> Negro -> Black -> Black American OR African-American[49] OR African American

To appreciate why different people prefer different labels, students may need to research the historical and political roots of the terms.[50] They will discover, for example, that in the late 1960's, "black," or sometimes the capitalized "Black,"[51] quickly replaced

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witness's physical disability (e.g., blindness) may invoke a reader's biases (e.g., a presumption of diminished mental capacity)").

47. Stephanie M. Wildman, *Teaching and Learning toward Transformation: The Role of the Classroom in Noticing Privilege*, 161, 172 *in* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (Stephanie M. Wildman, et al. 1996) ("Race, gender, and sexual orientation are in the room whether we make them explicit or not, but everyone pretends that they are not noticing.").

48. At times, of course, the question can be easily answered by simply asking the specific person or persons being labeled what is their preferred term.

49. While early forms of many terms that combined races or nationalities often had hyphens (e.g. "African-American," "Mexican-American," "Asian-American"), the current trend is toward omitting the hyphen. The argument for omitting the hyphen is that it conveys something less than full membership in both groups. See SCHWARTZ, *supra* note 37, at 46; MAGGIO, *supra* note 42, at 32 (1991); *but see* THE REDBOOK, *supra* note 46, at 275. A few terms that have retained the hyphen have a first term that cannot stand alone as a word, e.g., "Afro-American." Interestingly, Arab-Americans, unlike most other ethnic and racial groups, do not seem to resent a hyphenated term being applied to them. Dr. Tom O'Connor, *Discrimination Against Arab American and Other Middle Eastern Groups*, *in* JURIST: THE LEGAL EDUCATION NETWORK ¶ 3 (North Carolina Wesleyan College 2001) (on file with authors).

50. Many dictionaries and websites are helpful in this regard. Because it includes extensive usage notes developed by its diverse and respected usage panel, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) offers superb insight into complex social, linguistic, and historical backgrounds of various words [hereinafter AMERICAN HERITAGE].

51. Those who disagree over whether to capitalize "black" raise several arguments. Those who favor capitalization point out that ethnic designations are typically capitalized. THE CHICAGO MANUAL OF STYLE 247 (John Grossman ed., 14th ed. 1993). Those who favor lowercase argue that parallel usage would require capitalizing "white" as well, and "White" is commonly associated with white supremacist groups. *See* SCHWARTZ, *supra* note 37, at 56. Upper-

"Negro"[52] as the preferred term. The new term, which emphasized skin color, represented racial pride and was an outgrowth of the civil rights and black power movements.[53] It was also critically important that "black," unlike "Negro," was self-chosen. At the end of the 1980's, several black leaders encouraged the adoption of a new term, "African American," which emphasized geographic, historic, and cultural roots rather than skin color. Although rapidly adopted by the media, "African American" did not replace "black"; rather, both terms attained widespread acceptance. Persons who still prefer "black" cite a variety of reasons, including that they either do not have[54] or do not feel a strong connection to Africa, even if there is an ancestral link. Persons who prefer "African American" may do so because of the obvious reference to their African heritage or because the word "black" has negative connotations in American culture.[55]

Law students deciding which term to use to describe descendants of the original inhabitants of the Americas will run into a similar progression of terms (Indian → American Indian → Native American) and differing preferences.[56] Here again, their research should help

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case "White" also suggests that the term represents one ethnic group, a suggestion that many would take issue with. AMERICAN HERITAGE, *supra* note 50, at 189–90.

52. The word "Negro," which comes from the Spanish and Portuguese word "negro," meaning "black" and the Latin word "niger," which also means black, is now often considered offensive. AMERICAN HERITAGE, *supra* note 50, at 1177. At least one source considers its use "slavery-based and contemptuous" except in established titles such as the United Negro College Fund. MAGGIO, *supra* note 42, at 199. "Colored" is considered offensive except in established titles such as the National Association for the Advancement of Colored People. *Id.* at 71.

53. *Id.* The rallying phrases "black power" and "black is beautiful" are probable sources for the positive associations with the term "black." *Id.* at 50.

54. *Id.*

55. "Martin Luther King, Jr. pointed out that there are some 120 synonyms for 'blackness' of which at least half are offensive. Almost all the 134 synonyms for 'whiteness' are favorable." MAGGIO, *supra* note 42, at 51; MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 41 (1968); *but see* BOSMAJIAN, *supra* note 43, at 48–49 (1974) (noting the existence of negative connotations of "black" in black societies that have not been exposed to white people and giving examples of negative connotations of "white"). A recent example of the lingering negative connotations associated with the word "black" has been the reference to September 11 as "Black Tuesday." *See, e.g.*, Nicholas M. Horrock, *Analysis: Bush's Second Worst Week"* UNITED PRESS INTERNATIONAL (May 17, 2002) (available in LEXIS, News Group File).

56. Most students will already know that Columbus labeled the people he encountered in the "New World" "Indians" because he mistakenly believed that he had reached the Indies. The term "American Indian" attempts to correct any possible confusion over whether "Indians" refers to inhabitants of America or India. The term "Native American" also seeks to correct the original mistake, and for many, it is strongly preferred as historically accurate and respectful. AMERICAN HERITAGE, *supra* note 50, at 891. Others, including many in the member group, continue to prefer "Indian," finding that the historical inaccuracies have lost their relevance with the passing of time. Interestingly, many writers use the terms interchangeably. *Id.* at 1171. A lingering controversy that surrounds the term "Native American" concerns the government's use

them decide which term to use, and it should uncover a third principle to add to their understanding about bias in language: whenever possible, prefer specific terms to general ones.[57] Thus, while there are differences within the group over whether to use "Indian" or "Native American,"[58] what is consistently preferred is to use a more specific term such as "Mohawk" or "Navajo" whenever possible rather than a generic term.[59]

In researching terms like "Hispanic," "Mexican American," "Spanish," "Latino/Latina," and "Chicano/Chicana," students will begin to appreciate the interplay among the reasons why certain terms are preferred. Choosing among the terms in this group involves attending to simple things, like what is an accurate term,[60] but it also re-

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of the term to include "Alaskan Natives (Indians, Inuit, and Aleuts of Alaska), Samoans, and Native Hawaiians." SCHWARTZ, *supra* note 37, at 66. Indians from India prefer "Native American" for the original inhabitants of the Americas and use the term "Indian" to refer to themselves. "Indians" should not be used, however, to label Burmese, Bangladeshis, Pakistanis, or Sri Lankans. The term "East Indian" is considered incorrect and colonialist. MAGGIO, *supra* note 42, at 144. Since the early 1980's a new term, "First Nation," has emerged in Canada as a "respectful alternative" to "Indian." Although any single group can be referred to as a "First Nation," the plural form "First Nations" is more commonly used in the collective sense. AMERICAN HERITAGE, *supra* note 50, at 664. In the United States, the term "First Americans" has begun to appear in some of the literature about race consciousness. *See, e.g.*, Frances V. Rains, *Is the Benign Really Harmless? in* WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 89, 98 n.3 (Joe L. Kincheloe et al. eds., 1998) (stating that she "purposefully used 'First American' in preference to 'Native American' or 'American Indian'. . .to take personal responsibility for naming in a way that, similar to the First Nations of Canada, makes clear the history of location and precedence.")

57. Unnecessarily lumping groups of people with varying histories, cultures, and languages under a generic term can be interpreted as not making the effort to understand or respect the differences captured by the specific terms. This principle also applies to the term "Asian American." Consequently, although "Asian American" is appropriate when a generic term is needed, it is better to use a more specific term such as "Japanese American" whenever possible. SCHWARTZ, *supra* note 37, at 53, 66; MAGGIO, *supra* note 42, at 143–44.

58. Some writers use these terms interchangeably. AMERICAN HERITAGE, *supra* note 50, at 1171.

59. SCHWARTZ, *supra* note 37, at 66; MAGGIO, *supra* note 42, at 143–44 (pointing out that adding the word "Indian" after a specific tribal name is redundant).

