Gender and Race Bias against Lawyers: A Classroom Response

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One very painful aspect of the practice of law is the existence of race and gender bias within the legal system. As clinical law professors, many of us struggle to provide our students with a meaningful analysis of the impact of bias on the practice of law. Recent efforts of clinicians to bring race and gender bias to the attention of students have stimulated frank classroom discussion of the subject. Yet the structure of current teaching approaches to bias may prevent students from examining the full range of relevant issues on an objective, as well as personal, level.

In reviewing other clinicians' approaches to teaching about bias, I identified problems that eventually led me to design a two-hour class session on bias against lawyers. The following is a review of a few other teaching methods and a description of my own approach, detailing its own strengths and weaknesses. This is not an exhaustive review of all possible approaches to bias. It is offered to promote classroom discussion of bias against law-

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1. Currently, over twenty states have formed task forces or commissions to study gender bias in the legal system. A growing number of states have also embarked on similar studies of race bias. To any experienced practitioner, especially those of us who appear in trial courts regularly, the findings of the commissions are not surprising. Although extremely hard to document and prove through "objective" means, state after state is uncovering evidence of gender and race bias in the legal system. Recommendations from the investigators typically call for educational programs aimed at making participants in the legal system more sensitive to bias and better able to respond to the bias.

The Michigan Supreme Court Task Forces on Gender and Race/Ethnic Issues in the Courts released their findings in December 1989. For their findings on the treatment of women and minorities by the courts, see Appendix A.

A list of gender bias studies initiated as of April 1989 is reproduced in Appendix B. The list was prepared for the National Conference on Gender Bias in the Courts, held in May 1989 in Williamsburg, Virginia.
yers and to invite the development of innovative alternatives to my approach.

I learned a great deal from the class demonstrated at the 1988 Association of American Law Schools (AALS) Clinical Conference by the faculty of two clinics at The American University, Washington College of Law. The faculty demonstrated the class by teaching it to conference participants who were clinical law professors. Prior to the demonstration, participants read background information on a mock case involving the criminal prosecution of rape. During the class demonstration, the faculty guided participants through a detailed investigation of the case, asking the participants to assume the role of the lawyer representing the defendant accused of rape. In the course of the simulated investigation, several issues of race and gender bias arose. During the class demonstration, the faculty did not initially disclose that race and gender stereotyping would be discussed in class, expecting participants to bring out stereotyping as they discovered it in the hypothetical case. The participants began to make assumptions about the parties and the crime based on these stereotypes. Some participants became so consumed by the bias issues that they could not concentrate on the discussion of case investigation offered by the faculty. This same phenomenon occurred when the faculty presented this class to their own law students.

After the demonstration, I felt uncomfortable with the class because the participants were not told that bias issues existed in the simulation. As a result, the participants were labeled as either racist or sexist if they said something based on a stereotype, or as self-righteous or paranoid if they challenged a stereotype. For example, in an effort to investigate the hypothetical case, one participant described her questions for the victim. She wanted to know what the victim was wearing at the time of the incident; eventually it became clear that she was looking for evidence that the victim's manner of dress might have provoked the attack. This made the participant a direct target for criticism that she stereotyped victims of rape, assuming that "women ask for it." Participants verbally attacked their peers

2. The 1988 AALS Clinical Conference was held in Bloomington, Indiana. This is a wonderful example of the value in sharing our teaching experiences. Watching the extremely well-planned demonstration by the faculty and discussing the demonstration with other clinicians gave me a great deal of insight into teaching about bias.

3. Memorandum from Clinical Faculty to Washington College of Law Faculty (November 5, 1986), included in the written materials for the AALS Conference in Bloomington (on file with University of Michigan Journal of Law Reform).
who made seemingly racist and sexist assumptions during the discussion.

In order to allow the participants to learn from each other and to retain them in their role as attorney-investigators, the faculty members attempted to remain neutral when race or gender issues arose. This added to the feeling of some participants that the class was out of control; when faculty allowed the comments that had been offensive to some to remain unchallenged, the participants could not think about the investigation. This demonstration convinced me that students need a more structured environment to discuss these issues: one in which they know race and gender bias will be discussed and one which reduces vulnerability to personal attack.

At the 1989 AALS Clinical Conference, Professors Richard Boswell, Professor of Law, University of Notre Dame; Rosemary Phelps, Professor of Psychology, University of Notre Dame; and Marcia Dickman, consultant in private practice and Assistant to the Vice President, Oklahoma State University, reported the results of a program designed to address first-year law students on the topic of race and ethnic diversity. At Notre Dame, they presented a series of evening programs intended to sensitize students to their own biases, including presentations to large groups, as well as small group "consciousness-raising" sessions. At the AALS Conference, the faculty reported mixed results and made suggestions for those attempting similar programs. Interestingly, one of the most significant complaints that Notre Dame faculty reported about their "Dealing with Difference" sessions for first-year law students was the lack of warning given to the students as to what would be discussed. Their students were surprised by the topic and unprepared for the discussion. Although giving students notice of the topic decreases the possibility for truly gut-level biases to surface, it does not trap them into being labeled as racist or sexist by their peers.

Clinical Professor Mary Jo Eyster, Director of the Big Apple Clinic in Brooklyn, presents another approach to sexism in the legal system, using the personal experiences of students enrolled in her clinic as the basis for class discussion. When a student experiences gender bias from outside the clinic (from a client or investigator, for example), Professor Eyster facilitates a classroom discussion of the situation, with the student’s consent. The student has an opportunity to describe the biased activity and to

receive input from classmates, in an effort to design a response to the offensive situation. If the student does not wish to discuss the situation in class or if the problem exists between students in the clinic, Eyster helps the student design a remedy through discussions with the clinical supervisor and between the students involved. Her approach reflects the greatest strengths of clinical methodology: it is grounded in the actual experiences of students; it brings specific experiences to a group of students for reflection, role playing, and problem solving; and it uses the clinical professor as a facilitator, not a lecturer.

One practical concern about Eyster's method, however, stems from my observation that instances of gender and race bias occur sporadically throughout a given semester. Semesters may pass without an example of sex or race bias appropriate for group discussion. This may be especially true at law schools with very little diversity within the student population, so that few students directly experience bias.

Even when a student experiences bias, he may not report it. Professor Eyster describes a Hispanic student who said she had grown used to the discriminatory treatment and did not think to report an incident her classmates had found offensive. Students might feel that the incident is insignificant, they may be accustomed to the treatment in question, or they may not wish to share an incident that they feel is too personal. Assuming, as I do, that it is useful for all clinical students to contemplate the impact of bias against attorneys, it is not enough to address bias only as it arises in clinical practice.

I am further concerned about the privacy of students who might be potential victims of bias. In recent dialogue between minority students and faculty at the University of Michigan Law School, students voiced resentment over the seemingly never-ending burden of educating their White peers. Students ex-

5. Id. at 188-92.
6. Id. at 190-91.
7. At the University of Michigan Law School, the minority student population (defined by the law school as Black, Chicano, Native American & Mainland Puerto Rican) constitutes approximately 12% of all students, according to Assistant Dean Allan T. Stillwagon. This results in an average of 2-3 minority students per clinical class of 20 students.

The students' risk of experiencing bias might also be decreased because of the types of cases they handle. For instance, the incidence of gender bias in the Child Advocacy Law Clinic might be limited because our students deal largely with female clients, witnesses, and judges.

8. Eyster, supra note 5, at 188.
9. The group included Black, Hispanic, Native-American and Asian-American students.
pressed frustration and anger at feeling regularly singled out to provide the Black or Hispanic perspective. In the context of a discussion on race and gender bias in the courts, it seems to me particularly important to attempt to spread the burden of exploring the issues, education, and problem solving to all students. This is more difficult when a particular student’s experience is the basis for discussion. When a student shares what may be a painful experience with her peers, she must subject her responses to discussion and possible criticism. Because the situation is presented as specific to the particular student, her classmates might perceive it as “her problem” and fail to generalize the experience to their own future practices.

I offer a class designed to allow students to express feelings freely, without as much risk of being labeled. The class uses examples posed by the instructor rather than falling into the discussion by chance or using the actual experiences of students to discuss bias. I have developed this approach not as an alternative to Eyster’s method, but as a supplement that is not subject to the unpredictable incidence of bias in the course of a semester and not subject to the willingness of students to share their personal experiences.

In my class, students read materials on gender and race bias in the courts and discuss examples of bias against attorneys, assuming the roles of the attorneys and judges in the given examples. The examples are true cases, but are not based on the experiences of students in the class. The two-hour session offers students an introduction to evidence of the existence of race and gender bias in the legal system, the difficulties inherent in identifying bias, and the various approaches one might take to address bias. Students also learn the value of gaining feedback from their colleagues about whether bias might exist in a given situation and how best to address it.

My approach is limited in two major respects. First, I do not try to accomplish what was proposed so well by the presenters from Notre Dame Law School through their session on “Dealing with Difference.” They addressed students’ personal attitudes about differences, bringing the student’s own biases to the surface to explore and perhaps change. I wholeheartedly support that effort, but feel it should be available to all students, conducted over a longer period of time than I have available in my clinic, and should include the help of professionals from other disciplines, as modeled by the Notre Dame faculty. In my two-hour session, I do not attempt to make students less sexist or racist. My intention is to make potential victims or witnesses of
bias aware of the possible impact of bias on their future practices and to develop ideas for responding to bias.

Next, I limit the class session by addressing bias against lawyers, not against clients. I believe bias against clients is discussed, at least to a limited extent, in other courses. More importantly, I feel the students’ semester in clinic is an important opportunity in law school to think and talk about their futures as attorneys. I see the discussion of bias against attorneys as a means of addressing what may be an important aspect of their future law practices.

I offer here a description of my class, student reactions to the class, and my own observations to illustrate one method of teaching about bias.

I. CLASS DESCRIPTION

I have taught my session on race and gender bias to five classes of second and third-year law students: twice to my students in the Child Advocacy Law Clinic (CALC); twice to the students of the Michigan Clinical Law Program (MCLP); and once to the students in an advanced professional responsibility course with no clinical component. After each session, the students completed written evaluations of the class.

10. In the Child Advocacy Law Clinic, students represent children, parents or the Michigan Department of Social Services in cases involving child abuse and neglect. The students, under supervision of the clinic faculty, handle cases at all stages in eight different Michigan counties. There is a substantial classroom component (six hours each week), which includes trial advocacy training.

11. In the Michigan Clinical Law Program, under the supervision of clinical faculty, students handle a wide variety of civil and criminal matters, including landlord-tenant, employment discrimination, misdemeanor defense, and prisoner civil rights cases.

12. My approach benefits from its adaptability to nonclinical students. I found, however, that several of the professional responsibility students did not plan to pursue a trial practice and did not feel the issue would affect them. In a nonclinical setting, perhaps a broader approach, which involves bias against clients, would better engage students.

13. The evaluation is reproduced in Appendix C.

Students did not provide their names on the evaluations, and demographic information was optional. Ninety-eight students turned in evaluations. Thirty-five of those identified themselves as women, fifty-one as men, and twelve failed to indicate their gender. Seven identified themselves as a race or ethnicity other than White, sixty-nine as White and twenty-two did not designate their race or ethnicity. Of the students designating race or ethnicity other than White, one was Black, two were Asian-American and four were Hispanic. By my own knowledge and observation of the students, clearly most of the students from minority groups chose not to identify their race and ethnicity. This is understandable, when such a designation can easily identify the student in classes with few students of color (probably averaging two or three per class among the classes I taught).
In preparation for the class, students read summaries of the findings of gender and race bias task forces and articles on women in the courts. At the outset I explain the goals of the class: to discuss the difficulties of identifying bias and to develop possible responses to various examples of bias. I state from the start that I do not believe there are “right answers” to many of the questions which will arise, but that I feel it is an important topic for discussion among future attorneys. I also explain that the class is designed to explore various responses to bias by all players in the legal system, noting that all attorneys may witness bias and are faced with the possibility of responding. With this comment I attempt to draw into the discussion those students who believe they will never be subject personally to discrimination.

We then discuss the readings and I explain the current status of the states’ bias task forces. I engage the students in a short discussion of the barriers to documenting bias, including the risks of reporting bias, the lack of common definitions of bias, the subtle forms of modern bias, and the changing forms of bias over time.

14. Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts 84-86, 99-102, 130-41 (December 1989); Final Report of the Michigan Supreme Court Task Force on Race/Ethnic Issues in the Courts 24-39 (December 1989); Michigan Supreme Court’s Citizen’s Commission to Improve Michigan Courts: Final Report and Recommendations to Improve the Efficiency and Responsiveness of Michigan Courts, 6-7 (1986); Copleman, Sexism in the Courtroom: Report from a “Little Girl Lawyer,” 9 WOMEN’S RTS. LAW REP. 107 (1986); Kushner & Lezin, Bias in the Courtroom, 14 BARRISTER 8 (Spring 1987); Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L. J. 126-147 (1986-87); Schafran, Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts, 9 WOMEN’S RTS. L. REP. 109 (1986). In an effort to provide a degree of spontaneity to my class discussion, I do not provide specific examples for discussion to the students ahead of time. Although this might provide for a deeper and richer discussion, I believe there is too much risk that it would also provide an opportunity to plan “appropriate” responses. Students, however, did suggest distribution of the examples before class in their evaluations.

15. In an excellent and brief summary entitled Discussing Racial Topics in Class, 5 INNOVATION ABSTRACTS 3 (Feb. 4, 1983) (on file with the University of Michigan Journal of Law Reform, and also available through the U.S. Department of Education, Educational Resources Information Center, ED 237160), John F. Noonan calls on educators to “communicate your uncertainty to students. . . . Teachers who show by example that a person can voice a tentative position in the face of uncertainty thereby offer their students an important lesson about modern living: many contemporary problems are so daunting that insisting on certainty before speaking guarantees silence.” Id. at 3 (emphasis in the original).
I then divide the class into three sections. I introduce the first hypothetical for the class’s analysis and assign parts to each section of the class.¹⁶ For example:

A judge typically holds his pretrials informally in chambers before going on the record. The conference includes all of the attorneys with cases before the court that day. A female attorney notes, after several such meetings, that the judge regularly begins to discuss recent rape cases with the male attorneys. He discusses the cases in detail, making comments like “If he didn’t take his pants off, it wasn’t rape,” and “How much penetration is needed to establish rape?” She believes these comments are made because of her presence in the room.

Group A is the judge.
Group B is the female attorney.
Group C is one of the male attorneys in the room.

Maintaining their assigned roles, the students then begin to discuss the example. Throughout the discussion, we cover questions, such as:

1. What might the judge’s motives be for bringing up the cases?
2. How might the female attorney learn whether or not the comments are directed at her?
3. How might the comments make the female attorney feel?
4. What are possible responses to the judge’s comments by the female attorney? By the male attorney?
5. What are the relative risks or benefits of various responses for the attorneys?

The students commonly identify “innocent” motivations for the judge (i.e., he was very concerned about a sexual assault case and wants to discuss it informally with attorneys) and biased motivations for the judge (i.e., he wants to test the woman to find out if she is tough enough to practice in his courtroom). They relate possible responses of the attorneys: ignoring the judge’s comments, having the male or the female attorney confront the judge, or not laughing when others laugh at the comments.

¹⁶ Assigning roles also engages those students who might feel the topic is irrelevant to them.
One of the most interesting discussions that often flows from this example involves the question of possible reactions by the male attorney. Men in the class will sometimes suggest that if the man is a friend of the judge, he should let the judge know that the comments are inappropriate, especially if they occur only when there is a woman in the room. Men and women in the class will often respond that if a man goes to bat for the female attorney, the woman might perceive him as paternalistic and he might perpetuate the judge’s perception that female attorneys are different and unable to speak for themselves. Other comments suggest that the judge may not know how to treat women lawyers, that the male attorneys can aid the woman by reporting to her how the meetings are different when she is not present, and that there are risks to any of the attorneys in confronting the judge.

I follow this example with two situations involving court appointments. In the first:

A Black attorney receives far fewer criminal appointments than a White attorney on the same appointment list.

Group A is the Black attorney.
Group B is the White attorney.
Group C is the White judge responsible for the appointments.

Much of this discussion revolves around the difficulty of identifying whether or not a practice is based on race bias. The students are asked, in their respective roles, to list ways in which the attorneys (assuming both perceive the disparity) can attempt to discover the judge’s motive. They typically point out that the disparity may be due to factors other than race: age, experience, types of cases, etc. They then list objective means of investigating the judge’s practices.

Next, I ask students to assume that the investigation results in a belief by both attorneys that the judge’s practice is racially motivated. We explore the possible reactions of the attorneys, the judge’s possible reactions, and the possible interaction between the attorneys. This discussion is usually rich with the discovery that it is not so much what one says, but how one says it, that can make all the difference in preserving delicate relationships. Students often observe that the length of the relationships between the players will dictate possible reactions.
The second example involving court appointments shifts the focus a bit and results in a general pause in the room:\(^\text{17}\)

A legal aid office is regularly appointed by the local probate judge to represent children in child abuse and neglect cases. The attorneys in the office notice over time that the judge always appoints the female attorney in the office to represent female victims of sexual abuse. The male attorney is appointed to other cases, but never sexual abuse cases.

Group A is the male attorney.

Group B is the judge.\(^\text{18}\)

Group C is the female attorney.

Although there is some discussion of how the attorneys should decide whether this practice is based on gender bias (and not based on the judge’s personal knowledge of the attorneys involved), the class quickly begins to attack the question of whether gender bias can be appropriate when it is done for the good of the client. Students find it difficult to identify the possible harmful effects of the practice on the male and female attorneys. They eventually note that the woman lawyer in the example may gain a reputation as the person to call on when young girls are involved, but not when, for example, a complex robbery is at issue. The woman lawyer will not gain as much experience as the man in other cases: she is being stereotyped based on her gender. This is also true for the man. The students often note that not all women are particularly sensitive to children, and not all men are particularly unsuited to relating to children. Suddenly, they realize that what at first seemed an appropriate bias on the part of the judge might indeed be negative bias based on gender stereotypes. Students often pose the interesting question of whether the court should be blind to gender in making assignments, even when a client specifically requests a male or female attorney. This is especially difficult for the students who usually want to do everything in their power to protect child clients.