60. As an underlying principle in all word choice in legal writing, accuracy requires special attention, particularly when selecting words that describe race, ethnicity, national origin, and religion. For example, although "Hispanic" means "Spanish speaking" or "descended from Spanish-speaking people," occasionally the term is used to describe people who do not speak Spanish such as the French- or Portuguese-speaking people of South American or Caribbean ancestry or those who do not speak Spanish themselves but are descended from a Spanish-speaking people. SCHWARTZ, *supra* note 37, at 60-61. "Mexican American" should be used only to refer to a person who is a U.S. citizen or permanent resident with Mexican ancestry. "Spanish" refers to persons whose ancestors were from Spain. AMERICAN HERITAGE, *supra* note 50, at 1666. "Latino" and "Latina" should be used only to refer to persons who have Latin American ancestry. THE LATINO/A CONDITION: A CRITICAL READER 62 (Richard Delgado and Jean Stefancic eds., 1998) [hereinafter LATINO/A]. Similarly, students may not realize that

quires understanding why some individuals may resent certain terms and even find them offensive. For example, although "Hispanic" is an accurate term for people in the United States who trace their ancestry back to one or more Spanish-speaking countries, some Spanish-speaking persons resent the term, not only because it homogenizes so many diverse peoples,[61] but also because it came into common use by way of the government (particularly through the census), the media, and the public at large.[62] Hence, the term does not have the advantage of being self-chosen.[63] Other people resent the term "Hispanic" because they associate it with Spanish colonialism[64] and feel it overemphasizes Spanish ancestry and ignores the African and indigenous roots of Latino culture.[65] "Latino," on the other hand, is preferred by many because it has both a Spanish sound and connotations of ethnic pride. As with other self-chosen terms, its use connotes "self-definition and self-assertion."[66] Whether a given individual prefers to be called "Hispanic," "Latino," or "Chicano" may also depend on where the person resides in the United States, or on the person's politics. "Hispanic" is the more the popular choice in Florida and Texas;

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the terms "Arab," "Middle Easterner," and "Muslim" are not interchangeable; they refer to language, geography, and religion, respectively. The term "Arab," for example, refers to persons who speak the Arabic language. The term, "Middle Easterners," which focuses on geography, is obviously accurate for only those individuals from the Middle East and not people from Algeria, Tunisia, Morocco, and Libya. Students may also need to be reminded that there are non-Arab countries — Iran, Turkey, and Israel — in the Middle East. The term "Muslim" refers to a person who believes in the Islamic religion. Thus, not all Muslims are Arabs, nor are all Arabs Muslims. O'Connor, *supra* note 49, at ¶ 2. Likewise, not all Israelis are Jewish, nor are all Jewish people Israelis. *Id.* 80% of Israel's population is Jewish; 20% is Arab. *Id.* Of the 20% who are Arab, half are Christian and half are Muslim. *Id.*

61. Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 404–12 (1994) *reprinted in* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 355–56 (2000) (pointing out that lumping persons in a generic "Hispanic" category ignores the diversity of the Latino/a population). LATINO/A, *supra* note 60, at 3–5. Once again, it is often preferable to use a more specific term such as "Cuban American."

62. LATINO/A, *supra* note 60, at 4.

63. AMERICAN HERITAGE, *supra* note 50, at 832.

64. LATINO/A, *supra* note 60, at 62. Others argue that "Latino" is similarly associated with Spanish colonialism.

65. SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES xiv, 2 (1995).

66. LATINO/A, *supra* note 60, at 63. Despite its popularity based on ethnic pride, however, "Latino" raises another concern among feminists. As the male form of the word ("Latina" is the female form), its use as an adjective in sentences like "Ms. Garcia is the only Latino juror" may be considered sexist. MAGGIO, *supra* note 42, at 160. "Chicano" and its female form "Chicana" raise the same concern.

"Latino" is more commonly used in California;[67] "Chicano" has connotations of political activism.[68]

Another example of a term that members of a group find offensive is the label "Oriental" when used to refer to persons. The objections to the term are twofold. First, the word "Oriental," which means "eastern," identifies people from Asian countries in relationship to being east of Europe; hence the term reflects a Eurocentric perspective. Second, and probably more importantly, the word "Oriental" has connotations of Asian countries as "exotic lands full of romance and intrigue, the home of despotic empires and inscrutable customs." As a result, many Asian Americans consider it nothing short of an ethnic slur to be called "Orientals." Using the word "Oriental" as an adjective as in phrases like "Oriental rug," "Oriental cuisine," or "Oriental medicine," however, is generally considered acceptable.[69]

Three terms that designate a person as a member of a group other than the majority white[70] population — "non-white," "minority," and "person of color" — also demonstrate an interplay of several

67. AMERICAN HERITAGE, *supra* note 50, at 51.

68. The term "Chicano" was originally a pejorative, but during the 60's and 70's it grew in popularity as a way of connoting the ethnic pride and racial awareness of Mexican Americans. LATINO/A, *supra* note 60, at 315–16. The term was adopted by the Mexican-American student youth movement "as their new form of self-identification, signifying their affirmation of their Latin American heritage, particularly their indigenous roots." OBOLER, *supra* note 65, at 65. Not all Mexican Americans share the political views associated with the term, and some older members of the group still associate the term with its earlier derogatory meaning. AMERICAN HERITAGE, *supra* note 50, at 320. Consequently, the term should be used with care.

69. AMERICAN HERITAGE, *supra* note 50, at 1240.

70. Predictably, students will also discover that the various terms for white members of the population also have embedded imprecision and possible offense. The term "Anglo," for example, which is a shortened form of "Anglo-Saxon," traditionally meant a person of English heritage. AMERICAN HERITAGE, *supra* note 50, at 70. Not surprisingly, it evolved to mean an English-speaking person with light skin color who is not Hispanic or French. Most recently it has begun to mean, but only in parts of the United States with a large Hispanic population, any non-Hispanic white person. THE REDBOOK, *supra* note 46, at 273. Thus, in these areas, an "Anglo" may have Polish, German, or Irish heritage. Some whites, most notably the Irish, find it offensive to be labeled "Anglos." MAGGIO, *supra* note 42, at 38; SCHWARTZ, *supra* note 37, at 54. The alternate term "Caucasian" contains some remnants of a racial classification in its meaning, even though the notion of a Caucasian race is no longer accepted in the scientific community. AMERICAN HERITAGE, *supra* note 50, at 295. "Caucasian" has come to mean simply "white" or "European." *Id.* at 1441. Although still used in many police departments, "Caucasian" is not recommended because it is based on an outmoded theory of race. SCHWARTZ, *supra* note 37, at 57. The preferred term, "white," is also not without problems, not the least of which is that its parameters are ambiguous. The term obviously refers to skin color, and its generally accepted meaning is any white or light skinned person of non-Latin extraction. *Id.* In some cases, however, "white" includes Latinos and Latinas. JUAN F. PEREA, *supra* note 61, at 445–55 (discussing how the Irish, Italians, and Jewish people "became white").

principles related to bias in language and add a fourth principle: prefer terms that describe what people are rather than what they are not. "Non-white" is often considered offensive because it "makes white the standard by which people are classified."[71] While the term "minority" does not seem to create the same level of resentment as "non-white,"[72] "minority" may be inaccurate or ambiguous. If the person using the term means a group that actually has fewer members than a majority group, then the numbers must support those designations.[73] In some cases, however, people using the term "minority" do not seem to mean a group with fewer people but rather one that has less power and has traditionally suffered from discrimination.[74] All three terms have the disadvantage of grouping widely disparate peoples together and, at least in some instances, should be replaced by a specific reference. In some situations, however, students will find that long lists of specific references are impractical and the generic term "person of color" is the preferred option because it "stands 'nonwhite' on its head, substituting a positive for a negative."[75]

The same principles that apply to terms describing race, ethnicity, and national origin can also be applied to terms describing sexual orientation and disability.[76] Moreover, researching terms related to sexual orientation and disability will help students identify three additional principles: notice that a word's connotations may change as the part of speech changes; avoid terms that suggest a difference sums up a person's total identity (sometimes known as the "person first" rule);[77] and avoid patronizing or overly euphemistic terms or verbs that suggest people are victims.