The issues clearly become more complex for the class when I pose the question of whether courts should honor the request of

\(^{17}\) Noonan also notes the need to “create zones of silence where students can compose their thoughts. . . . unless you want to hear only from bolder students whose thoughts are already formulated.” Noonan, supra note 16, 3-4 (emphasis in the original).

\(^{18}\) At times I have designated the judge as female.
a Black child for a Black attorney.\textsuperscript{19} The class recognizes that in cases in which counsel is hired, rather than appointed, litigants are more able to make decisions about their attorney based on gender or race. Is there a difference between a Black child requesting a Black attorney and a White child requesting a White attorney (usually posed as a White child refusing a Black attorney)? Here the students explore the relevance of historical discrimination, and some of the arguments for affirmative action are proposed to defend the practice of giving the Black child a choice but not allowing discrimination against Black counsel.

I pose one final problem to the class:

Male and female partners in a firm together interview a man fired by a Japanese-owned company. The partners accept the case on behalf of the client and explain that the woman will be handling the case because she has expertise in the relevant area of the law. The client calls the woman and tells her that although he has no problem with her handling the case, he believes a woman would be at a distinct disadvantage in negotiations against the Japanese company. He believes that the Japanese would not take her seriously.

Group A is the male partner.
Group B the client.
Group C the female partner.\textsuperscript{20}

As the students consider the case, I readily detect their acceptance of the stereotype that the Japanese will not take the female attorney seriously. It is difficult for the students to identify any potential harm to the female partner. They often believe that she should turn the case over to the male attorney for the good of the client. One student asked whether it might be unethical for the woman to stay on the case if her presence would harm the client’s case.

During one class a student presented an example involving gender bias by Arabs. Several students agreed that female attorneys could not work effectively in Arab countries. When their

\textsuperscript{19} I share with the class that this did actually happen in the Child Advocacy Law Clinic. Two Black children had Black students assigned as their first student attorneys, and then had a series of teams of mostly White students. The children asked the White students when they could have Black attorneys again.

\textsuperscript{20} I do let the students know that this example happened to me and share the ultimate outcome at the end of the discussion (we turned the case down). One colleague suggested that since this is my last example, using my own story invites the students to feel comfortable about sharing their own stories next.
professor and I attempted to point out the stereotype of Arabs behind their analysis, one student protested that he knew this was true because of stories he had heard about specific attorneys.

It is usually only with my prompting that the class turns to the possible effects of assigning cases based on the sex of the attorney, including the potential ramifications at the hiring level if female attorneys are not perceived as able to handle all potential cases. One female student shared with the class her practice of asking California law firms about their policy for assigning cases when Japanese companies were involved, because she had learned of a tendency to keep women away from those cases.

The class normally moves to whether or not the client’s underlying assumptions are true: Would the woman be unable to deal with the Japanese company? Wouldn’t the attorney for the company likely be from the United States, thus eliminating cultural difference in the negotiation? Was the client actually motivated by his concern over Japanese gender bias, or was it a cover for his own concerns about having a woman handle his case?

Probably the most significant lesson in this example is the students’ willingness to accept some forms of bias over others. Many students can accept gender bias when it seems to originate in another country or when it is for the good of the client. I change the example to involve a White client who says he has nothing against Blacks, but he thinks a Black partner will not be taken seriously by the White defendant the client is suing. The class will visibly alter its position at this point and become clearly more uncomfortable with the thought of taking an attorney off a case because of her race. Some students state explicitly that race bias is a more significant problem than gender bias, others express resentment that race bias is perceived to be a more significant problem than gender bias.

After considering these examples, the students will sometimes have time to offer their own examples for discussion. These have ranged from examples of bias in interviewing, to instances of bias witnessed during summer jobs with law firms, to bias experienced or witnessed by students in their clinical cases. I attempt to maintain a similar framework for discussion: identify whether or not there is bias and, if so, identify possible responses.
II. STUDENT REACTIONS

One student who described himself as male, twenty-five and "Very White" lamented that he had not discussed race or gender issues in a law school class in six terms and asked whether small discussion groups on the topic could be organized on an informal basis. (C28) A thirty-six-year-old woman stated, "[t]hese issues should be addressed much more than they are in law school—and should start in the first year." (E8)

The great majority of the students (eighty-four) stated that they found the class valuable. Several commented that the discussion raised their awareness and gave them ideas for responding to bias. Other students noted the value of hearing the points of view of classmates and verbalizing their own positions. Clearly, many were testing their own perceptions against their peers:

[I]t helps to have one’s own perceptions verified [and] to work through [in advance] some of the situations I might encounter.

Thirty-seven-year-old White female (C15)

[It was valuable] mostly to discover the range of reactions.

Twenty-seven-year-old White male (B1)

The issues are complex—I like to hear what others have to say—to test my own views—to further form my views.

Thirty-two-year-old White male (B8)

You don’t really know how your ideas about bias stack up until you compare them with actual experiences of other people. In addition—the conversation helps expose your “blind spot” in assessing your own views.

Twenty-five-year-old White female (C22)

There was some evidence in the evaluations that the discussion had affected student perceptions of bias:

It helped me to consider arguments against race and gender bias that went beyond my intuitive sense that the
bias is wrong. *i.e.*, long term broader effects of individual incidents.

*Twenty-five-year-old White male* (A11)

I find it helpful, as a man, to hear views on what women believe is sexist or discriminatory and what is not. I believe a lot of such behavior goes unchecked because people don’t often recognize what they are doing.

*Twenty-four-year-old White male* (C32)

[I]t made me aware of several circumstances where people may interpret something as racist/sexist where I would never have questioned it.

*Twenty-five-year-old White male* (E6)

[A]ctually, the reading really kind of shocked me and made me think about what I was doing.

*Twenty-four-year-old Asian-American male* (E11)22

Fourteen students reported finding the class less than valuable. Generally, those students felt they were already sensitive to the issues and did not need a class on the subject.