In the gender bias exercise, students were introduced to the notion that changing the same words ("father" and "mother") from nouns to verbs can reveal some deeply embedded biases. This same

71. SCHWARTZ, *supra* note 37, at 67; L. Eldridge Cleaver, *As Crinkly As Yours*, 30 THE NEGRO BULL. 132 (1962).

72. One lingering problem with the word "minority" is the residual resentment some non-black minorities have over the word being treated as synonymous with "African American." While blacks constituted 96% of the minority population in 1960, today they constitute only about 50%. Early in this century, Latinos are projected to become the largest minority population. LATINO/A, *supra* note 60, at 479.

73. Brad Edmondson, *The Minority Majority in 2001*, AMERICAN DEMOGRAPHICS 16 (October 2, 1996).

74. Females, for example, are a numerical majority in the overall population, but they are a "minority" when it comes to virtually every aspect of status and power in society.

75. AMERICAN HERITAGE, *supra* note 50, at 364.

76. The principles discussed in this article can also be applied to language issues surrounding age and religion.

77. SCHWARTZ, *supra* note 37, at 76; THE REDBOOK, *supra* note 46, at 273.

principle comes into play in the preferred terminology for sexual orientation and disability. Students may be surprised to learn that "homosexual,"[78] for example, is not considered offensive as an adjective in a phrase like "homosexual relationship," but its use as a noun describing an individual is offensive to many members of this group.[79] Those who object to the noun form cite its emphasis on the sexual life of an individual rather than on the broader cultural or social life of that person.[80] The self-chosen terms are "gay man," "gay woman,"[81] or "lesbian." "Gay" by itself is not preferred as a noun,[82] as in the following sentence: "Two gays were on the Board of Directors." The preferred use is as an adjective,[83] as in the following sentence: "Two gay members were on the Board of Directors."[84]

In researching the language choices related to mental and physical disabilities, students will undoubtedly notice the close relationship between the changing-connotations-for-changing-parts-of-speech principle and the "person first" principle. The "person first" principle, which is endorsed by the disability community, recommends "getting the person before the disability whenever possible."[85] The idea is that the individual should be emphasized over the difference and that the difference should not be treated as the person's total identity.[86] Consequently, members of the disability community tend to prefer the adjective form of "disabled," as in "disabled persons," over

78. The related term "queer" has followed an established pattern as a word that has been reclaimed by the group members it describes. Although "queer" was a hateful slur for many years, since the 1980's it has begun to be rehabilitated by some gay men, lesbians, bisexual, and transgendered persons to describe themselves. As an umbrella term for all these individuals, the term is used in phrases like "queer rights," "queer nation," and "queer studies," but like other reclaimed words, it may still be offensive to many members of these groups and thus should be used with extreme caution. Another feature it shares with other reclaimed words is its use is more likely to be accepted when used by insiders because in such contexts it has connotations of unity and defiant pride. AMERICAN HERITAGE, *supra* note 50, at 1435; *but see* Richard Schneider Jr. *May-June 2002: "Places in the 'Gay' Heart,"* IX GAY & LESBIAN REV. 4 (2002) (arguing that "queer" is still highly exclusionary and offensive because it is synonymous with abnormal).

79. AMERICAN HERITAGE, *supra* note 50, at 842.

80. *Id.*

81. Some writers use "gay" only with males. *Id.* at 729.

82. *Id.*

83. A similar concern is whether to use the noun "Jew." While some members of this group do not find the noun form objectionable, others recommend using "Jewish person" or "Jewish people." SCHWARTZ, *supra* note 37, at 63; THE REDBOOK, *supra* note 46, at 273 (applying the "person first" rule and recommending "Jewish person").

84. "Gay" is often used as an adjective meaning both gay men and lesbians, as in the phrase "gay rights"; however, binary adjectives are preferred, as in the phrase "gay and lesbian rights."

85. SCHWARTZ, *supra* note 37, at 76.

86. THE REDBOOK, *supra* note 46, at 273.

the noun form, "the disabled." Some further recommend "persons with disabilities"[87] over "disabled persons" because it puts the person before the disability.[88] Similarly, "person with epilepsy" is preferred over the term "epileptic,"[89] "person with an amputated leg" over "amputee," and "person with diabetes" over "diabetic."[90]

Students working to find the best language for persons with physical and mental disabilities will discover that while there is a temptation to move toward more euphemistic terms, that temptation should be tempered not only by the importance of communicating clearly but also by the realization that sugar-coated euphemisms can be patronizing. Some options also seem to be too long to be practical. Consider the following progression:

Handicapped -> Disabled -> Physically Challenged OR
Persons of Differing Abilities OR
Differently Abled Persons OR
Persons with Exceptionalities OR
Exceptional Persons

Well-meaning persons have tried to introduce terms such as "persons of differing abilities," "differently abled persons," "persons with exceptionalities," and "exceptional persons" to try to put a positive gloss on the disability.[91] Such euphemisms may fail because they are both imprecise and patronizing.[92] The term "physically chal-

87. Note the terminology in the title of the Americans with Disabilities Act of 1990.

88. "[T]he person-first construction, also known as the person first rule, has not found wide acceptance with the general public, perhaps because it sounds somewhat unnatural or possibly because in English the last word in a phrase tends to have the greatest weight, thus undercutting the intended purpose." AMERICAN HERITAGE, *supra* note 50, at 513.

89. *Id.*

90. THE REDBOOK, *supra* note 46, at 273 (advising that a characteristic's label should, whenever possible, be used as an adjective instead of a noun e.g., "a deaf and mute person" rather than a "deaf-mute").

91. SCHWARTZ, *supra* note 37, at 75 (arguing that these terms seem to suggest that "disabled people belong to a different or uncommonly rare species or that having a disability is an exciting adventure").

92. Another obvious example of language that is patronizing and sometimes inappropriately euphemistic is the terminology surrounding aging. While youth is almost uniformly painted in a positive light, aging is usually portrayed negatively or, at the very least, in a patronizing or sentimental fashion. AMERICAN ASSOCIATION OF RETIRED PERSONS, TRUTH ABOUT AGING: GUIDELINES FOR ACCURATE COMMUNICATIONS 4–8 (1984). While the terms "senior" and "senior citizen" have a high level of acceptance, they typically mean a person who is either at retirement age or 65 and older. Some find the term "senior citizen" to be "unpleasantly euphemistic." The term "elder" has positive connotations in some senses, such as an elder in family, tribe, church, or community, meaning that the person is not only older but also influential and respected as a leader. This phenomenon possibly accounts for the preferred label "Elder

lenged"[93] is more acceptable because it finds a balance between being sensitive to those described and being clear about the relevant condition.[94]

In addition to knowing which terms are preferred for persons with disabilities, students should be aware of the controversy in the disability community over verbs that paint persons with disabilities as being weak and helpless victims. Students should consider whether it is strategically better to omit or replace the clichéd verbs in phrases such as "person *confined* to a wheelchair" ("person in a wheelchair" or "person who uses a wheelchair"); "person *stricken* with multiple sclerosis" ("person with multiple sclerosis"); "person *suffering* from arthritis" ("person who has arthritis"); and "person *afflicted* with AIDS" ("person with AIDS").[95] While a lawyer may at times find there is a strategic advantage to portraying someone as a victim, this choice should always be intentional, rather than unthinking, and it may be appropriate to consult the described individual to determine his or her preference.

Whether the issue is one of gender, race, national origin, sexual orientation, or disability, the overriding principles governing word choice are the same: (1) realize that what a person is called affects how that person is seen, and respect the individual's right to self-chosen labels; (2) write precisely and avoid offense; (3) whenever possible, prefer the specific term over the general term; (4) prefer terms that describe what people are rather than what they are not; (5) note that a word's connotations may change as the part of speech changes; (6) emphasize the person over the difference; and (7) avoid terms that are patronizing or overly euphemistic or that paint people as victims. Language choices based on these principles are the hallmark of the culturally competent lawyer.