I also asked students if they found any part of the discussion offensive. Five students from the same MCLP session commented on the lack of sensitivity of their classmates. In that class there were a few men who felt there was nothing wrong with the judge’s pointed discussions of rape when the female attorney was present, even after I asked them to assume that the woman learned that the references to rape cases occurred only when a female attorney was present. These students suggested “innocent” motives for the judge’s comments and thought that perhaps the judge was trying to make the woman feel welcome by discussing a “female” issue. I recall feeling angry and surprised by the extent of the male students’ reluctance to acknowledge the possible harmful effects of the judge’s comments. I did respond, eventually, after giving their classmates an opportunity, and pointed out that the judge’s comments could be interpreted as gender bias. One student felt I had not gone far enough: “It was offensive that no response came from on high about what was wrong with the judge’s rape discussion. I think there was clearly sexism present in the discussion and it should have been brought out.” (Thirty-year-old White female) (B4)

22. My fellow clinicians will enjoy one student’s response to whether he found the class valuable: “Yes, but I’ve got a trial tomorrow.” (B12)
Four students found offensive the class discussion of foreign cultures. One referred to the class discussion about the ability of women to negotiate with the Japanese as “Japan bashing.” Another wrote: “[C]haracterizations of Asians and Arabs [were offensive] [as was] the absolute willingness to stereotype in one context and condemn it in another.” (Twenty-four-year-old Asian-American male) (E11)

Responding to “What would you change about today’s class for future presentations?,” students suggested:

1. Cover bias in law school, too.
2. Talk more about the impact of responding to bias on one’s career.
3. Cover discrimination in the hiring process.
4. Point out systemic solutions, not just personal responses.
5. Bias against clients should be considered.
6. Talk more about real life experiences of class.
7. Add information on age bias.

In space left for general comments on the class, many students praised the class and expressed appreciation that the class had been offered. A few others provided extensive thoughts about solutions for bias in the system. The class clearly sparked much interest and thought among the students. I felt many of them were happy to have even a brief outlet to talk about their concerns, gripes and fears about the issue of race and gender bias in general, and specifically as it related to their legal careers.

III. My Reactions

We are at a point in our history when increased sensitivity to sexism, racism and other “isms” makes us particularly wary of being labeled as sexist or racist. On the other hand, the trend in the last decade toward a more conservative government and student population has, for many, made it equally threatening to be labeled a feminist or a proponent of affirmative action. The desire of students to avoid being labeled clearly limits the possible level of frankness in the classroom setting.

Over a semester in clinic, mutual trust often builds among students and supervisors. When this happens, students feel more free to disclose personal points of view. This phenomenon was described by Professor Patricia Cain in her article, Teaching
Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections," describing a nonclinical class that developed a level of trust due to the personal sharing and non-threatening climate cultivated by Professor Cain and her students.

In my own experience I see this occur frequently in groups of clinic students. This is not always the case, however, and a key to teaching a session on race and gender bias is to be cognizant of the "politics" of the particular group of students. I encountered a striking example of these politics not readily apparent to a professor when I led this class session for a group of MCLP students. As described above, several students complained of the offensive nature of their classmates' opinions. Yet, I recalled noting an atypical lack of response from the women in the class to fairly obvious sexist comments from their classmates. Later I learned that the women in the MCLP group had felt sexually harassed by one of the male students in the class and had struggled throughout the semester with how to deal best with him. When I gave him an opportunity, through my examples, to express rather insensitive opinions, the women felt too angry and frustrated to respond. Not understanding the relationships within the class, I was cautious in providing my own response to the male students' comments, leaving the women feeling unsupported.

When presenting this class to my own CALC students I was aware of tensions between certain students that might have hampered their ability to speak freely. At times I was able to turn the flow of the discussion away from personal conflicts between students to a discussion more responsive to the entire class. This was accomplished by, for instance, calling on "neutral" classmates to break the flow of debate which was becoming very personal or offering my own observations which I thought might express the opinion of someone silenced by a contentious relationship.

There is a downside to knowing the students well; they also know you well. I first offered this session to my own CALC students. I then presented it to the MCLP students and commented to one of their professors that his students seemed less sensitive to these issues than had my students. He kindly pointed out that my students knew my opinions and likely felt less free than the MCLP students to present the opposing view-

point. I identify myself as a feminist, and my students are well aware of my work on gender issues and my "politics."

The impact of my own biases on the class was reflected in an evaluation by a twenty-six-year-old White male: "There was a slight slant in our discussion. I think we all started with the belief of each hypo that there existed bias in the hypo. This doesn't always allow for honest responses against that position."(A22) Perhaps making my views clear from the start adversely affects the class on gender and race bias, because, as suggested by this student, participants may feel unable to express their positions.

On the other hand, restraint caused by my clear identification with a certain position serves as an asset in two ways. First, it may keep the discussion free from flagrantly racist or sexist comments. During the presentation on "Dealing with Difference" at the May 1989 AALS conference on Clinical Legal Education, Professor Nancy Polikoff expressed her belief that students should not be subjected to painful racist comments in the process of educating other students about racism.

Making my politics known may also set a bottom line for the conversation. I want the group to discover how bias may be difficult to identify and that bias may not exist where first perceived. I am not willing, however, to accept a position that bias based on race and sex is never harmful or should not be the subject of public concern. There is, therefore, a value-laden premise at the bottom of my efforts: that race and gender bias against attorneys exists, is harmful and should be eradicated. If the instructor does not take a position on these topics, the students might use the two hours to deny the existence of bias, rationalize reports of bias, and generally feel satisfied that there really is no problem.24

In designing the class, I assumed that by using the experiences of others and by asking the students to assume roles, I would create an environment in which they could be honest yet protect themselves personally. For instance, if a student felt there was nothing wrong with discussing rape cases in detail only when a woman attorney was present, he could say in role as the judge that "I believe all attorneys need to be hardened to the realities

24. Some may feel this is unlikely to occur, given the wide variety of opinions held by law students. My experience suggests that this denial scenario can occur in a group of students that combines outspoken students who deny that bias is a problem with students who have never thought about the issue or believe "it will never happen to me" and students silenced by their frustration and anger over bias they perceive in their classmates.
of the cases we see in court and I don’t think I should give women attorneys special treatment.” Even though the student might be expressing his own opinion, he can appear to the students to be playing devil’s advocate, offering possible motivations for an unnamed judge.

My actual experience in teaching this class and the reactions of the students have confirmed the value of separating the students from their own personal experiences for a time, to allow them to analyze these issues through the experiences of others. An example of the risks of using personal experiences occurred the last time I taught the class for the MCLP students. One of the MLCP professors told me that two of his students had a lengthy conversation with a Black client who had implied that the students were racist. The professor asked one of the students if he would like to share the experience in my class that night. The student had agreed and they had developed a method for presenting the case to the class which the professor felt would protect the student from having to identify his actions as racist. The student did not believe he had been racist.

During class, after discussion of my examples, I turned to the student and said that I understood that he had a situation he would be willing to share. He said, “Well, [the professor] wants me to [share it].” His professor and I both offered him an out at that time, but he said he would go on. He embarked on an extremely lengthy description of the case and the revealing conversation with the client. He did not use the format he and his professor had planned for the presentation. The student never actually stated the conflict between the students and the client, nor did he mention the client’s feelings about the impact of race on the case until he was prodded by his professor. In the end, his classmates jumped to his defense, stating how patient they had seen him be with the client and how obviously unreasonable the client had been.

The students attempted to protect their classmate rather than evaluate the client’s concerns with objectivity. This stemmed from both their tendency to relate to their peer (not the client) and their strong desire to avoid the racist label. One student wrote in his evaluation, “I felt bad that the guy who told [the] example from class may have had to say things which may have cast him in an unfavorable light with at least some classmates.” (Twenty-four-year-old White male) (E5) Personal experiences can restrict, rather than enhance, discussion.

There are other practical reasons for not using actual student experiences as the basis for discussion. As noted above, such ex-
periences are sporadic, the students may not wish to share them, and the students may fail to report them. Further, student experiences involve limited issues. By carefully selecting several examples for class, I covered a wide range of issues in a relatively short time. Many of my arguments are similar to arguments for the use of simulations, as opposed to live client cases, in clinic:26 the instructor can better control the educational experience. My suggestion that my classroom session should be combined with the approach based on student experiences described by Eyster parallels our combined use of simulated and live-client cases as teaching tools in the Child Advocacy Law Clinic.

I want to emphasize that the use of hypotheticals, rather than student experiences, allows for only relatively more open discussion. Students still feel very concerned about being labeled when speaking in role within my examples. As one student wrote, "I think it's hard for White men to express their views in a setting such as this out of fear of saying the wrong thing and being chastised." (Twenty-four-year-old White male) (C32)

Although I feel that the class achieved my goals in many ways, one significant result disappointed me. As I embarked on designing the class I envisioned reaching all of the students in the class in some way. After teaching the session five times I have discovered a pattern that does not surprise me, but that I find troubling. It appears that the two-hour session is valuable to White men who have not thought much about these issues and how they might address bias, even though they may not be directly affected. Even for White men who have given significant thought to the issues, it appears to be helpful to share reactions and ideas. Some of the most enthusiastic evaluations came from White women, who were happy to have the issue discussed and felt they made important remarks in class. My disappointment stems from a perception that I did not, in this setting, offer much of value to minority students.

Comments from White females, in the written evaluations, perhaps offer some insight:

I felt vulnerable, as a woman who's thought a lot about these issues.

Twenty-six-year-old White female (A2)

[A]s a woman I was (typically) afraid to voice all of my feelings because of the fear of a label. ... Consider making [the class] longer and allowing the genders and races to meet separately, briefly to vent frustrations in a supportive atmosphere.

Twenty-three-year-old White female (B6)

Most women ultimately felt comfortable speaking out because their greater numbers in the class balanced their fears. If some of the minority students felt the same concern about voicing their opinions, their concerns were further encumbered by their small numbers. The women were also supported by having a female attorney facilitate the discussion. At times, the women clearly turned to me, expecting me to express an opinion they felt unable to share. As a White woman, I did not feel able to provide the same support to students of color.

This inability to offer a supportive atmosphere for students in the minority represents a significant shortcoming. As schools recruit more students of color this may become less of a problem. At present, we could offer sessions similar to my class, informally, to groups of minority students. Ultimately, I believe that the recruitment of more attorneys of color to teach in our clinics would greatly benefit my two-hour session and our clinical students' experience in general.

Clearly being female or Black or Hispanic does not make one inherently good at facilitating the class I have described. Nor does being male and White automatically disqualify one from teaching this class well. The individual instructor must find a method for approaching this topic that suits her personality, comfort with the subject, and available class time. There is little doubt, however, that race and gender bias permeates the practice of law in our society. Ignoring the impact of bias on law practice would be a disservice to the future lawyers we teach.
APPENDIX A

COURTROOM TREATMENT OF MINORITY LITIGANTS, WITNESSES, JURORS AND ATTORNEYS

1. There is a perception on the part of racial and ethnic minorities and also of many non-minorities of the justice system's discrimination and insensitivity. There is evidence that such behaviors do exist.
2. A minority lawyer's ability to attract and service clients is affected by the quality of treatment afforded the lawyer by judges, court personnel and other lawyers. Testimony was received by the Task Force which indicated that minority lawyers and litigants are treated differently. The apparent ease of access that non-minority lawyers have to judges and court personnel is as detrimental to the minority lawyer as overt negative behaviors and comments.27

TREATMENT OF WOMEN JUDGES, ATTORNEYS, LITIGANTS, WITNESSES AND JURORS

1. Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system are subjected to discourteous and disrespectful conduct not encountered by their male counterparts.
   a. Patronizing language, improper forms of address and references to appearance and marital status undermine credibility and isolate female litigants, witnesses, judges, attorneys and court staff.
   b. Verbal and physical actions such as interruptions, male-only conferences and directed conversations exclude women or ignore their presence.
   c. Jokes or demeaning comments are made by some judges, lawyers and court staff within the court environment.

d. Male attorneys "bully" female litigants, witnesses or attorneys in a manner which transcends acceptable advocacy techniques.

2. Sexual harassment of women occurs in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

3. Some judges and attorneys appear to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They may express undue impatience with or harsh criticism of women in the courtroom which they do not express with respect to men in comparable situations.

4. Some judges and attorneys appear to tolerate or encourage certain behavior by male professionals which they devalue in female professionals such as aggression, assertiveness and other departures from the "feminine" ideal.28

COURTROOM TREATMENT OF MINORITY LITIGANTS, WITNESSES, JURORS AND ATTORNEYS

The Task Force recommended:

1. Both judges of courts of record and quasi-judicial officers should be educated about this issue as a regular part of their ongoing continuing legal education. Wherever possible such education should be a part of training on substantive areas of law and judging as a curriculum component of all training which is offered to the bench on a required or non-mandated basis (MJI [Michigan Judicial Institute], ICLE [Institute for Continuing Legal Education], Civil Service and Appropriate Administrative Agencies).