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law." "Elderly" as a noun as in "the elderly" to refer to a group or population is respectful, but it carries connotations of frailty. "Elderly" as an adjective as in "elderly person" is preferred over the blunt term "old person," but interestingly, once "old" is changed to the comparative "older" the bluntness is muted, giving the phrase "older person" a high level of acceptance. *See* AMERICAN HERITAGE, *supra* note 50, at 1223; SCHWARTZ, *supra* note 37, at 88.

93. Sometimes shortened to "challenged."

94. "Physically challenged" and "challenged" are preferred by some who find "disabled" and "persons with disabilities" too negative. The parody use of the word "challenged" in phrases such as "geographically challenged" to refer to persons who get lost easily, however, has undercut the use of "physically challenged," and recently there has been a return to "disabled" or "person with a disability" as preferred terms. AMERICAN HERITAGE, *supra* note 50, at 308.

95. SCHWARTZ, *supra* note 37, at 76. In some instances, a lawyer may feel that the "language of victimization" works towards the client's advantage. The question, of course, is whether to use this kind of short-term "advantage" when it contributes to a particular cultural bias and stereotyping.

B. Teaching Students to Recognize Bias in Legal Analysis

Just as cultural assumptions can be embedded in language, such assumptions may also surface in the analysis of legal problems. Helping students to recognize how cultural assumptions or individual bias can be expressed in legal analysis will, first, strengthen their understanding of cases and other authorities and, second, aid them in constructing and evaluating arguments; both skills are central to legal writing courses.

1. Understanding cases

One of the most important skills a Legal Writing professor teaches is the ability to read and analyze cases. A good critical understanding of a case, however, requires more than an understanding of how the judge applied the relevant precedent to a given set of facts. When judges decide cases, they are often called upon to express and apply prevailing cultural norms. They also bring their own individual values and beliefs to the decision-making process. While it is generally appropriate that decisions express cultural norms and that they are informed by the judge's knowledge and experience, decisions can, as a result, also reflect cultural biases, bias on the part of the decision-maker, or assumptions that call for further examination. Students will have a more critical understanding of the authorities they are asked to research and analyze if they are able to recognize biases or assumptions that may exist in these sources of law.

One case that illustrates this point is *Jones v. Star Credit Corp.*[96] The case is one especially relevant to first-year students,[97] and the unconscionability doctrine that it involves can be made the basis of a legal writing assignment. In *Jones,* the plaintiffs, who were welfare recipients, brought an action to have a contract, in which they agreed to purchase a freezer for $900, declared unconscionable.[98] The total purchase price ended up being $1,234.80, including credit charges and sales tax, for a freezer with a maximum retail value of approximately $300.[99] The Supreme Court, Nassau County, New York, found the

96. Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (1969).

97. *Jones* appears in numerous first-year Contracts case books. *See, e.g.,* STEWART MACAULAY ET AL., CONTRACTS LAW IN ACTION 587 (1995); E. ALLAN FARNSWORTH ET AL., CONTRACTS CASES AND MATERIALS 409 (6th ed. 2001); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION 606 (4th ed. 2001).

98. *Jones,* 298 N.Y.S.2d at 265.

99. *Id.*

contract unconscionable as a matter of law.[100] In evaluating the contract, the court noted:

> The effort to eliminate these practices has continued to pose a difficult problem. On the one hand it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand, there is concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community.[101]

While most people would agree with the result reached in this case, one question the case raises is whether the court made an assumption about economic class that requires further examination. The facts of the case state only that the plaintiffs received welfare; they do not indicate the plaintiffs' level of education or literacy. While it may be true that the "uneducated and often illiterate" are "usually the poorest members of society," the statement may reflect an unexamined assumption that poor people tend to be illiterate.[102]

Students can be asked what relevance the plaintiffs' financial condition and level of education have to the legal issues in the case. Such a discussion can help students explore the theoretical bases of the unconscionability doctrine itself. The quotation above suggests that the plaintiffs, as welfare recipients, were less able to understand the terms of the unfair contract, and thus warranted protection from it.

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100. *Id.* at 266.

101. *Id.* at 265. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), is a case similar to *Jones* that also provides a vehicle for discussing bias in legal analysis with regard to race, gender, and class. *Williams* involved a discussion of the unconscionability doctrine in the context a consumer installment sale contract similar to the one in *Jones*. *Id.* at 449. The court below noted that the debtor Williams was "a person of limited education separated from her husband[,] maintaining herself and her seven children by means of public assistance." Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964). Muriel Morisey Spence cautions that *Williams* may raise troubling stereotypes. Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 94–99 (1994).

102. DeLong, *supra* note 7, at 314 n.92; Muriel Morisey Spence poses the question, "Do courts help or hinder low-income consumers when their decisions depend upon the view that such consumers are weak, uninformed participants in the retail marketplace?" Spence, *supra* note 101, at 95-98. Anthony R. Chase also suggests that unconscionability cases perpetuate negative stereotypes of blacks. Professor Chase criticizes the use of *Williams v. Walker-Thomas* in contracts case books because it "involves the oppression of African-American consumers, thereby equating African-Americans with the 'irresolute, feeble, or weak' and implying that the condition of blackness creates the need for protection by the paternalistic white power structure." Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 38–39 (1995).

The argument that equates poverty with lack of comprehension may reflect an inappropriate class-based assumption, as discussed above, but it can also lead to a discussion of whether the unconscionability doctrine is premised upon the creditor's oppressive conduct, on general notions of fairness, on the debtor's lack of understanding of the contract, or on a combination of these concerns.

If the unconscionability doctrine focuses on the creditor's oppressive conduct, the debtors' financial status and level of education may be relevant only to the extent that they were known by the creditor and to the extent that the creditor ought not benefit from the contract.[103] If, however, the doctrine is premised on the inherent unfairness of the contract's terms,[104] one might ask whether it could be set aside regardless of the debtor's financial status or literacy. If the doctrine is premised on the debtor's lack of understanding of the contract, perhaps there needed to be some record of the debtors' actual level of education and ability to comprehend the terms of the agreement, rather than a broad statement that the uneducated and illiterate are "usually the poorest members of the community."[105] Exploring these premises can lead to a discussion of whether the unconscionability doctrine exists to remedy wrongful conduct on the part of the creditor or, in contrast, whether it exists as a paternalistic device to protect the poor and illiterate from their contracts.

By examining the court's characterization of the plaintiffs in *Jones*, students will have a deeper understanding of the case itself. Not only does the case illustrate a possible assumption about poor people that merits examination, but exploration of that assumption can help students develop a deeper understanding of the relevant doctrine.

2. Constructing and evaluating arguments

A skill that flows from the ability to read and understand cases and that is also emphasized in Legal Writing courses is the ability to construct and evaluate arguments. After all, understanding a case necessarily involves evaluating the arguments. When examining arguments — both their own and others — students should be taught to look for assumptions or biased views of the law or facts. These skills will help them become better legal thinkers and better advocates.

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103. The court acknowledged that "[t]he very limited financial resources of the purchaser, known to the sellers at the time of the sale, is entitled to weight in the balance." *Jones*, 298 N.Y.S.2d at 267.

104. The court, for example, noted that "the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs." *Id.*

105. *Id.* at 265.

In the scenario at the beginning of this article, Sam made the argument that the low-income clientele of a thrift store would increase the incidence of crime. In working with Sam, the professor might have asked what factual support there is for the assumption that low-income persons bring with them a higher incidence of crime. The professor could also have asked how a judge might receive the argument and help Sam explore alternative arguments. For example, the better argument might be that the presence of a thrift store is inconsistent with the promised "upscale" nature of the mall, leaving aside any argument characterizing the thrift store's potential clientele.

While Sam's argument may just seem an unthinking mistake, the pattern of argument is similar to potentially more injurious arguments that persons of a certain race, national origin, or religion have the propensity to act in unlawful ways. For example, during World War II, government attorneys argued before the Supreme Court that the cultural isolation of Japanese Americans justified concerns that they would commit acts of espionage and sabotage.[106] More recently, government anti-terrorism laws have targeted Arabs, Muslims, and persons of Middle Eastern descent in the aftermath of the September 11th terrorist attacks.[107] While some might argue that this use of race, national origin, and religion in legal argument is appropriate, is good law enforcement, and, indeed, is based on precedent,[108] others would argue that it reflects inappropriate, unsubstantiated, group-based assumptions.[109]

106. *See* Hirabayashi v. United States, 320 U.S. 81, 96–98 (1943), *conviction vacated*, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 323 U.S. 214, 216–17 (1944), *conviction vacated*, 584 F. Supp. 1406 (N.D. Cal. 1984). For a discussion of the World War II *Korematsu* and *Hirabayashi* cases, *see* Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 755–81 (H. Kim ed., 1992); YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 95–176, 277-378 (2001).

107. Numerous articles have been written regarding the impact of recent anti-terrorism laws on persons of Middle Eastern descent. *See, e.g.*, Susan M. Akram and Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–343 (2002); Joo, *supra* note 5, at 32–41. (2002); *see also infra* note 109.

108. Glaberson, *supra* note 23 ("Lawyers supporting the administration say the critics have ignored Supreme Court precedents that approved such extreme wartime actions as the internment of Japanese-Americans in World War II. 'The precedents are overwhelmingly in favor of what the president is doing,' says Richard A. Samp, chief counsel of the conservative Washington Legal Foundation.'").

109. *See* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L. J. 1 (2001). Many commentators have discussed concerns about the racial profiling of Muslims and persons of Middle Eastern descent in the aftermath of September 11th. *See, e.g.*, Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575–1581 (2001); Liam Braber, *Korematsu's Ghost: A Post-September 11th*

Concerns about inserting individual or cultural bias into arguments can generate a discussion about professional responsibility when making arguments.[110] Does a lawyer's obligation of zealous representation[111] require the lawyer to advance any argument that would aid the client's cause, even if that argument might arguably rely upon a harmful stereotype? Is there an obligation to avoid perpetuating such stereotypes?

While the ABA Model Rules of Professional Conduct do not address these questions directly, the Comments to those rules suggest some guidelines. For example, the Comments to Rule 1.3 of the Model Rules do not require zealous representation at the exclusion of all other concerns:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[112]

Analysis of Race and National Security, 47 VILL. L. REV. 451, 457–460 (2002); Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 28 AMERASIA J. 51 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1434 (2002); Jerry Kang, *What 12/7 Has to Teach about 9/11: Race Matters*, 28 AMERASIA J. 42, 43–51 (2002); Farah Brelvi, *Racial Profiling and the Backlash after September 11*, 48 FED. LAW 69, 70 (2001); Huong Vu, *Us Against Them: The Path to National Security is Paved by Racism*, 50 DRAKE L. REV. 661, 684-91 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185, 1185 (2002); Joo, *supra* note 5 at 32-41; Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 SUM. CRIM. JUST. 52, 58 (2002); David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17 SUM. CRIM. JUST. 36, 40–59 (2002); Akram and Johnson, *supra* note 107, at 351–355.

110. *See* Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. LEGAL EDUC. 501 (1990) (urging that issues of professional responsibility be addressed in the legal writing classroom as they arise).

111. MODEL RULES OF PROF'L CONDUCT Preamble [2] (2002) (stating that, as an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system"). The comment to Rule 1.3 further states that "a lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* at Rule. 1.3 cmt. [1].

112. *Id.* The Rules also provide that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* at Preamble [1] (2002). Government lawyers have special responsibilities under the rules of ethics. *See* YAMAMOTO, *supra* note 109, at 31–45 (exploring the ethical issues raised by the conduct of government lawyers who prosecuted the World War II *Korematsu* and *Hirabayashi* cases). The comments to Rule 3.8 of the ABA Model Rules provide

Further, Rule 8.4(d) says that "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."[113] The comments to that rule state that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."[114] Thus, students can be asked to consider whether arguments asserting stereotypes based on race, national origin, or religion are "prejudicial to the administration of justice."

Discussion of the above issues can teach students to be aware that arguments may contain unexamined assumptions or express bias. This is not to say, however, that arguments should never refer to an individual's race, gender, or other similar personal or cultural characteristics. Such characteristics may sometimes be relevant to an argument, even in instances where some might argue that they are not. Again, what is important is that students recognize and examine arguments based on cultural assumptions or potentially biased views and that they then evaluate the effectiveness or appropriateness of such arguments.

For example, a legal writing assignment might involve the issue of whether a particular person has acted "reasonably" under the circumstances.[115] In constructing arguments under that standard, students can be asked to consider the extent to which the person's cultural experience and background are relevant to and inform the reasonableness of the person's actions.

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that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.

113. *Id.* at R. 8.4(d).

114. *Id.* at R. 8.4(d) cmt.

115. The potential relevance of cultural background or personal characteristics to the reasonableness of a person's actions or responses is illustrated in numerous contexts. For example, possible legal writing assignments might involve the application of the "reasonable person" standard in the context of torts, *see e.g.*, Logan v. Sears, Roebuck & Co., 466 So. 2d 121, 122 (Ala. 1985) (where plaintiff brought a tort of outrage claim against a department store after one of its employees, referring to the plaintiff, stated, "This guy is as queer as a three-dollar bill," the court asked whether the emotional distress suffered by the plaintiff, who was admittedly gay, was "so severe that no reasonable person could be expected to endure it."); criminal law, *see, e.g.*, Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L. J. 57, 57 (1994) (discussing the "cultural defense," a defense based on the theory that "the defendant, usually a recent immigrant to the United States, acted according to the dictates of his or her 'culture,' and therefore deserves leniency"); or employment discrimination, *see, e.g.*, Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 195 (2001) (discussing the use of a "reasonable woman" standard, instead of a "reasonable person" standard in sexual harassment cases).

One issue that can illustrate the potential relevance of race in such an analysis is whether an officer has sufficient reasonable suspicion of criminal activity to justify a stop and frisk. The seminal case on this issue is *Terry v. Ohio*.[116] In that case, Police Officer Martin McFadden, a white male, observed two black men, Richard Chilton and John W. Terry, standing on a street corner. "He had never seen the two men before, and he was unable to say precisely what first drew his eye to them."[117] He stated, "Now, in this case when I looked over they didn't look right to me at the time."[118] As the officer started to observe the men, he noticed that each took turns walking down the street, looking in a store window, walking a short distance, turning around, then looking in the same store window again, and then rejoining his companion. The two men repeated this ritual alternately five to six times each. After a third man joined them and then left, the original two men resumed their pacing and peering and then left as well. Officer McFadden, suspecting the men of casing out the area for a robbery, approached the two men, stopped, and frisked them. On discovering weapons on both men, Officer McFadden arrested them for carrying concealed weapons.[119] The Supreme Court held that the officer could lawfully stop and frisk these men and not run afoul of the Fourth Amendment proscription against unreasonable searches and seizures, so long as he could point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[120]

Students can be asked to apply *Terry* to a new set of facts involving a police officer who stops a black suspect observed in a predominantly white neighborhood.[121] Is the race of the suspect, as well as the race of the police officer, relevant to analyzing whether the officer had "specific and articulable facts" to stop the suspect? Some may argue that the only relevant facts are those relating to the suspect's conduct prior to the stop. Others may argue that the race of the suspect or officer — or both — is relevant, especially in light of recent studies that have found that police officers stop persons of color more often than

116. Terry v. Ohio, 392 U.S. 1 (1967).

117. *Id.* at 5.

118. *Id.*; *see also Transcript of Chilton's Trial, reprinted in State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387 app. B at 1456 (John Q. Barrett, ed., 1998) [hereinafter *Ohio v. Chilton Transcripts*].

119. *Terry*, 392 U.S. at 5–7.

120. *Id.* at 21.

121. See Oates, *supra* note 13, at 3–5 (describing a legal writing assignment involving the arrest of a black suspect and the ways in which the issue of race was discussed in class).

whites.[122] Those studies regarding racial profiling show that blacks are stopped more often by the police than whites, even though whites are more likely to be found with contraband than blacks.[123]

The facts that the defendants were black and the officer was white are not mentioned anywhere in the *Terry* opinion.[124] Further, while the officer did note in his testimony that the two original men were black and the third man was white,[125] he was never questioned as to whether the race of the men was a factor that drew his attention and contributed to his belief that something "didn't look right." Should defense counsel have argued that the race of the defendants, as well as of the officer, had legal relevance in considering the totality of the circumstances?[126] Should students asked to write a memo or brief on a

122. Numerous studies have shown that persons of color are more likely than others to be stopped by police. *See, e.g.*, Michael Higgins, *Looking the Part*, 83 A.B.A. J. 48, 49 (1997) (citing studies showing that 73% of drivers who were stopped and searched on Interstate 95 between Baltimore and Delaware were African American, while only 14% of the drivers on the highway were black, and black drivers on the Florida turnpike were 6.5 times more likely to be searched than white drivers); David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (June, 1999), *available at* http://archive.aclu.org/profiling/report/(last visited July 27, 2003); Stuart Eskenazi, *Minorities Get Searched More Often by Patrol*, SEATTLE TIMES, Jan. 17, 2001, at A1; David Rudovsky, *Breaking the Pattern of Racial Profiling*, TRIAL, Aug. 2002, at 29–30; *see also* State v. Soto, 734 A.2d 350, 359–361 (N.J. Super. Ct. Law Div. 1996). However, persons of color are less likely to be found with contraband than whites. Harris, *supra* note 109, at 295-96 (reporting statistics showing "that blacks may not, in fact, be more likely than whites to be involved with drugs"); Eskenazi, *supra* note 122 (reporting study showing that the chance of troopers finding contraband in a search was less for nonwhites than for whites); Rudovsky, *supra* this note, at 30 (explaining that data do not indicate a minority-dominated drug trade; instead, quoting former drug czar William Bennett, "The typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb").

123. *Id.*

124. For an excellent discussion of the extent to which race plays a role in Terry stops, *see* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); *see also* Milton Heumann & Lance Cassak, *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping*, 53 RUTGERS L. REV. 911, 953–54 (2001).

125. *Ohio v. Chilton Transcripts*, *supra* note 118, at 1408 (in describing the time that the third man joined the defendants, Officer McFadden testified: "There was a man, a white man, short white man, came down the north side of Huron Road, and came directly over to where these two men were at, after one of them had come back, and it wasn't half a second, and this white man came over and talked to these two colored men, and he was there for about a minute or so talking to them, and then he left." The officer noted at least three times in his testimony that the third man was white, but only once mentioned the race of the defendants.).

126. Professor Anthony Thompson explains that "the Supreme Court's Fourth Amendment decisions treat race as a subject that can be antiseptically removed from a suppression hearing judge's review of whether a police officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop and frisk." Thompson, *supra* note 124, at 983. He posits that "race is an ineradicable part of any evaluation of a search and seizure." *Id.* at 962; *see also* Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discrimination*, 72 ST.. JOHN'S L. REV. 1271, 1285 (1998) ("Where convincing evidence shows that a particular practice adversely affects a segment of the community, that evidence merits judicial atten-

similar set of facts discuss the race of the parties in their analysis? A discussion of this issue can help students not only better understand the underlying doctrine, but also construct better arguments based on that doctrine in the context of real world issues.[127]

Finally, in order to critically evaluate their own arguments, students need to be aware of their own unexamined biases and assumptions.[128] Professor Linda S. Whitton discusses a hypothetical she posed to her students that revealed ageist views.[129] The hypothetical involved Mrs. Anderson, a well-dressed, articulate seventy-year-old widow. After the death of her husband, Mrs. Anderson had become depressed and prescription-drug dependent. Her children, claiming that they were having her house repainted, placed her in a retirement home "temporarily." Unbeknownst to her, the children had sold her house and furnishings, and her son had begun guardianship proceedings. Believing that Mrs. Anderson could live independently in her own home, the Social Services Director at the retirement home expressed concern that Mrs. Anderson might become lonely and depressed again.

In discussing what options they would propose to Mrs. Anderson for her future, most students did not consider the purchase of another home to be a viable option, but instead suggested a "nice apartment" in a retirement community.[130] Some even suggested agreeing to a limited guardianship as a supervisory mechanism, should Ms. Anderson "fall off the wagon." The responses were quite different when the students were asked to assume that Mrs. Anderson was thirty-five, instead of seventy. Changing this one fact was "a catalyst for exploring

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tion. . . . Where . . . evidence [of racial impact] exists, as it did in Terry, it would be irresponsible not to consider it as part of the "totality of the circumstances" when determining the reasonableness of the intrusion.").

127. *See* Oates, *supra* note 13, at 2.

128. Dark, *supra* note 6, at 550 (1996) (discussing how students' personal biases may affect their analysis of a hypothetical); *see also* Felsenburg & Curry, *supra* note 13, at 76: Oates, *supra* note 13, at 6-7 (describing exercise to aid students in recognizing their own assumptions about the characters in legal writing assignments and to explore ways in which similar assumptions may affect the outcome of the case).

129. Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 453–54 (1997). In her article, Professor Whitton also surveys adult protection, guardianship, and conservatorship statutes and cases and explains how many contain expressions of ageism. Many of these statutes and cases identified age or old age as a basis for the imposition of a guardianship or conservatorship, and some identified age as an independent basis for considering a person to be "impaired," "incapacitated," "disabled," or "vulnerable" and in need of protection. *Id.* at 477–78.

130. *Id.* at 454–55.

previously unexamined attitudes."[131] Students could consider counseling or rehabilitation, instead of a nursing home, and a recommendation that Mrs. Anderson give up her home became unreasonable.[132]

In order to craft more effective arguments, therefore, students need to be able to recognize bias in the cases they read, in the arguments crafted by others, and in their own arguments. There are no easy answers or set rules for determining when or whether it is or is not appropriate to use arguments based on bias or stereotypes. The only clear rule is that basing arguments on unexamined assumptions is poor lawyering.

III. CHALLENGES TO INCORPORATING BIAS ISSUES IN COURSES

While it is important to discuss bias in language and legal analysis, some faculty may be reluctant to incorporate these issues into their law courses for one or more of the following three reasons.[133] Each represents a challenge that the bias material presents.

Challenge #1: Lack of time to fit bias issues into the course

Faculty who teach Legal Writing classes, like other faculty, are pressed to find adequate time to cover essential material. While appreciating the significance of the issues of bias in language and legal argument, the Legal Writing professor may secretly feel, "I already have to teach print and online research, legal analysis, how to create a legal argument, citation, grammar, punctuation, etc. etc. etc. I can't fit anything else in!"

Related to the "lack of time" challenge may be two other concerns. Some professors may question whether the material belongs in a Legal Writing course at all, asking, "Shouldn't it be taught in legal ethics or professional responsibility or some other course like Gender and the Law, Race and the Law, or Elder Law?"[134] Still others, while

131. *Id.* at 455.

132. *Id.*

133. Other commentators have expressed these and other concerns. *See, e.g.*, Calleros, *supra* note 41, at 292–93 (noting additional challenges, including "the risk of painting diverse characters and events in a manner that some students find to be inauthentic or stereotypical" and potential trauma to students who have been victims of discrimination); Felsenburg & Curry, *supra* note 13, at 77 (expressing concern for spotlighting students as the "authoritative voice" of a group or silencing students who have unpopular views or who have had negative experiences with the subject); Oates, *supra* note 13, at 2.

134. *See* Felsenburg & Curry, *supra* note 13, at 77 (noting concern that students may be so distracted by feelings about, for example, race, sex, religion, or culture, that the process of learning legal writing suffers); Stanchi, *supra* note 27, at 20–21 (pointing out that because legal writing

respecting their colleagues' efforts to help students deal with issues of bias, may feel that raising such issues "is not my battle."

Response to Challenge #1

While Legal Writings professors are continually confronted with time constraints, the best way to introduce these issues is where they might naturally arise in the course, as discussed above.[135] For example, issues raising the topic of bias can be built into assignments that would be given anyway,[136] and the discussion of the use of bias-free language fits naturally into a discussion of writing with precision.[137]

Further, in response to the concern that these issues should be taught in elective classes dealing with issues of bias and the law, it is our view that these issues ought to be raised across the law school curriculum. They should arise as we teach our students to be effective communicators/lawyers.[138] Teaching students to be aware of issues of race, class, disability, and sexual orientation, and in general how cultural pluralism impacts the study and practice of law, should not be limited to elective courses that only reach students who self-select into those courses.[139]

Finally, while raising awareness about bias may not be everyone's battle, teaching students to be effective lawyers is.[140] A well-rounded legal education ought to prepare students for practicing law in the real world in which they and their clients work and live. Being able to recognize bias in legal argument and avoiding offense are material to professional competence.

Challenge #2: Lack of personal experience or expertise on issues

A second commonly offered reason for not incorporating bias issues into law courses arises from two separate, but related, concerns: Professors may feel that they lack the personal experience to discuss

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professors are overworked and underpaid and their courses receive fewer credits it may be unrealistic to expect them to add more to their courses).

135. *See* discussion *infra* at notes 30–36.

136. *See id.*

137. *See* discussion *supra* Part II, A.

138. Stanchi, *supra* note 27, at 55 ("[B]ecause critical theory courses have a scholarly bent and legal writing has a practical bent, students will likely compartmentalize critical theory as a scholarly activity and not as a part of good, effective lawyering.").

139. Testy, *supra* note 7, at 1030 (asserting that issues of race, gender, and class should permeate the law school curriculum, just as they permeate society).

140. Dark, *supra* note 6, at 556 (arguing that students need to hear all professors address diversity issues).

the material credibly or that they lack the expertise to discuss the material knowledgably.

First, professors may feel that they cannot discuss issues with which they have no personal experience. Male professors, for example, may have concerns about facilitating a discussion about gender discrimination;[141] white faculty may have concerns about leading a discussion about race.[142] Heterosexual faculty may feel that it is somehow inappropriate for them to lead a discussion about cultural bias against gays, lesbians, bisexual and transgendered persons; able-bodied faculty may have similar concerns about leading a discussion about disability.[143] Realizing that they may come at these issues from a "privileged" vantage point,[144] faculty are sometimes reluctant to take a leadership role in addressing potential bias against a group to which they do not belong. In fact, some faculty may realize that they are unintentionally "members" of the oppressor group[145] and as such, they may feel that it is somehow "not their place" to bring up bias-related topics.

Second, while some professors may recognize the importance of examining how bias affects the way students craft arguments, they may feel that they lack the knowledge needed to discuss these issues with their students.[146] The refrains of "I don't know enough about the issue to teach it" or "I only know enough to be dangerous" are yet other ways of expressing this challenge. Some professors may not see, or may not see how to incorporate, issues of bias in the materials they teach. Others may be discouraged by the "moving target" nature of the material. Staying abreast of preferred terminology alone can be a daunting task, particularly when individual group members have different preferences. Precious few teachers' manuals are helpful in this

141. Rains, *supra* note 56 at 89 (noting, however, that "many white women teach literature written by men without ever having a sex-change operation. White women scholars do not have to be British or male to teach Shakespeare, for example.").

142. GARY R. HOWARD, WE CAN'T TEACH WHAT WE DON'T KNOW 2, 116 (1999); ALICE WALKER, HER BLUE BODY: EVERYTHING WE KNOW, EARTHLING POEMS 1965–1990 442–48 (First Harvest ed. 1993), *reprinted in* 1 SEATTLE J. SOC. J. 1, 7 (2002) *as The Right to Life: What Can the White Man Say to the Black Woman?*.

143. Edwards & Vance, *supra* note 11, at 74–76 (pointing out that faculty who are members of a minority group may also feel uncomfortable raising these issues).

144. PEREA, *supra* note 61, at 459 .

145. "The target or victim group often experiences race in a much different, more visceral way than the agent or perpetrator group." YAMAMOTO, *supra* note 109, at xxi.

146. Wildman, *supra* note 47, at 161, 175.

regard,[147] and it is a rare textbook that sets up or addresses these topics.[148]

Response to Challenge #2

As to the first concern, personal experience with biased perspectives does aid in teaching about bias. However, even professors who have not been victims of bias can still urge students to recognize it. If we view cultural competence as a necessary skill, we all need to give thought to ways we can foster it in our students, regardless of our background and experience.[149]

And, even if we might not be consciously aware of it, our experience in simply living and working in a diverse society can aid us as we raise bias issues with our students.[150] For example, many of us, regardless of our race, gender, or income bracket have been the subject of biased perspectives. Most people are privileged in ways, but disadvantaged in other ways.[151] While a person may experience white privilege, he or she may be or may have been disadvantaged by gender, disability, sexual orientation, economic class, or in any number of ways. Reflecting on these types of disadvantages that the professor may have experienced may provide some insight into the experience of being subject to unfounded assumptions or inappropriate language.

Further, many professors have had the unfortunate experience of relying on unexamined assumptions or using inappropriate language. These experiences give them perspective on how to avoid those mistakes in the future. A professor who, recognizing the importance of

147. Dark, *supra* note 6, at 555 (noting that materials from other disciplines may be necessary for incorporating issues of diversity into law classes).

148. *But see* OATES, ENQUIST, & KUNSCH, *supra* note 42, at 713–717; THE REDBOOK, *supra* note 46, at 272-78; ANNE ENQUIST AND LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 141-44 (2002).

149. *See* Testy, *supra* note 7, at 1030 ("[O]ne need not be of any particular biology to take responsibility for attending to social justice concerns.").

150. *Id.* ("We are all members of different races, genders, and classes. Like our students, we see and feel these issues in our own life and work.").

151. Dr. Francis Kendall, *Major Workshop 17: We Have to Understand It to Dismantle It: Looking Closely at White Privilege*, National Conference on Race and Ethnicity (NCORE) in American Higher Education (June 2, 2001); *see also* Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 91–92 (1995) (pointing out that each of us "lives at the juncture of privilege and subordination" and discussing importance of understanding systems of privilege in teaching and learning in the diverse environment of law school).

these issues, makes an effort to raise them with, and learn alongside, students, can model both the need to learn and the learning process.[152]

As to the second concern, lack of expertise, Legal Writing professors, as well as other law school faculty, already know much about the issues addressed in this article. For example, they know and teach about scrutinizing cases and arguments to see on what rationale they are based. They know and teach about how to use language that is both precise and appropriate. While it may be true that many law professors do not know much about the experiences of people different from themselves or what the "right" kinds of labels are, the solution to this problem is actually quite simple. We in the academy need to educate ourselves. We must fill gaps in our own knowledge as we prepare to teach our courses. Just as we ask students to research questions they may have, we must do the same.[153] If we do any less, we will not prepare our students for practicing law in a multicultural society.

Challenge #3: Fear

There are risks in bringing these issues into the classroom. Some faculty may prefer to keep the proverbial lid on Pandora's Box rather than let out what they fear will be the anger, frustration, guilt, and blame that discussions about bias may trigger.[154] Knowing that many law students come to law school with fully formed opinions about controversial issues and, in some cases, life experiences in which they were either accused of discrimination or victimized by discrimination, law professors may decide it is just easier to avoid a head-on discussion about bias and its pernicious effects. They rationalize this by saying, "I think awareness of bias is important, but to be honest with you, I'd rather avoid the topic than have it blow up on me in class."

The fear they have is a three-headed monster. It includes fear that a student will make a highly offensive comment and then they, as

152. Edwards & Vance, *supra* note 11, at 82; TEACHING FOR DIVERSITY AND SOCIAL JUSTICE 304–05 (Maurianne Adams et al. eds., 1997) [hereinafter TEACHING FOR DIVERSITY] (arguing that teacher's knowledge gaps opens the door for them to model the learning process); Oates, *supra* note 13, at 10.

153. Calleros, *supra* note 6, at 156; Stanchi, *supra* note 27, at 52; Edwards & Vance, *supra* note 11, at 82.

154. *See* Margaret Chon, *Transforming Talks: Public Dialogue About Social Justice in a Post 9-11 Age*, 1 SEATTLE J. SOC. J. 13, 15 (2002) (arguing that "we must not fear the conflicts that dialogue engenders because these conflicts are precisely what we need to learn to live with others in a multicultural world); Felsenburg & Curry, *supra* note 13, at 77; Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1554–1561 (1991).

the professor, must figure out how to deal with it.[155] It includes fear that if they themselves make a mistake that offends, they will be forever labeled as sexist, racist, homophobic, or (at the very least for just entertaining the topic of bias at all) a bleeding heart.[156] Finally, it includes the fear that students will react negatively to the material.[157] After all, it asks students to examine the biases deeply embedded within the culture. Some students may not be pleased to learn that as people who have absorbed their culture's biases, their self image as a progressive, sensitive, open-minded person is not completely accurate. Put another way, a class that requires tough cultural examination may result in less than glowing student evaluations,[158] which can be especially threatening to non-tenured faculty.[159]

Response to Challenge #3

Discussions around issues of bias may well be challenging and sometimes difficult. However, a professor can create a safer, more productive environment for the discussion, first, by creating a classroom environment that encourages the open exchange of ideas and, second, by staying focused on how the discussion relates to the subject matter of the course.

First, the professor can draw on general principles of good teaching. Professor Okianer Christian Dark discusses the skills a professor needs to incorporate issues of diversity into a course:[160] the development of good, respectful relationships with students and an inclusive

155. Dark, *supra* note 6, at 557–59; TEACHING FOR DIVERSITY, *supra* note 152, at 302–04, 306–07 (pointing out that many faculty assume that emotions do not belong in academia and offering strategies for dealing with tense moments).

156. TEACHING FOR DIVERSITY, *supra* note 152, at 301.

157. *Id.* at 292-98 (describing resistance, anger, immobilization, disassociation, and conversion as common student reactions to having their world view questioned); Edwards & Vance, *supra* note 11, at 77 (pointing out that law students of color may feel uncomfortable discussing racially charged issues or resent having to educate other students).

158. Dark, *supra* note 6, at 557.

159. *See* Edwards & Vance, *supra* note 11, at 75–76, 77–81 (discussing concerns about legal writing faculty having the academic freedom to raise social justice issues); Felsenburg & Curry, *supra* note 13, at 77–78.

160. "Too often, teachers will avoid these important discussions because they feel that one needs to have a range of special tools and skills to effectively handle a discussion about diversity. I believe that the most critical skills that teachers need are related to what is referred to as 'good teaching' — the ability to listen, to demonstrate respect for the student, to model professionalism in the level of preparation and treatment of the material, and to not take yourself so seriously. But most importantly, the teacher must be willing to engage in some risk taking to enhance and enrich the students' learning experience." Dark, *supra* note 6, at 543; *see also* Oates, *supra* note 13, at 5, 10 (discussing how she, in raising issues of race, class, and gender, acts as a moderator, listening carefully and modeling the decision-making process for students).

classroom environment;[161] making sure that the discussion is relevant to the legal analysis or process of lawyering[162] (discussed below); being an active listener, one who listens to both the speakers and non-speakers;[163] using varied teaching methodologies;[164] using humor;[165] making silence work in a positive way in the classroom;[166] and preparation.[167]

A professor can also create ground rules for the discussion, for example, asking that the discussion focus on the ideas expressed, not the individuals who articulate them.[168] Students can also be reminded that the classroom is a place for the exploration of ideas where all views must be not only respected, but also subject to critical examination in the search for sound legal analysis.[169] A professor can admit that everyone,[170] including the professor,[171] continues to learn about these issues.

Second, as Professor Dark suggests and as emphasized earlier in this article, issues of bias should be discussed where they will most naturally arise in the course.[172] Grounding the discussion in the context of the course will keep it close to what the professor is familiar and comfortable with and will make the discussion most relevant to the students. A Legal Writing professor, raising these issues in the context of how to draft an effective client letter, how to draft an effective memo or brief, how to write with precision, or simply how to be an effective legal writer or advocate can return to those contexts as the discussion progresses. The discussion should be one about effective legal

161. Dark, *supra* note 6, at 564–69; *see also* Calleros, *supra* note 6, at 159–60.

162. Dark, *supra* note 6, at 569.

163. *Id.* at 569–70.

164. *Id.* at 570–71.

165. *Id.* at 571.

166. *Id.* at 572.

167. *Id.*

168. *See generally* YAMAMOTO, *supra* note 109 (suggesting some teaching strategies for discussing race); Felsenburg & Curry, *supra* note 13, at 79 n.31 (addressing ground rules for discussions about social justice issues).

169. *See* TEACHING FOR DIVERSITY, *supra* note 152 (quoting P. Rothenberg, *Teaching About Racism and Sexism: A Case History*, 20 J. THOUGHT 122, 124–25 (1985), about students' need for faculty to find the balance of providing a safe place for discussion yet still critiquing "blatantly false beliefs").

170. Dark, *supra* note 6, at 557 (pointing out that we all have biases).

171. Baker, *supra* note 12, at 56 ("[A]s instructors we must be aware of our own cultural baggage, our inherited insights and blind spots . . . [N]ot only must we acknowledge rough spots when they occur, but we must also be willing to say 'sorry' when we learn that we have affronted a student.").

172. Dark, *supra* note 6, at 569 (discussing need to raise diversity issues in a way that is related to, and that is designed to advance, the course discussion in a material way).

analysis and lawyering, not about political positions. Professors should give careful thought to preparing for class, including preparing the assigned reading materials, in order to give the class discussion structure and direction.[173]

Finally, some discomfort may be inevitable because our culture is still struggling with these issues.[174] While they may sometimes be difficult issues, they are nonetheless important ones. Grappling with these issues will result in important personal and professional growth.[175]

There are no easy answers and no "correct" positions,[176] but examining how bias may be embedded in language and legal argument is simply part of being an effective lawyer.

IV. CONCLUSION

Sam, the student in the introduction to this article, was not the first, nor will he be the last, law student to fall into the trap of basing an argument on an unexamined assumption. Students who are male, female, young, old, rich, poor, gay, straight, able-bodied, disabled, white, or of color will all have the tendency to reflect the biases of their experiences and cultures. It does not matter whether a student is at the top, middle, or bottom of the class or where he or she was born and raised; every student will be naturally inclined to absorb and then reflect cultural biases in both language and argument. Lawyers, judges, and law faculty are not immune to this same cultural conditioning.

The ability to identify and evaluate cultural assumptions is critical to effective lawyering, and law schools, particularly in Legal Writing classes, can do much to help students develop this skill. Our students need to understand how bias may be embedded in language so that they can become skilled and sensitive communicators. They need to understand how bias may be embedded into the analysis of legal

173. *Id.* at 573 (discussing the importance of preparation prior to raising diversity issues in class).

174. Calleros, *supra* note 6, at 156, 161–63; *see also* YAMAMOTO, *supra* note 109, at xx-xxi; Oates, *supra* note 13 (discussing positive experiences with raising issues of race, class, and gender, even though noting that such discussion may be uncomfortable at times).

175. Matsuda, *supra* note 6, at 32 (noting that students who "ride out the wave of animosity" that may follow angry dialogue about race "add something to their toolkits that will serve them well in a complex and changing world"); Edwards & Vance, *supra* note 11, at 65-66 (quoting Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 47–48 (1995)) (discussing the value of "disorienting moments" that will cause students to question their values and beliefs).

176. *See* YAMAMOTO, *supra* note 109, at xxii.

problems so that they can create sound and effective arguments. If we do not discuss these issues with our students, we risk sending out lawyers whose language skills, arguments, and analysis have cracks in their foundations.

There is no question that 21st century law students will live and work in a multicultural society. They already are. As lawyers and future community leaders, they must be prepared to communicate effectively with clients, attorneys, and judges who will expect their work to be based on deliberate, informed choices and not unexamined stereotypes. The challenges to incorporating these lessons in recognizing bias are many, but they are worth tackling. By encouraging students to examine the cultural biases lurking beneath the surface of language and legal analysis, we can take the "un" out of "unexamined assumptions" and "unintended messages" and help our students become culturally competent lawyers.