2. Educational materials and guidelines should be amended and designed to identify and appropriately advise judges on problems related to racial/ethnic issues and judicial decision-making.

3. Attorneys should be educated about these issues as a regular part of their on-going Continuing Legal Education. Wherever possible such education should be a part of training on substantive and procedural areas of law as a curriculum component of all training which is offered to the bar on a required or non-mandated basis.


Presiding Officer’s Designation, Disqualification and In-ability) should be amended to prohibit such conduct by quasi-judicial officers and should provide appropriate sanctions.

5. Just as the Michigan Rules of Professional Conduct and the Code of Judicial Conduct govern overt behaviors, effort should be made to ensure equal and appropriate access to judges and court personnel for all counsel, and to educate both judicial and court personnel on this issue.

6. Increase the amount of participation by the trial bench in pre-trial stages of litigation, with heightened race/ethnic consciousness.

7. Institute educational programs for judicial and court personnel to increase consciousness of race/ethnic issues.

8. Increase the number of racial/ethnic minorities in the alternative dispute resolution process. (See recommendations under professional opportunities for minorities).

NOTE: For the purpose of this section, a quasi-judicial officer includes: magistrates, referees, hearing officers, and any other administrative officers performing adjudicative functions as part of their official action.

TREATMENT OF WOMEN JUDGES, ATTORNEYS, LITIGANTS, WITNESSES AND JURORS

1. The Michigan Supreme Court should issue an Administrative Order that behavior exhibiting gender bias in the court environment is not acceptable and that judges must set an example by not engaging in or permitting such behavior in chambers, courtroom or administrative areas.

2. The Michigan Supreme Court should require the Michigan Judicial Institute (“MJI”) to provide education in the following areas:
   a. awareness training for judges on the definition, recognition and impact of sexist behavior; and
   b. the importance of language.

3. All court administrators should:
   a. direct that all forms, manuals, bench books, and correspondence employ gender-neutral language;
   b. establish a policy prohibiting gender-biased conduct by all judges and court personnel;

c. conduct regular training for court employees on the issue of gender bias and its relation to the proper function of the court as a service provider; and

d. when undertaking improvements to court facilities, take into account the special needs of parents by providing for child care areas and facilities.

4. Jury instructions should be continually monitored to ensure gender neutrality. Some jury instructions should be amended to include specific examples of the types of bias jurors must guard against and the ways in which such bias might influence their decision-making.

5. The State Court Administrative Office should be empowered to investigate allegations of gender bias on the part of court personnel.\textsuperscript{30}

\textsuperscript{30} Task Force Report on Gender Issues, \textit{supra} note 26, at 101.
APPENDIX B

*Gender Bias Task Forces Initiation, Establishment and Official Mandate*\(^{31}\)

**ARIZONA**

Mandate: Not yet developed.

**CALIFORNIA**

Initiated by: California Judicial Council.  
Established by: Two successive Supreme Court Chief Justices, Rose Elizabeth Bird and Malcolm M. Lucas.  
Mandate: To examine the problem of gender bias in the California courts, gather information and make recommendations to the Judicial Council to correct identified problems.

**COLORADO**

Initiated by: Colorado Bar Association and the Colorado Women's Bar Association.  
Established by: Chief Justice of the Colorado Supreme Court.  
Mandate: To consider whether gender bias does exist in the judicial system in Colorado, and, if such gender bias exists, to determine the nature and extent of such bias and to propose measures for its reduction and ultimate elimination.

**CONNECTICUT**

Initiated by: Chief Justice of the Connecticut Supreme Court.  
Established by: Chief Justice of the Connecticut Supreme Court.  

\(^{31}\) This list of gender bias studies initiated as of April, 1989 was prepared for the National Conference on Gender Bias in the Courts, held in May, 1989 in Williamsburg, Virginia.
Mandate: To determine the presence and extent of gender bias in Connecticut courts and to develop strategies for its eradication.

FLORIDA

Initiated by: Gill Freeman, Esq., and Sandy Karlan, Esq., on behalf of the Florida Association for Women Lawyers.
Established by: Florida Supreme Court.
Mandate: To determine in what areas of our legal society bias based on gender exists, and recommend measures to correct, or at least minimize the effect of, any such bias.

GEORGIA

Initiated by: Georgia judges.
Established by: Georgia Supreme Court.
Mandate: To study and investigate the existence and scope of gender bias in the judiciary of Georgia and to file a report on this with the Supreme Court of Georgia.

HAWAII

Initiated by: State Judicial Conference.
Established by: Resolution of the State Judicial Conference.
Mandate: To determine the extent to which gender bias might exist in Hawaii's judicial system, and to assess the real or perceived effect it might have on courtroom interaction and the judicial decision-making process.

ILLINOIS

Initiated by: Illinois State Bar Association, the Chicago Bar Association, and the Women's Bar Association of Illinois.
Established by: Illinois Bar Association, the Chicago Bar Association, and the Women's Bar Association of Illinois.
Mandate: To review the judicial system to determine if laws, rules, practices and conduct work to create inequitable conditions for women and men litigants, lawyers, witnesses, court per-
sonnel, and all those who come into contact with the judicial branch of government.

MARYLAND

Initiated by: Maryland Judiciary and the Maryland State Bar Association.
Established by: Chief Judge Robert C. Murphy and the President of the Maryland State Bar Association.
Mandate: To determine first whether bias exists in the Maryland judicial system. If it does, to determine the extent to which it affects court decision-making and participants in the court system (judges, attorneys, litigants, jurors, court employees, and the public). If gender bias does exist, to recommend means to eliminate its effect in Maryland judicial system.

MASSACHUSETTS

Initiated by: Massachusetts Women's Bar Association.
Established by: Supreme Judicial Court Chief Justice.
Mandate: To investigate whether gender bias exists within the Massachusetts judicial system and, if such gender bias does exist, to make appropriate remedial recommendations.

MICHIGAN

Initiated by: Citizens' Commission to Improve Michigan Courts.
Established by: Michigan Supreme Court Chief Justice.
Mandate: To investigate the nature and extent of gender bias in Michigan state courts, and to recommend ways to reform the court system to prevent actual or perceived bias.

MINNESOTA

Initiated by: Minnesota judges and lawyers, including representatives of the State Bar Association, the State Court Administrator, and the State Commission on the Economic Status of Women.
Established by: Minnesota Supreme Court Chief Justice.
Mandate: To explore the extent to which gender based myths, biases, and stereotypes result in unfair application, interpretation and enforcement of the law within the judicial system in Minnesota. To document discriminatory treatment where found to exist, and to make recommendations for necessary changes in report to be presented to the Chief Justice.

NEVADA

Initiated by: Group of interested professional women, mostly attorneys.
Established by: Supreme Court of Nevada.
Mandate: To consider studies regarding the existence and extent of gender bias in the court generally, and specifically, to examine the judicial system of the state of Nevada to determine whether there are statutes, rules, practice or conduct that reflect gender bias, and to document instances of gender-based discrimination. To report on findings and recommendation, and to issue a plan for the education of the bench, bar and the public.

NEW JERSEY

Initiated by: New Jersey judges.
Established by: New Jersey Supreme Court Chief Justice Robert N. Wilentz.
Mandate: To investigate the extent to which gender bias exists in the New Jersey judicial branch and to develop an education program to eliminate any such bias.

NEW MEXICO

Initiated by: State Bar Association of New Mexico.
Established by: Board of Bar Commissioners.
Mandate: To examine the acceptance of women lawyers by the bench and bar in general, and to examine the needs of women lawyers and the degree to which the State Bar has addressed those needs. To determine whether any barriers still exist for women in the practice of law in New Mexico, and to suggest ways in which the State Bar can assist in the removal of those barriers.
NEW YORK

Established by: Chief Judge Lawrence Cooke.
Mandate: The general aim of the Task Force will be to assist in promoting equality for men and women in the courts. The more specific goal will be to examine the courts and identify gender bias and, if found, to make recommendations for its alleviation.

NORTH DAKOTA

Initiated by: Judicial Planning Committee of the North Dakota Supreme Court.
Established by: Judicial Planning Committee of the North Dakota Supreme Court.
Mandate: To examine the status of women and men in the legal system of this state, to determine whether and what inequities exist, to recommend any changes in attitude and administration necessary to assure that women and men receive equal treatment in North Dakota’s legal system, and to educate the bench, bar and the public about gender fairness in the legal system.

PIMA COUNTY, ARIZONA

Initiated by: Group of concerned Pima County attorneys, judges, probation officers and social scientists.
Established by: Judge Lillian Fisher.
Mandate: No formal mandate. Informal mandate is to examine whether men and women can find themselves at a disadvantage in certain types of cases, as litigants, clients, witnesses, attorneys, and/or suspects, as a result of gender stereotypes and to educate and raise public awareness to lessen or eliminate gender bias.

RHODE ISLAND

Initiated by: Rhode Island Bar Association Committee on Sex Discrimination.
Established by: Chief Justice of the Rhode Island Supreme Court.

Mandate: To examine the extent to which gender bias exists in the state courts, document specific instances of discrimination and to formulate solutions to the problem.

UTAH

Initiated by: Chief Justice of the Utah Supreme Court.
Established by: Utah Judicial Council.
Mandate: To determine the nature, extent, and consequences of gender bias in Utah, to direct its efforts towards both substantive and procedural aspects of the law . . . (and) to make concrete recommendations for reform, as well as to monitor progress as changes may occur over the long term.

VERMONT

Initiated by: Women's Section of the Vermont Bar Association, Ellen Mercer Fallon, Esq., Vermont Supreme Court Chief Justice Frederic W. Allen.
Established by: Vermont Bar Association and the Vermont Supreme Court.
Mandate: To investigate the existence of gender bias in Vermont's legal system, document its manifestations and consequences, and, where appropriate, to propose and facilitate steps toward its elimination.

WASHINGTON

Initiated by: Washington State Legislature.
Established by: Chief Justice of the Washington State Supreme Court.
Mandate: To study the status of women and minorities as litigants, attorneys, judges, and court employees, make recommendations for implementing reform, and provide attitude awareness training for judges and legal professionals.
Initiated by: State Bar Special Committee on the Participation of Women in the Bar.
Established by: Wisconsin Supreme Court Chief Justice Nathan S. Heffernan.
Mandate: To investigate the extent to and means by which gender affects the delivery of legal services and the opportunities for fair and accessible treatment in the legal services and the opportunities for fair and accessible treatment in the legal system, and make specific recommendations for methods of eliminating gender-related problems identified through such investigation.
APPENDIX C

EVALUATION

CLASS ON RACE & GENDER BIAS IN TRIAL PRACTICE

THIS EVALUATION IS MEANT TO GIVE THE INSTRUCTOR FEEDBACK AS TO THE USE OF THIS CLASS IN THE FUTURE. PLEASE DO NOT PROVIDE YOUR NAME.

OPTIONAL:  Sex ___ F ___ M
Race or ethnicity ______________
Age ______

PLEASE ANSWER THE FOLLOWING QUESTIONS AND USE THE BACK OF THIS PAGE IF YOU NEED MORE SPACE:

1. Have you ever discussed race or gender bias in the courts in a law school class before today? If so, please describe the setting. Did you find it a valuable discussion?

2. Did you find today’s class valuable? Why or why not?

3. Was there any part of today’s discussion that you found offensive? If so, how was it offensive?

4. Have you personally experienced or witnessed race or gender bias in the courts in the course of a clinical program or other law school experience? Optional: Please describe briefly.

5. What would you change about today’s class for future presentations?

6. Did you feel there was ample time today to discuss the issues presented? Would you like to spend more time discussing these issues?
7. Did you read the assigned readings for class? If so, were they helpful? Any suggestions?

8. How do you feel about your ability to deal with race and gender bias when you begin to practice law?

9. How would you rate the significance of the issue of race and gender bias in trial practice to your future as an attorney?

   _____ Very significant
   _____ Significant
   _____ Slightly significant
   _____ Not significant

   Why?

10. Other comments: