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Russell A. McClain

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### Recommended Citation

Russell A. McClain, *Bottled at the Source: Recapturing the Essence of Academic Support as a Primary Tool of Education Equity for Minority Law Students*, 18 U. Md. L.J. Race Relig. Gender & Class 139 (2018). Available at: <https://digitalcommons.law.umaryland.edu/rrgc/vol18/iss1/21>

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**BOTTLED AT THE SOURCE: RECAPTURING THE ESSENCE OF  
ACADEMIC SUPPORT AS A PRIMARY TOOL OF EDUCATION EQUITY  
FOR MINORITY LAW STUDENTS**

Russell A. McClain\*<sup>1</sup>

INTRODUCTION

The inaugural diversity conference of the Association of Academic Support Educators and this symposium have presented us with a clear opportunity to focus on the commitment of academic support programs to diversity in the legal profession. From the grassroots beginnings of academic support efforts, these programs have been fundamental to the academic and bar exam success of law students of color. But during the last two decades, academic support programs have gravitated away from that original focus. This shift has worked to the direct disadvantage of minority (primarily Black and Latino/a) students. A return to focusing on these students—coupled with an appreciation for more recently-discovered psychological dynamics affecting minority student learning—has the potential to dramatically improve learning for these students.

Part I of this paper focuses on the history of academic support programs, exploring (i) their origins in law school integration efforts and their connection to a desire to improve the academic performance of African-Americans and other students of color, and (ii) the drift away from a race/ethnicity-based focus toward a race-neutral (i.e., low performance) model.<sup>2</sup> Part II identifies the weaknesses in a race-neutral approach—namely, the failure to address the impact of implicit bias and stereotype threat, psychological dynamics that can have a dramatic effect on academic performance.<sup>3</sup> Part III sets forth a proposal for an academic support program that includes an explicit focus on minority

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\* Law School Associate Professor, Associate Dean for Diversity and Inclusion, and Director, Academic Achievement Program, University of Maryland Francis King Carey School of Law. Special thanks to Jill Smith, librarian extraordinaire, who helped me with so much of my research. Thanks also to the joint junior faculty workshop between the University of Maryland Carey Law School and the University of Baltimore law school.

<sup>1</sup> Some of the content for this article is adopted from an earlier article on stereotype threat. See Russell A. McClain, *Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016).

<sup>2</sup> See *infra* Part I.

<sup>3</sup> See *infra* Part II.

performance, accounting for the existence of stereotype threat and implicit bias.<sup>4</sup>

#### I. THE SOURCE: ACADEMIC SUPPORT PROGRAMS SPRING FROM RACE-BASED AFFIRMATIVE ACTION

Since the civil rights era, there has been concern about the adequacy of number of African-Americans and (later) other ethnic minorities and women in the legal profession.<sup>5</sup> In the late 1960s and early 1970s, only about one percent of attorneys were black, while the percentage of Blacks relative to the total United States population was more than ten percent.<sup>6</sup> These numbers were due, in large part, to systematic discrimination and marginalization of even the Blacks who were lawyers.<sup>7</sup>

Widespread recognition of the underrepresentation of minorities in law school and in the legal profession led to efforts to correct the

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<sup>4</sup> See *infra* Part III.

<sup>5</sup> See Henry W. McGee, Jr., *Minority Students in Law School: Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 BUFF. L. REV. 423 (1971). McGee describes how, “Northern law schools, ‘nominally open to Negro applicants,’ were until recently virtually lily-white, and ‘except for the occasional ‘Jim Crow’ institution, Southern law schools were completely closed to the Negro until the 1950’s.” *Id.* at 424 (quoting Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069, 1069 (1968)).

<sup>6</sup> McGee, *supra* note 5, at 424–25 (explaining that the “notorious ‘one per cent’ statistic” was drawn from 1968 census data showing the number of black lawyers at about 3,000 while the total number of lawyers was more than 300,000) (citing Gellhorn, *supra* note 5, at 1073)).

<sup>7</sup> McGee, *supra* note 5, at 424. As explained by Professor McGee “Those few blacks who slipped through the variety of barriers placed in their paths by the American social order and graduated from law school, found themselves relegated to the ‘fringe of the profession.’ Opportunities in firms, business, and government were virtually non-existent, so much that Secretary of Labor Wirtz called the legal profession ‘the worse [sic] segregated group in the whole economy or society.’ Almost any black lawyer who graduated from law school prior to 1967 can substantiate from personal experiences severely circumscribed professional opportunities.” *Id.* (citing W. Willard Wirtz, Sec’y of Labor, Dep’t of Labor, Address at the Association of American Law Schools Convention (Dec. 29, 1963); see William H. Brown III, *Racial Discrimination in the Legal Profession*, 53 JUDICATURE 385 (1970). See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (Transaction Publishers 1996) (1944); CARTER GODWIN WOODSON, THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY (Johnson Reprint Corp. 1970) (1934).

problem. In the 1960s, law schools at Emory, Harvard, Denver, Columbia, UCLA, and elsewhere began creating programs designed to (i) increase the admissions of Blacks in law school, and (ii) bolster the likelihood of academic success for these students once admitted.<sup>8</sup>

### A. CLEO

In the late 1960s as part of those efforts, the Council on Legal Education Opportunity (CLEO) was created in an effort to create a pipeline for these law school programs and to prepare students for law school.<sup>9</sup> The CLEO summer program was created, in part, to help students get access to schools to which they might not otherwise have been admitted.<sup>10</sup> CLEO began to hold pre-law programs for prospective minority law students.<sup>11</sup> These programs helped students develop the basic skills needed for survival in law school—how to read a judicial opinion, how to construct basic legal analysis, and how to write answers to law school exams.<sup>12</sup>

### B. *The Birth of Academic Support Programs*

During the same timeframe, law schools began to enact affirmative action admissions policies designed to grow the number of black lawyers.<sup>13</sup> These policies were moderately effective at increasing the number of Blacks in law schools. Over the decade of the 1970s, first-

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<sup>8</sup> See Teri A. McMurtry-Chubb, *Toward a Disciplinary Pedagogy for Legal Education*, 1 SAVANNAH L. REV. 69, 77–78 (2014); see also McGee, *supra* note 5, at 426 (“Pioneer programs were instituted at Harvard and New York University in 1965-1966 which were essentially summer programs with financial aid for minority students who were admitted under a different set of academic criteria.”); see also *The CLEO EDGE*, COUNCIL ON LEGAL EDUC. OPPORTUNITY, INC., <https://cleoinc.org/50/about/> (last visited Mar. 23, 2018).

<sup>9</sup> See *The CLEO EDGE*, *supra* note 8; McGee, *supra* note 5, at 426 (“CLEO is, of course, now the largest of the law school ‘headstart’ or ‘prestart’ programs.”).

<sup>10</sup> McGee, *supra* note 5, at 426.

<sup>11</sup> CLEO was and remains a leading organization for the minority preparation for law school. See *The CLEO EDGE*, *supra* note 8 (noting CLEO’s fifty years of “championing education diversity and greater equality in legal profession”).

<sup>12</sup> *Id.*

<sup>13</sup> McGee, *supra* note 5, at 426 (discussing “pioneer programs” from elite law schools in the mid-1960s).

year enrollment nearly tripled, and, by the mid-1980s, minority enrollment was at an all-time high.<sup>14</sup>

But with the admission of greater numbers of minorities followed other concerns. Not only was admission of Blacks a significant issue, but so was retention.<sup>15</sup> Blacks and other students of color received lower grades than Whites,<sup>16</sup> attrition rates for minorities were higher, and minority students failed the bar exam at higher rates.<sup>17</sup> It became clear that increased admission of minority students, alone, would not sufficiently resolve issues of underrepresentation in the profession.

To find ways to support the academic development of black students while in law school, law schools slowly began to adopt Academic Support Programs (ASPs).<sup>18</sup> From the 1970s through the early 1990s, either faculty members or administrators as ancillary aspects of their jobs ran most ASPs.<sup>19</sup> There was very little formal training for those running ASPs, and the programs took various forms.<sup>20</sup>

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<sup>14</sup> Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55, 55 n.1 (1989) (“1986 was the first year the number of minority students enrolled in law schools exceeded ten percent . . .”).

<sup>15</sup> Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 158 (1995).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Finke, *supra* note 14, at 59 (identifying four grounds to support a race conscious ASP: (i) serving minorities, (ii) increasing or maintaining diversity, (iii) providing role models for minorities, and (iv) eliminating negative stereotypes about minorities). See also Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support Program*, 12 T.M. COOLEY L. REV. 559, 572 (1995) (describing the California Western School of Law ASP).

<sup>19</sup> In many cases, minority professors or administrators became the de facto academic support professionals in their law schools. See Audio Recording: Interview with Kent Lollis, Exec. Dir. for Diversity Initiatives, Law Sch. Admin. Council, with Russell A. McClain (Mar. 2013, 5:07) (on file with author) (“Whenever you are a black administrator at any university, you get called on to do almost everything. So as soon as I arrived [at the University of Louisville Brandeis School of Law] the black law students descended upon my office, and I became their advisor, and that was almost like a full-time job.”). This is not universally true. For example, some schools, like the Southern University Law Center and others, created comprehensive ASPs and committed substantial resources to them.

<sup>20</sup> See Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839 (1997). As explained by

Those administering ASPs began to meet one-on-one with minority students, working on developing the skills of these students in an effort to make them more competitive.<sup>21</sup> Some programs worked with groups of minority students, doing workshops for them on a range of academic skills, teaching students effective ways to read, take notes, outline, and compose written legal analysis.<sup>22</sup>

ASPs also created pre-law programs to help minority students adjust to the rigors of law school.<sup>23</sup> These programs introduced law students to the law school environment by having them participate in mock classes and do introductory legal work.<sup>24</sup> Once in law school, many students were offered one-on-one tutoring or academic advising.<sup>25</sup> Most ASPs offered voluntary or mandatory services to students after the first semester of law school.<sup>26</sup> In large part, all of these

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Professor Lustbader: “Although several programs have been in existence for decades, until 1988, many ASPs existed in isolation from one another. Each program developed in response to the specific needs of its institutions [sic] and students. In fact, most law schools did not have a formal ASP. But with the increasing need for law schools to diversify their student body, came a concomitant duty to provide assistance for those students. Thus, many law schools became interested in developing their own ASPs.” *Id.* at 841–42. *See also* McMurtry-Chubb, *supra* note 8, at 77 (“Some law schools’ responses to low minority law school admissions was to develop nascent Academic Support Programs (ASPs) aimed at recruiting those students to legal careers.”). Audio Recording: Interview with Ruth Ann McKinney, Professor Emeritus, Univ. of N.C. Sch. of Law, with Russell A. McClain (Mar. 26, 2013, 1:00) (on file with author) (“Academic support probably doesn’t have a universal definition, because it varies depending on the institution that is offering those services in their program.”).

<sup>21</sup> Knaplund & Sander, *supra* note 15, at 184–85 (calling tutoring the “most widespread [type of academic support] in law schools nationally”).

<sup>22</sup> The instruction on writing included short-term writing, like that on exams, and longer-term work-product, like that created in traditional legal analysis and writing courses. *See* Interview with Ruth Ann McKinney, *supra* note 20, at 51:00 (discussing development of a program designed to help students develop research, reading, writing, and reasoning skills).

<sup>23</sup> Knaplund & Sander, *supra* note 15, at 161.

<sup>24</sup> *Id.* at 184–85.

<sup>25</sup> *Id.* (calling tutoring the “most widespread [type of academic support] in law schools nationally”).

<sup>26</sup> *See generally* Judith J. Devine & Jennifer D. Odom, *Do Academic Support Programs Reduce the Attrition Rate of First-Year Law Students?*, 29 T. MARSHALL

iterations of ASPs focused on skills development.<sup>27</sup> Doctrinal teaching was mostly absent except only as necessary to allow the students to work on the relevant skills.<sup>28</sup>

At the source of the development of ASPs was an understanding of the core ASP mission:

Although no model program design emerged from [early efforts to organize ASPs], what did emerge was a *consensus that ASPs share a common mission: to provide diverse persons access to legal education*, help create community, help diverse students succeed and excel academically, and most importantly, preserve students' feelings of self-worth and value. In addition to this common mission, ASP professionals realized that they serve a variety of roles in carrying out this mission.<sup>29</sup>

### C. The LSAC's Leadership

By the early 1990s, the Law School Admissions Council (LSAC) had gotten into the ASP mix. LSAC leadership saw the increased attrition rates at law schools and endeavored to make a difference in minority academic performance.<sup>30</sup>

Kent Lollis, who had been an administrator or faculty member at two law schools,<sup>31</sup> already had acted as a *de facto* academic support professional. As one of a few minority faces in leadership and faculty

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L. REV. 209 (2004) (noting differences between mandatory and voluntary ASP programs).

<sup>27</sup> See Lustbader, *supra* note 20, at 854.

<sup>28</sup> Even today, most academic support professionals are administrators, staff, or non-tenured faculty. See Knaplund & Sander, *supra* note 15, at 176. This limits opportunities for teaching substantive (doctrinal) material, relegating these instructors to teaching skills-based courses only. See Lustbader, *supra* note 20, at 855–56.

<sup>29</sup> Lustbader, *supra* note 20, at 842 (emphasis added).

<sup>30</sup> Interview with Kent Lollis, *supra* note 19, at 19:00.

<sup>31</sup> *Id.* at 3:35. Lollis was Associate Dean for Law Career Services and Associate Professor of Law at Ohio Northern University Claude W. Pettit College of Law from 1987-1992 and Assistant Dean for Administration at University of Louisville Louis Brandeis School of Law from 1983-1987. See Kent D. Lollis, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/diversity/bios/lollis.html> (last visited Mar. 30, 2018).

at those schools, students of color gravitated toward him immediately. He began to provide support to those students in formal and informal ways. In 1992, when Lollis arrived at the LSAC, the organization already was in the process of consulting with law schools on academic support initiatives.<sup>32</sup>

In doing this, the LSAC worked to develop an academic support handbook—a guide of best practices for academic support.<sup>33</sup> But there were two problems with this effort. First, ASPs had grown organically, so there were no universally accepted best practices that had yet arisen from these various ASP laboratories.<sup>34</sup> Second, because each school was different—e.g., in rankings, resources, student preparedness, and institutional commitment—there was no one-size-fits-all set of practices for ASP.<sup>35</sup> On the other hand, it was clear that academic support professionals from law schools across the country were developing expertise and could benefit from each other’s experiences and knowledge.

To capitalize on and marshal this decentralized expertise, the LSAC began hosting annual workshops, where academic support professionals from across the country could meet and share ideas.<sup>36</sup> Like the academic support efforts of the workshop participants, a significant focus of these early workshops was providing academic assistance to minority students.<sup>37</sup> For nearly two decades, the LSAC was the driving force supporting the work of ASPs.<sup>38</sup>

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<sup>32</sup> See Interview with Kent Lollis, *supra* note 19, at 14:10 (noting that “[t]he initiative was up and running” in 1992). See also Lustbader, *supra* note 20, at 842.

<sup>33</sup> Lustbader, *supra* note 20, at 842.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 842 n.13.

<sup>36</sup> Professor Lustbader notes that “[T]he Law School Admission Council (LSAC) committee on minority affairs concentrated its efforts to promote the proliferation of ASPs by retaining a consultant who: researched existing programs to collect a variety of program designs, instructional materials, and administrative models; created a manual for ASPs; traveled to numerous schools to help them develop a program; and developed a five-day institute on ASPs.” *Id.* at 842.

<sup>37</sup> *Id.* at 842–43.

<sup>38</sup> LSAC’s involvement with Academic Support has been ongoing “since 1992, with the sponsorship of the Law School Admission Council, academic support professionals have had an annual national conference. These conferences have provided a much needed forum for ASP teachers to share their ideas, knowledge,



*D. The Drift Away from Race-Based Academic Support*

As more ASPs across the country began developing programs designed to assist minority students, these programs came under significant pressure. This pressure followed a predictable path, like other challenges to affirmative action programs.<sup>39</sup> These attacks came on the heels of one of the greatest civil rights gains in American history<sup>40</sup> and were based primarily on the argument that affirmative action gave less qualified black applicants positions to which better qualified white applicants were entitled.<sup>41</sup>

Two primary forces began to push against the race focus of most academic support programs.<sup>42</sup> The first was stigma, which can refer to the negative stereotype that students admitted under affirmative action policies are less qualified than their majority counterparts.<sup>43</sup> On the other hand, stigma can refer to the corresponding effect that low performance by black students has by “confirming” these negative

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approaches to solving problems, theories, and teaching methods. Because of this professional organizing and collaborating, many existing programs have improved their effectiveness, new programs have been established, and the number of ASP professionals has grown significantly.” *Id.* at 844–45. The Association of Academic Support Educators, a national organization for those working in law school academic support, was formed and held its inaugural conference in 2013. *See Upcoming Conferences*, ASSOC. OF ACAD. SUPPORT EDUCATORS, <http://www.associationofacademicupporteducators.org/conferencesevents.html> (last visited Mar. 30, 2018).

<sup>39</sup> *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (reversing an order by Supreme Court of California enjoining the University of California at Davis from considering race as a factor for admission into its medical school).

<sup>40</sup> *Id. Bakke*, which was decided in 1978, was based on facts occurring in the early-to-mid 1970s. *See Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1155 (1976), *rev'd in part*, 438 U.S. 265 (1978).

<sup>41</sup> *Bakke*, 438 U.S. at 266.

<sup>42</sup> *See Finke, supra* note 14, at 59 n.11 (“Much of the discussion of academic support programs . . . centered on the twin problems of the resentment felt by ineligible nonminority students and the stigma placed upon minority participants.”); *see also* Interview with Ruth Ann McKinney, *supra* note 20, at 5:03 (“What academic professionals know or should learn quickly is that focusing only on whatever the baseline target audience is creates stigma and backlash.”).

<sup>43</sup> *See generally* Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 CALIF. L. REV. 101 (2008) (discussing stigma as a consequence of affirmative action).

stereotypes for both minority students and their white colleagues. Both understandings of stigma affected ASPs.<sup>44</sup>

Even though ASPs were designed to help minority students familiarize themselves with law school basics, the narrative arose that the participating students—who were mostly black and brown—were deficient and needed fixing.<sup>45</sup> This carried with it the risk of creating a self-fulfilling prophecy. In other words, by communicating to minority students that they were less likely to succeed, ASPs actually made it more likely that those students would not succeed.<sup>46</sup> The culture of low expectations actually reinforced low performance.<sup>47</sup> If the students were equal and capable, the narrative asks, why did they need extra help before classes started?<sup>48</sup> This notion of stigma was exacerbated by the fact that minority students still tended to perform at the bottom of the

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<sup>44</sup> See Adam G. Todd, *Academic Support Programs: Effective Support Through a Systemic Approach*, 38 GONZ. L. REV. 187, 190 (2002) (citing Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs – A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205, 205 n.1 (2000)) (“A number of legal scholars have mentioned that academic support programs might potentially harm students. Kathy Cerminara and Paul Wangerin use compelling empirical evidence and data to show that stigma, backlash, and dependency can undermine the goals of academic support.”). See Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 772–73 (2000); Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 256–57 (1996). See also Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L. J. 771, 773, 786–89 (1989).

<sup>45</sup> See Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 808 MISS. L. J. 259, 290 (2010) (recognizing that that “law schools may disproportionately dismiss African American students” and that to “address the attrition problem generally, law schools now require or highly recommend that students participate in school-sponsored academic success programs to assist those who enter law school with slightly lower grade point averages or LSAT scores”).

<sup>46</sup> See Todd, *supra* note 44, at 194 (noting that stigma has a “debilitating effect on the program’s efficacy”).

<sup>47</sup> See Lustbader, *supra* note 20, at 856 (noting that programs deemed “remedial” have a “negative impact on learning”).

<sup>48</sup> See Cerminara, *supra* note 44, at 256 (discussing beliefs that students are “less intellectually capable than other students” is reinforced by programs which are “targeted specifically at them”).

law school performance ranks.<sup>49</sup> In addition (although there was little conformity among different ASPs),<sup>50</sup> many students who performed at the bottom of the class were required to participate in ASP programs occurring during the semester.<sup>51</sup> Sometimes, students were pulled out of “normal” classes and placed in ASP courses, further reinforcing the stigma that these courses were remedial.<sup>52</sup> Remedial classes filled mostly with minority students served only to reinforce negative stereotypes, both for those inside and those outside of these classes.<sup>53</sup> This stigma led to resentment from students who were participating in ASPs.<sup>54</sup>

While pressure from stigmatized students was building, so was a corresponding pressure. White students expressed growing concerns about so-called “reverse discrimination”—i.e., that black students were

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<sup>49</sup> See DONALD E. POWERS, *DIFFERENTIAL TRENDS IN LAW SCHOOL GRADES OF MINORITY AND NONMINORITY LAW STUDENTS* 1 (1982), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/j.2333-8504.1982.tb01307.x>.

<sup>50</sup> See Lustbader, *supra* note 20, at 842.

<sup>51</sup> Knaplund & Sander, *supra* note 15, at 191 (discussing how a mandatory course for students on academic probation “[b]y its very nature . . . became and experiment in academic support”).

<sup>52</sup> The idea that these courses were remedial also was reinforced by the fact that these courses sometimes were presented as less rigorous versions of other course, focusing on less challenging material (either in subject matter or volume), thus requiring less of ASP participants than their colleagues. This sent the unintended message that these students were less capable than others. See Lustbader, *supra* note 20, at 856.

<sup>53</sup> These approaches continue today. In 2006, when I began directing the Academic Achievement Program at the University of Maryland Carey Law School, lower performing students were withdrawn mandatorily from their normal third semester writing courses and placed into a remedial course. See Dionne L. Koller, *Legal Writing and Academic Support: Timing is Everything*, 53 CLEV. ST. L. REV. 51 (2005). The normal courses had roughly twenty-five students in them, so when low-performing students were pulled from their classes, their absence was obvious. Moreover, the remedial course, which was offered at a time when others were not in class, was clearly designated on the school’s online curriculum. Given that minority students were overrepresented in the bottom parts of the class, other students could walk by and see a classroom heavily populated by faces of color. Word spread throughout the school, with low-performing white students announcing that they had been placed in a remedial class with mostly black students. Inside the classroom, black students sat embarrassed and powerless, realizing that in some minds they were merely confirming enduring stereotypes about the academic ability of Blacks.

<sup>54</sup> See Finke, *supra* note 14, at 59 n.11.

receiving a benefit that the white students were not receiving.<sup>55</sup> This “affirmative action backlash” did not exist in a vacuum; in the 1970’s—immediately on the heels of the civil rights era and the emergence of affirmative action programs—anti-affirmative action sentiment was growing across the country.<sup>56</sup>

These pressures tested the resolve of law schools to continue their race-conscious ASPs. The result was that many ASPs moved toward race-neutral models.<sup>57</sup> Instead, over the last twenty years,

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<sup>55</sup> As early as 1971 Henry W. McGee Jr. discussed the possible consequences of ideas of “reverse discrimination,” for the legal profession, expressing concern that “[t]he feeling that blacks are getting a special advantage to the detriment of whites [was] a disturbing development that could ultimately lead to the dismantling of programs designed to increase the number of black attorneys.” McGee, *supra* note 5, at 432.

<sup>56</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>57</sup> The University of Maryland School of Law was one of many schools that developed their own ASPs in the late 1980s. The Maryland version was a course that invited admitted minority students to the law school two weeks before their regular courses began. Then Dean of the Law School, Michael Kelly published a piece in the student newsletter describing the program. See, Michael J. Kelly, *Ref*, RAVEN (Univ. of Md. Sch. Of L.), Nov. 1989, at 2. During the two weeks, students met faculty, took mock classes, completed writing assignments, and had opportunities to socialize with each other. At the time, Maryland was well regarded for having a diverse student population—at the time meaning that it had a significant population of African American students, as compared to other schools that were not historically black. So the cohort of incoming students in any given year achieved a critical mass. This, coupled with the pre-enrollment program, had the effect of instilling in its participants a sense of belonging. In addition, the program permitted students to familiarize themselves with the law school process and engage in some degree of academic rigor during the pre-enrollment period. This program was the center of controversy, when then Dean Kelly described the program as “designed to assist specially admitted students,” which sparked the formation of a Student Bar Association Race Relations Committee. This Committee hosted a forum and surveyed 166 students, then published a report on racial issues on campus. See *Race Relations Committee Report*, RAVEN (Univ. of Md. Sch. Of L.), May 14, 1990, at 2, 16. The conflicting views of students on Maryland’s academic support program at the time echo the same concerns around such programs today. “Those students supporting the Summer Program identify the positive benefits of providing Black Law students with a sense of solidarity. . . . Sixty-eight percent of the Black students responding to [the survey] perceived that professors treat students differently because of their race. . . . Opposition to the Summer Program advances the argument that the Summer Program actually causes Black students to isolate themselves from students of other races. Therefore, the social polarization ultimately resulting from

many<sup>58</sup> ASPs have refocused their efforts on low-performing students.<sup>59</sup> In most cases, these race-neutral moves have been made with the best of intentions. Given that minorities tended to be overrepresented at the bottom of the class, many programs move forward with the belief that “low-performing” can be used as a sort of proxy for racial and ethnic minorities. In other words, because minorities are overrepresented in the lower tiers of class rankings, it is more likely that they will be helped by programs targeted at those tiers.<sup>60</sup>

Other programs avoid arguments about preferential treatment altogether, offering academic support to the entire class.<sup>61</sup> This is a common aspect of ASPs that continues today. ASPs generally offer assistance during orientation and throughout the first semester of law

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the Summer Program outweighs any positive benefits recognized. Other students feel to truly end all forms of ‘discrimination’ the administration should likewise end all academic programs open to only certain races. No easy solution exists from solving the Summer Program dilemma. Is the program a necessary supplement to a Black Law Student’s education, or an aging dinosaur that more appropriately existed during some forgone time period?” *Id.*

<sup>58</sup> There is a dearth of data showing how many ASPs reach out directly to students of color.

<sup>59</sup> See David C. Walker, *A Third Place for the Law Library: Integrating Library Services with Academic Support Programs*, 105 LAW LIBR. J. 353, 358 (2013) (“In response to the fact that some students must make a greater effort to develop the requisite skills for success in law school, academic support programs have expanded in American legal education. While the structures of such programs differ among law schools, the ultimate goal of each of them is to provide support to students who are at risk of not being admitted to the bar (which in some cases may be the result of not being able to complete law school). Some academic support programs aim to increase the retention rate of academically at-risk students, while others focus purely on bar passage rates. Some programs target minority students, some target at-risk students, and some target all first-year students.”).

<sup>60</sup> As I discuss later, this reasoning suffers from a serious flaw. Black and brown students at all levels of academic performance may suffer under the pressure of stereotype threat. Thus, programs targeted at only the lower tiers fail students who happen to miss the low threshold. In other words, middle tier and higher tier students who could do even better than they are doing – if stereotype threat were ameliorated – may not reach their full performance potential. See *infra* Section II.B.

<sup>61</sup> See Finke *supra* note 14, at 59. (“Nonetheless, making race or ethnicity the sole factor for participation in a support program ignores the needs of many other nontraditional students who face barriers that unfairly impede their legal education. Although these students may be more difficult to identify, it is important to try to include them in an academic support program. Including them can benefit everyone in the program by removing the stigma minority programs often carry.”).

school.<sup>62</sup> The programs focus on introducing a full range of academic skills—like reading cases, class preparation, note-taking, outlining, studying, exam preparation, and exam writing—to all first-year students.<sup>63</sup> They also focus broadly on bar preparation for graduating students.<sup>64</sup> By supporting all students, these ASPs proceed on the hope that “a rising tide lifts all boats.”

In 2003, this shift in from a focus on minorities was documented—perhaps inadvertently—by Professor Adam Todd.<sup>65</sup> Professor Todd acknowledged that supporting minorities is core to the ASP mission:

Academic support programs in American law schools (“ASPs”) are often implemented with the express purpose of promoting social, racial, and economic diversity in the legal profession, which has historically excluded these populations.<sup>66</sup>

At the same time, he argued for a program that focused more broadly on the entire student body:

However, it appears that ASPs potentially perpetuate social, racial and economic barriers in law schools and

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<sup>62</sup> See, e.g., *Study Skill Workshops*, UNIV. OF WASH. SCH. OF L., <https://www.law.washington.edu/students/academicssupport/> (last visited Mar. 31, 2018) (describing the range of programs offered by the Academic Support Center, including study skills workshops); *Academic Support Program*, UNIV. OF PENN. SCH. OF L., <https://www.law.upenn.edu/academics/support/> (last visited Mar. 31, 2018) (describing a five part lecture series taught each fall by the director of the Academic Support Program).

<sup>63</sup> See, e.g., *Study Skill Workshops*, UNIV. OF WASH. SCH. OF L., <https://www.law.washington.edu/students/academicssupport/> (last visited Mar. 31, 2018); *Academic Support Program*, UNIV. OF PENN. SCH. OF L., <https://www.law.upenn.edu/academics/support/> (last visited Mar. 31, 2018).

<sup>64</sup> Appalachian School of Law offers a Bar Preparation Studies Course, primarily taught by Academic Support Center Staff, for students in the spring of their third year. *Academic Support and Bar Exam Preparation*, APPALACHIAN SCH. OF L., <http://www.asl.edu/academic-support-and-bar-exam-preparation/> (last visited Mar. 31, 2018).

<sup>65</sup> Todd, *supra* note 44, at 213.

<sup>66</sup> *Id.* at 188.

the legal community. These programs, rather than performing an inclusionary role, can potentially entrench an exclusionary hierarchy. Instead of changing law schools for the better, ASPs can enable the rest of the law school to continue functioning in the traditional manner that has historically caused people of certain social, racial, and economic backgrounds to be excluded from academic success. Furthermore, a poorly organized or underfunded academic support program can potentially harm the academic success of students participating in it, thereby further perpetuating the historic exclusion of these non-traditional student populations. For example, ASPs can cause harm by the additional work placed on a student participating in a given program, the dependence that such a program may create, or the stigma a student may feel from such a program.<sup>67</sup>

#### *E. Race-Neutral Academic Support*

In recent years, the attention of ASPs, and a growing body of academic support literature, has been on pedagogy, learning theory, and related matters. This focus on academic skills development is valid and important in its own right. But less and less academic support energy is spent focused specifically on issues of diversity. To be clear, by describing ASPs in this way, I do not mean to suggest that ASP directors are not concerned about issues of diversity. Notwithstanding that concern, ASPs often do not directly confront problems related to race, ethnicity, or other factors. In other words, ASPs are committing not an error of commission, but one of omission.

A cursory review of recent academic support scholarship suggests that academic support is, in large part, a race-neutral discipline, focused on many different topic areas.<sup>68</sup> Academic support

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<sup>67</sup> *Id.* at 190.

<sup>68</sup> For this proposition, I am relying exclusively on articles (i) published by authors who identify themselves—in their author's footnote—as or about whom it can be inferred that they are academic support professionals, or (ii) presented as relating to

professionals have mastered and are writing about topics including: (1) Bar Passage;<sup>69</sup> (2) Meta-Cognition;<sup>70</sup> (3) Flipped Classrooms;<sup>71</sup> (4) Learning Styles;<sup>72</sup> (5) Academic Preparedness,<sup>73</sup> and (6) other important topics.<sup>74</sup> However, while some writing in academic support

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academic support as a discipline. I am not accounting for the wide array of articles published that focus on accounting for minorities in legal education.

<sup>69</sup> See, e.g., Linda Jellum & Emmeline Paulette Reeves, *Cool Data on A Hot Issue: Empirical Evidence That A Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646 (2005); Derek Alphan et al., *Yes We Can, Pass the Bar. University of the District of Columbia, David A. Clarke School of Law Bar Passage Initiatives and Bar Pass Rates-from the Titanic to the Queen Mary!*, 14 UDC/DCSL L. REV. 9 (2011); Katherine A. Austin et al., *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753 (2017); Mario W. Mainero, *We Should Not Rely on Commercial Bar Reviews to Do Our Job: Why Labor-Intensive Comprehensive Bar Examination Preparation Can and Should Be A Part of the Law School Mission*, 19 CHAP. L. REV. 545 (2016).

<sup>70</sup> See Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269 (2011); Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy From Professor to Student*, 18 U. DET. MERCY L. REV. 1 (2003); Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons From Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311 (2013); Anthony S. Midwicket, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33 (2006); Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315 (1997); Kate E. Bloch, *Cognition and Star Trek: Learning and Legal Education*, 42 T. MARSHALL L. REV. 959 (2009).

<sup>71</sup> See, e.g., Susan D. Landrum, *Drawing Inspiration from the Flipped Classroom Model: An Integrated Approach to Academic Support for the Academically Underprepared Law Student*, 53 DUQ. L. REV. 245, 249 (2015).

<sup>72</sup> Robin Boyle et al., *Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles*, 17 PERSP. TEACHING LEGAL RES. & WRITING 153, 153, 159 (2009).

<sup>73</sup> Ruth Vance & Susan Stuart, *Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence*, 53 DUQ. L. REV. 133, 136–38 (2015); Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student as "Other"*, 61 J. LEGAL EDUC. 264, 265 (2011); Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 B.Y.U. EDUC. & L.J. 135, 136–38 (2015).

<sup>74</sup> Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699 (2012) (discussing the necessity of having a doctrinal learning component to law school);



seemed to focus on minority students<sup>75</sup>—the original focus of the academic support mission—relatively few have focused on these issues in recent years.<sup>76</sup>

Currently, black and brown students still overpopulate the bottom rungs of the class, fail the bar exam in greater numbers, and are

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Sophie M. Sparrow & Margaret Sova McCabe, *Team-Based Learning in Law*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 153 (2012) (discussing team-based learning techniques); Koller, *supra* note 53 (discussing how legal writing in law school compares to the legal field as whole); Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2007) (study showing that how a student reads an opinion correlates to their success in school); Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225 (2013) (discussing self-determination theory and receiving feedback); Louis N. Schulze, Jr., *Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth That FERPA Prohibits Cutting-Edge Academic Support Methodologies*, 19 WIDENER L.J. 215 (2009) (discussing FERPA's impact on ASPs).

<sup>75</sup> See Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?*, 73 UMKC L. REV. 497 (2004); Iijima, *supra* note 44; McGee, *supra* note 5; McClain, *supra* note 1.

<sup>76</sup> In the last ten years, scant more than a handful of articles have focused on minorities and academic support. See, e.g., Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member's Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489 (2008) (discussing ASP origins in minority support shifting to a focus on low performance); Jodie G. Roue, *Achieving Educational Equity and Access for Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CIV. RTS. L. REV. 31 (2009); Kevin W. Robinowich & Preyal D. Shah, *From Admission to Bar Passage: Extending A Helping Hand to Students at St. Mary's University School of Law*, 14 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 107 (2011); Erin Lain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal*, 45 J. L. & EDUC. 279 (2016); Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQ. L. REV. 163 (2015) (applying stereotype threat theory to struggling law students as a negatively stereotyped group); Antoinette Sedillo Lopez, *Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity*, 31 SEATTLE U. L. REV. 775 (2008); Sonia Bychkov Green et al., *Sailing Against the Wind: How a Pre-Admission Program Can Prepare At-Risk Students for Success in the Journey Through Law School and Beyond*, 39 U. MEM. L. REV. 307 (2009); McClain, *supra* note 1.

substantially underrepresented in the legal profession.<sup>77</sup> All of these are issues ASPs were designed specifically to address.<sup>78</sup> In other words, there is still work to be done to accomplish the original ASP mission.<sup>79</sup>

## II. *The Psychological Dynamics Affecting Performance of Minority Students in Law School*<sup>80</sup>

While ASPs were drifting away from a focus on minority law students, cognitive psychologists have made progress studying dynamics that affect academic performance, including those that can affect the academic success of minorities. In this section, this article will address how an understanding of these dynamics can make a significant difference in (i) where academic support programs focus their efforts, i.e., whether ASPs choose to spend deliberate effort focusing on the academic performance of minorities, and (ii) how successful those efforts will be in increasing minority student performance.

For the past several decades, researchers have investigated many psychological dynamics that can affect human behavior, including

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<sup>77</sup> See generally Weatherspoon, *supra* note 45 (discussing minority underrepresentation in the legal profession). According to data from the United States Census Bureau and the Department of Labor, the proportion of the population that is Hispanic and/or Black is not reflected in the demographics of the legal profession. See *Quick Facts Population Estimate*, U.S. CENSUS BUREAU, V2017 (July 1, 2017), <https://www.census.gov/quickfacts/fact/table/US/PST045217>; *Labor Force Statistics from Current Population Survey, 11. Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATS., <https://www.bls.gov/cps/cpsaat11.htm> (last visited Apr. 4, 2018). As of 2017, African Americans are more than 13% of the U.S. population but are only about 4.5% of the legal profession. Latino/a Americans are nearly 18% of the U.S. population but only 5.6% of the legal profession. Asian Americans are 5.7% of the population and 4.7% of the profession; see also Mary Wright, *Mission Accomplished? The Unfinished Relationship Between Black Law Schools and Their Historical Constituencies*, 39 N.C. CENT. L. REV. 1 (2016) (discussing the role and challenges of black law schools).

<sup>78</sup> As a practical matter, these issues still are the bailiwick of the ASP director. Few else in the law school environment are in positions to address these issues, and few others are in positions to be held directly accountable if these issues are not addressed sufficiently.

<sup>79</sup> See Wright, *supra* note 77, at 2.

<sup>80</sup> Portions of this section have been adopted from my earlier article on stereotype threat. See McClain, *supra* note 1.

academic performance. This section will focus on three dynamics—implicit bias, stereotype threat, and mindset. In this section I will show that each of these psychological effects, acting alone, can have an impact on the academic performance of minorities, while together, they can create a perfect storm and suppress minority academic performance dramatically.

### A. *Implicit Bias*

The term implicit bias refers to the insidious fallout from subconscious categorizations made by human minds.<sup>81</sup> In general, the study of implicit bias has shown that people react differently when confronted with differing “images” of race and gender.<sup>82</sup> The breadth of evidence of implicit bias is compelling, and many legal scholars have discussed how implicit bias should be considered in connection with law and policy.<sup>83</sup>

#### 1. Understanding Implicit Bias

In 2005, Professor Jerry Kang introduced legal academia to implicit bias.<sup>84</sup> In *Trojan Horses*, Kang summarized decades of social cognition research showing how race affects conduct in a variety of ways.<sup>85</sup> Research shows that human brains operate efficiently by using schemas, or subconscious categories.<sup>86</sup> Infinite external stimuli have the potential to overwhelm our brains, so our brains must sort the stimuli subconsciously.<sup>87</sup> This subconscious sorting function allows the human brain to make “automatic and nearly instantaneous”<sup>88</sup> categorizations based on external stimuli. In addition to the automatic sorting, the human brain ascribes characteristics to those categories.<sup>89</sup>

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<sup>81</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013).

<sup>82</sup> McClain, *supra* note 1, at 9.

<sup>83</sup> *Id.* at 10.

<sup>84</sup> Kang, *supra* note 81, at 1496–97.

<sup>85</sup> *Id.* at 1497.

<sup>86</sup> *Id.* at 1499.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1496–97.

<sup>89</sup> Kang, *supra* note 81, at 1496–97.

Imagine you are walking through a park and, out of the corner of your eye, you see near your feet something small moving quickly through the grass. You could consciously assess all of the available data—the thing that is moving is small, narrow, and slithering. This should cause you to conclude that it is a snake. Upon further reflection, you could attempt to determine if it is a garter snake—on the more harmless end—or some other, more dangerous species. You could calculate the likelihood of poisonous snakes in your geographical region and determine whether the risk of a dangerous snakebite is minimal or not. If you investigate closely, you probably could answer the question, but the inefficiency of this is obvious. In the time you spend consciously thinking through these options, you increase your risk of a less than positive encounter with the animal.

Instead, almost certainly, your brain will handle this situation by accessing a much more efficient process. First, your brain likely will categorize this as a small thing moving along the ground. Second, your brain will access the characteristics assigned to that category—wild, creepy, dangerous, biters, things to avoid. In reality, the categorization may be even more general—small movement on the ground equals bad. Regardless, you will not experience this consciously. What you will experience, however, is an elevated heart rate and an inescapable urge to jump away from the thing moving on the ground. And your reaction does not depend on your conscious judgment. Indeed, you may have the reaction I have described even if you like snakes. You may have the reaction above if what you saw was no animal at all but a piece of litter blowing through the grass. Upon reflection, you may determine that the danger was not as significant as your initial reaction would have suggested, but your instantaneous reaction would have been the same. This operation of the mind is part of a natural and necessary process that works well in the vast majority of situations that we encounter. But it can operate in insidious and unexpected ways.

Due to socialization, the human mind applies the same cognitive operation when it comes to human characteristics.<sup>90</sup> Race, ethnicity, skin color, gender, sexuality, body type, and disability all have been

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<sup>90</sup> *Id.* at 1499–1504.

identified as categories to which humans tend to assign either positive or negative characteristics.<sup>91</sup>

The long-running Harvard Implicit Association Test (IAT) focuses on potentially problematic human categorizations by measuring “the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).<sup>92</sup> The IAT measures the response time for users to select an appropriate key on a keyboard when faced with certain inputs.<sup>93</sup> For example, in the Race IAT users are asked to select a key on the left or right when presented with either of a pair of African-American or White images or positive or negative words. (e.g., a key on the left corresponds to African-American or a positive word, a key on the right corresponds to White or a negative word.)<sup>94</sup> The IAT has several rounds, so that in each round, the left or right key pairings change.<sup>95</sup> The data show that a supermajority of users find it easier to associate positive terms with

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<sup>91</sup> See Tanya Katerí Hernández, *One Path for “Post-Racial” Employment Discrimination Cases-The Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQ. 309, 321–22 (2014) (citing MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013)) (stating that “[t]here are IAT tests that measure implicit bias regarding gender, sexuality, religion Arab-Muslims, disability, age, weight, skin-tone, and race. Once the test is completed, test-takers receive ratings like ‘neutral,’ ‘slight,’ ‘moderate,’ or ‘strong’ preference for a particular group as a measure of their implicit bias on the subject tested. In short, the IAT measures the strength of associations between concepts like particular racial groups and positive or negative evaluations or stereotypes about that concept. The findings from Project Implicit’s six million participants over a decade of testing show that a majority of sampled Americans have some form of implicit bias. The associations are not randomly oriented but instead are biased in directions that favor groups higher in the social hierarchy. For instance, with respect to race, the IAT testing reveals that some 75% of Whites, Hispanics, and Asians show an unintentional bias for Whites over Blacks. In addition, one third of Blacks also show a preference for Whites over Blacks.”); Sarah E. Redfield, Professor Emerita, Univ. of NH, *Beyond Bias: Deconstructing Stereotypes*, Presentation at the ABA Section of Litigation Annual Conference 17 (Apr. 25, 2013), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac\\_2013/39\\_beyond\\_bias.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/39_beyond_bias.authcheckdam.pdf).

<sup>92</sup> PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Jan. 25, 2018).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Whites than they do with Blacks.<sup>96</sup> Conversely, these users make easier connections between Blacks and negative terms than they do Whites.<sup>97</sup> Other IATs reveal subconscious biases based on (i) skin color, (ii) gender, (iii) age, (iv) sexuality, (v) body type, and (vi) appearances or names perceived as being “Arab” or “Muslim.”<sup>98</sup>

This article will focus on the significantly studied bias concerning race. Most profoundly, the study of implicit bias has shown that people are more likely to make negative associations with Blacks that they do not make with Whites. These subconscious biases have been shown to make a difference in situations involving employment,<sup>99</sup> suspected criminal activity,<sup>100</sup> medical treatment decision-making,<sup>101</sup> and in other areas.

Although many, but not all, studies show a correlation between implicit biases and behavior.<sup>102</sup> In general, in medicine, for example, implicitly-held biases tend to be connected to treatment disparities.<sup>103</sup>

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<sup>96</sup> See, e.g., Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL’Y & L. 562, 564 (2011).

<sup>97</sup> *Id.*

<sup>98</sup> PROJECT IMPLICIT, *supra* note 92.

<sup>99</sup> See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

<sup>100</sup> See Bassett, *supra* note 81, at 1577 (describing potential effects of implicit bias on eyewitness identifications and jury deliberations); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); Ali Eacho, Comment, *Surviving Implicit Bias: Why the Appellate Court’s Interpretation of the 2012 Amendment to the Racial Justice Act Will Be a Life or Death Decision for North Carolina Death Row Prisoners*, 21 AM. U. J. GENDER SOC. POL’Y & L. 647 (2013); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012); Casey Reynolds, Note, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 L. & PSYCHOL. REV. 229 (2013).

<sup>101</sup> See *infra* notes 102–06.

<sup>102</sup> See Heather Mac Donald, *The False ‘Science’ of Implicit Bias*, WALL ST. J. (Oct. 9, 2017), <https://www.wsj.com/articles/the-false-science-of-implicit-bias-150759090>.

<sup>103</sup> See Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 BMC MED. ETHICS 19 (2017); Janice A. Sabin & Anthony

For example, in a study of pediatric patients, doctors with implicit biases—as measured by the IAT—were discovered to be more reluctant to prescribe higher levels of pain medication for black patients rather than Whites.<sup>104</sup> In another study, decisions on heart surgery procedures were correlated to biases.<sup>105</sup> But in some studies, although the data show both biases and treatment disparities, they may not be connected.<sup>106</sup>

Implicit biases are known to affect those who are subject to stereotyped groups in the same way—but perhaps not quite to the same extent—as those who are not in the groups.<sup>107</sup> So, women may hold biases against women, African Americans may be biased against African Americans, and so forth. In other words, these subconscious judgments are not limited to just a few. They affect everyone.

## 2. Implicit Bias in Law School

In law school, implicit bias can be expected to affect the teaching and learning environment in several ways.<sup>108</sup> If one envisions a professor who carries implicit biases about her students, those biases

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G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma*, 102 AM. J. PUB. HEALTH 988 (2012); Jeff Stone & Gordon B. Moskowitz, *Non-Conscious Bias in Medical Decision Making: What Can Be Done to Reduce It?*, 45 MED. EDUCATION 768 (2011); Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 J. GEN. INTERNAL MED. 1504 (2013); M. Norman Oliver et al., *Do Physicians' Implicit Views of African Americans Affect Clinical Decision Making?*, 27 J. AM. BOARD FAM. MED. 177 (2014); Adam T. Hirsh, et al., *The Interaction of Patient Race, Provider Bias, and Clinical Ambiguity on Pain Management Decisions*, 16 J. PAIN 558 (2015); Jordana R. Muroff et al., *The Influence of Gender, Patient Volume and Time on Clinical Diagnostic Decision Making in Psychiatric Emergency Services*, 29 GEN. HOSP. PSYCHIATRY 481 (2007).

<sup>104</sup> See Sabin & Greenwald, *supra* note 103, at 994.

<sup>105</sup> Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERN. MED. 1231 (2007).

<sup>106</sup> See FitzGerald & Hurst, *supra* note 103.

<sup>107</sup> Hernández, *supra* note 91, at 322.

<sup>108</sup> See generally Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L. J. 537 (2015) (discussing the prevalence of implicit biases in legal education, and the importance of addressing them).

could cause her to view one or more of her students as being less capable than others in the class. This view could in turn affect the professor's willingness to be as rigorous during Socratic dialogue, or to spend extra effort helping the student achieve a breakthrough in office hours. The professor may be less likely to provide mentoring opportunities or to recommend the student for employment.

Biases likewise could impact the choices students make about their colleagues.<sup>109</sup> If students tend to be biased against certain of their colleagues, their bias could cause them to leave their colleagues out of study groups, distrust them in collaborative exercises, or simply overlook them all together.

To place a fine point on it, consider a professor who asks a question of a student in class. The professor subconsciously categorizes the student as being in a category that classifies the student as less capable (even though the professor may not believe this consciously). If the student answers incorrectly or with less insight than the professor hoped, the professor may be more likely to move on from the student rather than press on with her. Note that this would have the effect of sending the message to the student that she is less capable and also communicating to the rest of the class that the student does not belong. It would further reinforce the biases of the student's classmates, who then would be less likely to include her in their academic activities. Coupled with minority underrepresentation in law school, these biases can leave minorities feeling isolated and out of place, working to the detriment of the student's academic development.

On the other hand, if the professor were able to overcome the bias, the professor might retain the expectation that the student is capable of understanding the concept. This would cause the professor to continue with the questioning and lead the student to understanding. This would send the message to the student and her classmates that the professor believes she is capable of succeeding, triggering a cycle of success rather than a cycle of failure.

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<sup>109</sup> *Id.* at 556.



### *B. Stereotype Threat*<sup>110</sup>

While implicit bias focuses, generally, on the views our minds construct about others, the study of stereotype threat looks at the reactions people have to the actual or perceived feelings of others.<sup>111</sup> Specifically, stereotype threat refers to the effect that negative group stereotypes can have on the performance of members of those groups.<sup>112</sup> To test the theory of stereotype threat, researchers set up tasks for members of particular groups to see how they would perform on tasks that appear to measure a stereotype-related characteristic.<sup>113</sup> The experiments examined group performance under conditions where the stereotype threat was “primed” and compared those results to performance where the primer was neutralized.<sup>114</sup> In every study, the groups being studied performed worse when stereotype threat was primed than when the primer was eliminated.<sup>115</sup>

#### 1. The Scope of the Threat

Since the mid-1990s, dozens of studies have tested the existence of stereotype threat and replicated Steele and Aronson’s original results.<sup>116</sup> Generally, those studies have shown that stereotypes exist broadly, but the two most studied negative stereotypes are (i) African-Americans are not as intelligent as Whites, and (ii) women are not as good as men at math.<sup>117</sup> This section will describe in detail the leading studies of stereotype threat. Individually, each of these studies describes a profound psychological dynamic that affects individual performance.

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<sup>110</sup> This section is adopted from an earlier article on stereotype threat. *See* McClain, *supra* note 1.

<sup>111</sup> *Id.* at 9.

<sup>112</sup> *See generally* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *AM. PSYCHOL.* 613 (1997) [hereinafter Steele, *A Threat in the Air*] (discussing how domain identification is used to describe achievement barriers faced by women and African Americans).; CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010) [hereinafter STEELE, WHISTLING VIVALDI] (discussing research on stereotypes and identity).

<sup>113</sup> *See generally* Steele, *A Threat in the Air*, *supra* note 112.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 627.

<sup>116</sup> *See infra* notes 118 and 135.

<sup>117</sup> *See infra* note 135.

Collectively, they show a shockingly pervasive threat that, left unaddressed, significantly and measurably depresses group performance.

One of the two most studied areas of stereotype threat involve African-Americans and intelligence.<sup>118</sup> Through these studies, researchers have demonstrated that African-Americans perform worse when confronted with a task that primes the negative stereotype that Blacks are less intelligent than Whites. The primer can be something as pernicious as “this test is diagnostic of intellectual ability,”<sup>119</sup> something slightly less obvious, such as having test subjects identify their race before taking an aptitude test,<sup>120</sup> or a seemingly non-race-based primer,

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<sup>118</sup> See, e.g., Steele, *A Threat in the Air*, *supra* note 112, at 613–29; Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC, Aug. 1999; Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995) [hereinafter Steele & Aronson, *Intellectual Test Performance*]; Michael J. Cullen et al., *Using SAT-Grade and Ability-Job Performance Relationships to Test Predictions Derived From Stereotype Threat Theory*, 89 J. APPLIED PSYCHOL. 220 (2004); Nalini Ambady et al., *Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance*, 12 PSYCHOL. SCI. 385 (2001); Robert E. Ployhart et al., *Understanding Racial Differences on Cognitive Ability Tests in Selection Contexts: An Integration of Stereotype Threat and Applicant Reactions Research*, 16 HUM. PERFORMANCE 231 (2003); Ryan P. Brown & Eric Anthony Day, *The Difference Isn't Black and White: Stereotype Threat and the Race Gap on Raven's Advanced Progressive Matrices*, 91 J. APPLIED PSYCHOL. 979 (2006); J. Thomas Kellow & Brett D. Jones, *The Effects of Stereotypes on the Achievement Gap: Reexamining the Academic Performance of African American High School Students*, 34 J. BLACK PSYCHOL. 94 (2008); Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. PERSONALITY & SOC. PSYCHOL. 82 (2007); Joshua Aronson & Michael Inzlicht, *The Ups and Downs of Attributional Ambiguity: Stereotype Vulnerability and the Academic Self-Knowledge of African American College Students*, 15 PSYCHOL. SCI. 829 (2004). See also Kay Deaux et al., *Becoming American: Stereotype Threat Effects in Afro-Caribbean Immigrant Groups*, 70 SOC. PSYCHOL. Q. 384 (2007); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999); S. Christian Wheeler et al., *Think unto Others: The Self-Destructive Impact of Negative Racial Stereotypes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 173 (2001). But see Paul R. Sackett et al., *On Interpreting Stereotype Threat as Accounting for African American-White Differences on Cognitive Tests*, 59 AM. PSYCHOL. 7 (2004).

<sup>119</sup> Steele & Aronson, *Intellectual Test Performance*, *supra* note 118, at 799.

<sup>120</sup> *Id*

like simply telling subjects that a task measures “strategic intelligence.”<sup>121</sup> No matter the primer, the effect is still real and measureable: subjects confronted with the threat do worse. On the other hand, when the primer is eliminated, performance improves.

In 1995, Claude Steele and Joshua Aronson published the results of their then-groundbreaking series of studies of stereotype threat.<sup>122</sup> An early study of stereotype threat examined black and white college students who were given a thirty-minute version of the Graduate Record Examination.<sup>123</sup> The questions on the thirty-minute test were on the more challenging side of the difficulty spectrum, picked to test the subjects’ limits.<sup>124</sup> One group of students was primed with a stimulus that the test was “diagnostic of intellectual ability,” a second was told that the test was “nondiagnostic of intellectual ability,” and a third was given neither instruction, but rather primed to “view the difficult test as a challenge.”<sup>125</sup> Thus, if stereotype threat was real, then a statement that intellectual ability was being tested should have triggered in the “diagnostic” group of African-American subjects a fear of confirming the negative stereotype that Blacks are not as smart as Whites.<sup>126</sup> The study showed a decrease in the performance of Blacks on the test when stereotype threat was triggered and an increase when it was not.<sup>127</sup> In the diagnostic group, Blacks performed markedly worse than Whites when primed for stereotype threat.<sup>128</sup> But in the non-diagnostic group, the performance gap was virtually eliminated.<sup>129</sup>

Over time, these results have been replicated in related studies using various stimuli to evoke the threat.<sup>130</sup> Requiring participants to

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<sup>121</sup> Stone et al., *supra* note 118, at 1223.

<sup>122</sup> See Steele & Aronson, *Intellectual Test Performance*, *supra* note 118.

<sup>123</sup> *Id.* at 799.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*; see also Jason S. Lawrence & Allegra Williams, *Anxiety Explains Why People with Domain-Contingent Self-Worth Underperform on Ability-Diagnostic Tests*, 47 J. RES. PERSONALITY 227 (2013) (discussing whether test anxiety is linked with people’s self-worth and underperformance on diagnostic tests).

<sup>127</sup> Steele & Aronson, *Intellectual Test Performance*, *supra* note 118, at 800.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 799 (explaining results were controlled for the subjects’ SAT scores).

<sup>130</sup> *Id.*

record their race immediately prior to testing had a dramatic impact on performance, “even when the test was not presented as diagnostic of intellectual ability.”<sup>131</sup>

Stereotype can have a measureable impact even in transparently benign situations. A Princeton experiment tested black and white college students’ performance on a miniature golf course.<sup>132</sup> When told the test was a measure of “ability to think strategically” and that demands on strategic intelligence would increase along with the test’s difficulty, black students golfed worse than those who were not so primed.<sup>133</sup> In the same study, black students who were required simply to record their race prior to the test golfed worse than those who were not.<sup>134</sup>

In addition to studies on negative stereotypes involving race, other experiments have explored whether stereotype threat might affect other groups subject to another common negative stereotype: that women are bad at math.<sup>135</sup> I will show below that, as with the negative

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<sup>131</sup> *Id.* at 808. See also David M. Marx & Phillip Atiba Goff, *Clearing the Air: The Effect of Experimenter Race on Target’s Test Performance and Subjective Experience*, 44 BRIT. J. SOC. PSYCHOL. 645 (2005) (showing that the race of the experimenter can prime race salience and thereby trigger stereotype threat).

<sup>132</sup> Stone et al., *supra* note 118.

<sup>133</sup> *Id.* at 1216–17.

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., Michael Johns et al., *Knowing Is Half the Battle: Teaching Stereotype Threat as a Means of Improving Women’s Math Performance*, 16 PSYCHOL. SCI. 175 (2005) [hereinafter Johns et al., *Half the Battle*] (discussing gender performance gap eliminated under conditions when primer was eliminated or when primer was present but subjects were informed about nature of stereotype threat); Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4 (1999); Jennifer A. Mangels et al., *Emotion Blocks the Path to Learning Under Stereotype Threat*, 7 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 230 (2012); Diane M. Quinn & Steven J. Spencer, *The Interference of Stereotype Threat With Women’s Generation of Mathematical Problem-Solving Strategies*, 57 J. SOC. ISSUES 55 (2001); Ryan P. Brown & Robert A. Josephs, *A Burden of Proof: Stereotype Relevance and Gender Differences in Math Performance*, 76 J. PERSONALITY & SOC. PSYCHOL. 246 (1999); Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males*, 11 PSYCHOL. SCI. 365 (2000); Emily Pronin et al., *Identity Bifurcation in Response to Stereotype Threat: Women and Mathematics*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 152 (2004);

stereotype involving African-American intelligence, different primers consistently triggered the threat and its corresponding lower performance, and removal of the threat reduced or eliminated the drop in performance.<sup>136</sup>

To confirm their hypothesis that the academic performance of women was being affected by stereotype threat—and to counter the argument that women were simply worse at *difficult* math than men—Steele and his colleagues conducted a follow-up experiment where, as before, the same challenging math test was given to equally proficient male and female students.<sup>137</sup> This time, however, the test was represented as either (i) showing gender differences, or (ii) not showing any such differences.<sup>138</sup> In this iteration of the experiment, women scored equally as well as their male peers when told that the test did not tend to show gender differences, but they scored lower than men when told that the test tended to show gender differences.<sup>139</sup>

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Christine Logel et al., *Interacting with Sexist Men Triggers Social Identity Threat Among Female Engineers*, 96 J. PERSONALITY & SOC. PSYCHOL. 1089 (2009); Brian A. Nosek et al., *National Differences in Gender-Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, 106 PROCEEDINGS NAT'L ACAD. SCI. U.S.A. 10593 (2009); Robert J. Rydell et al., *Multiple Social Identities and Stereotype Threat: Imbalance, Accessibility, and Working Memory*, 96 J. PERSONALITY & SOC. PSYCHOL. 949 (2009); Ulrich W. Weger et al., *Mindful Maths: Reducing the Impact of Stereotype Threat Through a Mindfulness Exercise*, 21 CONSCIOUSNESS & COGNITION 471 (2012); Priyanka B. Carr & Claude M. Steele, *Stereotype Threat Affects Financial Decision Making*, 21 PSYCHOL. SCI. 1411 (2010); Mara Cadinu et al., *Why Do Women Underperform Under Stereotype Threat? Evidence for the Role of Negative Thinking*, 16 PSYCHOL. SCIENCE 572 (2005); Catherine Good et al., *Problems in the Pipeline: Stereotype Threat and Women's Achievement in High-Level Math Courses*, 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 17 (2008). See also Jenessa R. Shapiro & Amy M. Williams, *The Role of Stereotype Threats in Undermining Girls' and Women's Performance and Interest in STEM Fields*, 66 SEX ROLES 175 (2012); Diana Jill Burgess et al., *Does Stereotype Threat Affect Women in Academic Medicine?*, 87 ACAD. MED. 506 (2012); Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29 (1999) [hereinafter Aronson et al., *When White Men Can't Do Math*].

<sup>136</sup> Steele, *A Threat in the Air*, *supra* note 112, at 619.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 619–20.

In a test of Asian-American women—women who potentially are subject to two stereotypes, one negative (i.e., women are bad at math), and one positive (i.e., Asian-Americans are good at math)—a study found that study participants did better than the control group when their Asian-American identity was primed, and they did worse than the control group when their identity as women was primed.<sup>140</sup> In a related study, these same effects were shown to occur for elementary and middle school children.<sup>141</sup>

Additional studies have revealed performance disparities that arise concerning other groups that may be subject to negative stereotypes, including (i) people with lower socioeconomic status (challenging an intelligence stereotype),<sup>142</sup> (ii) Whites (triggering stereotypes of athletic inferiority relative to Blacks<sup>143</sup> and mathematics ability relative to Asians),<sup>144</sup> (iii) older people (exploring negative stereotypes regarding memory),<sup>145</sup> (iii) younger people (poor driving stereotypes),<sup>146</sup> and (iv) students from underrepresented high schools (intelligence stereotypes).<sup>147</sup>

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<sup>140</sup> Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999) (participants were asked (i) what languages their parents spoke, (ii) what languages they knew and spoke, (iii) when and how often they spoke other languages on campus, and (iv) how long (i.e., for how many generations) their family had lived in the United States).

<sup>141</sup> Ambady et al., *supra* note 118.

<sup>142</sup> Jean-Claude Croizet & Theresa Claire, *Extending the Concept of Stereotype Threat to Social Class: The Intellectual Underperformance of Students from Low Socioeconomic Backgrounds*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 588 (1998) (discussing how students from lower socioeconomic backgrounds perform worse on intellectual tasks than other students).

<sup>143</sup> Stone et al., *supra* note 118, at 1219.

<sup>144</sup> Aronson et al., *When White Men Can't Do Math*, *supra* note 135.

<sup>145</sup> See Sarah J. Barber & Mara Mather, *Stereotype Threat in Older Adults: When and Why Does It Occur, and Who Is Most Affected?*, in THE OXFORD HANDBOOK OF EMOTION, SOCIAL COGNITION, AND EVERYDAY PROBLEM SOLVING DURING ADULTHOOD 302 (Paul Verhaeghen & Christopher Hertzog eds., 2012).

<sup>146</sup> Daniel P. Skorich et al., *Stereotype Threat and Hazard Perception Among Provisional License Drivers*, 54 ACCIDENT ANALYSIS & PREVENTION 39 (2013).

<sup>147</sup> Adam L. Alter et al., *Rising to the Threat: Reducing Stereotype Threat by Reframing the Threat as a Challenge*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 166 (2010).

Stereotype threat studies show that stereotype threat is as bad or worse for those who “identify with a domain.”<sup>148</sup> In other words, the threat is more acute and profound if a student cares about the threatened characteristic. For example, if it is important to a woman to do well in mathematics, they are more likely to be subject to the effects of stereotype threat.<sup>149</sup>

The increased intensity of the effect is the result of the increased risk associated with confirming the stereotype.<sup>150</sup> In other words, a woman who is good at math and who wants to achieve highly in math will care more about confirming a stereotype that women are bad at math. In turn, this intensified threat creates intensified anxiety, further impeding performance. This means that stereotype threat substantially affects high-performing students. Thus, stereotype threat may explain not only why certain students have low performance, but also why *high-performing* students do not perform at an *elite* level.<sup>151</sup> From this, we can infer that the higher the level of education, the more likely the threat is to be felt by those whom it affects.<sup>152</sup> The more important success in a particular field is to a person, the greater the consequences of not achieving success in that field.

## 2. Effects of Stereotype Threat

Stereotype threat affects working memory, cognition, and mental processing by producing a cognitive load that interferes with mental processing.<sup>153</sup> In simple terms, stereotype threat undermines the capacity of the brain to process information. Steele has summarized the profound effect of stereotype threat as follows:

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<sup>148</sup> Johannes Keller, *Stereotype Threat in Classroom Settings: The Interactive Effect of Domain Identification, Task Difficulty and Stereotype Threat on Female Students' Maths Performance*, 77 BRIT. J. EDUC. PSYCHOL. 323 (2010).

<sup>149</sup> *Id.* at 323.

<sup>150</sup> *Id.* at 324.

<sup>151</sup> As discussed below, this is a reason not to limit the ASP reach only to low-performing students.

<sup>152</sup> Keller, *supra* note 148, at 335.

<sup>153</sup> See generally Jessi L. Smith, *Understanding the Process of Stereotype Threat: A Review of Mediation Variables and New Performance Goal Directions*, 16 EDUC. PSYCHOL. REV. 177 (2004) (identifying the tested mechanisms of stereotype threat and specifying how they have been tested and how they might fit under a multidimensional umbrella).

When a stereotype indicts the intellectual abilities of your group, the implication is that, as a member of that group . . . you lack a critical fixed ability. It's a narrative that makes any frustration a plausible sign that you can't do the work, that you don't belong there. And it discourages your taking on academic challenges, for fear you'd confirm the fixed limitation alleged in the stereotype.<sup>154</sup>

The threat Steele identifies is pervasive:

Identity threat is not a passing threat that happens just on tests. It's a cloaking threat that can feed on all kinds of daily frustrations and contextual cues and get more disruptive over time.<sup>155</sup>

Stereotype threat has been shown to increase anxiety and worry, even when subjects did not report it verbally.<sup>156</sup> It can cause mind wandering.<sup>157</sup> The cognitive interference can limit working memory.<sup>158</sup> One explanation for the effects of stereotype threat is that the anxiety and other psychological effects of stereotype threat create a cognitive load that prevents

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<sup>154</sup> STEELE, WHISTLING VIVALDI, *supra* note 112, at 168.

<sup>155</sup> *Id.* at 177.

<sup>156</sup> See Jennifer K. Bosson et al., *When Saying and Doing Diverge: The Effects of Stereotype Threat on Self-Reported Versus Non-Verbal Anxiety*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 247 (2003) (demonstrating that non-verbal anxiety cues showed higher than reported levels of anxiety); Amanda B. Brodich & Patricia G. Devine, *The Role of Performance-Avoidance Goals and Worry in Mediating the Relationship Between Stereotype Threat and Performance*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 180 (2009); Lawrence & Williams, *supra* note 126; Jason W. Osborne, *Testing Stereotype Threat: Does Anxiety Explain Race and Sex Differences in Achievement?*, 26 CONTEMP. EDUC. PSYCHOL. 291 (2001).

<sup>157</sup> See Cullen et al., *supra* note 118, at 220.

<sup>158</sup> Sian L. Beilock, *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. EXPERIMENTAL PSYCHOL. 256 (2007); Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440 (2003).



the brain from operating at peak capacity.<sup>159</sup> Those subject to stereotype threat are more likely to engage in conduct designed to avoid a bad result rather than achieve a good one. This is called “performance avoidance behavior.”<sup>160</sup> Threat-vulnerable students might use less effort on a given task or use more effort pursuing unsuccessful methods.<sup>161</sup>

The work on stereotype threat does not purport to explain all causes of underachievement. Indeed, there are a variety of factors that can explain low achievement, including “socioeconomic disadvantage, poorer access to good schooling, less parental support, low participation in social networks that enable the timely development of critical skills and cultural capital, historically rooted patterns of sex-role socialization, and so on . . .”<sup>162</sup> In addition to these causes of underachievement, the effects of stereotype threat are substantial and warrant attention.

### 3. Stereotype Threat in Law School

Given that stereotype threat has been shown so often to have a dramatic impact on performance in a standardized testing environment, it should be obvious that diminished performance of minorities would be documented on the two standardized tests—the Law School Admissions Test (LSAT) and the bar exam—that bookend the law school experience. But it may be less obvious that the three or four years during law school are riddled with opportunities for stereotype threat to take hold and flourish. In this section, I will posit how stereotype threat operates in law school and works to the detriment of stereotype threat vulnerable law students.

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<sup>159</sup> Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering a Disruptive Mental Load*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 721, 728 (2004).

<sup>160</sup> Brodish & Devine, *supra* note 156, at 181.

<sup>161</sup> See, e.g., Jeremy P. Jamieson & Stephen G. Harkins, *Mere Effort and Stereotype Threat Performance Effects*, 93 J. PERSONALITY & SOC. PSYCHOL. 544 (2007); see also Carr & Steele, *supra* note 135.

<sup>162</sup> STEELE, WHISTLING VIVALDI, *supra* note 112, at 182; see Sackett et al., *supra* note 118, at 11.

If stereotype threat is as profound and pervasive as studies by Steele and a host of others have shown, then it necessarily has an effect on admissions. This is due to the fundamental fallout of stereotype threat: stereotype-threatened applicants' credentials are lower than they should be, and applications from stereotype-threatened applicants likely do not reflect their true academic capacity.<sup>163</sup> On the back end, the bar exam presents yet another standardized purported measure of intellectual ability, standing ready to prime stereotype-threat-vulnerable graduates. Hence, lower-than-able performance on the bar exam for those who are subject to the threat can be expected. It is also likely that minority attorneys may suffer the effects of stereotype threat in practice. Depending on the environment, minority lawyers may find themselves having to prove their intelligence to associates, partners, judges, and others in the legal community. This may offer some explanation for the failure of minority lawyers to thrive in law firms.<sup>164</sup>

There is every reason to believe that the effects of stereotype threat are not limited to standardized testing.<sup>165</sup> As I posited in an earlier article,<sup>166</sup> law school provides the ideal environment for stereotype threat to thrive. If one wanted to create the ideal place to promote the growth of stereotype threat, they would:

- (i) Isolate stereotype-threat-vulnerable students by admitting them in limited numbers, triggering the threat by making them feel as though they do not belong;
- (ii) Further trigger the threat by providing material that is highly challenging, both in terms of its inherent difficulty and its high volume;

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<sup>163</sup> Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOL. 42, 46 (2012) (arguing that “[i]f conventional measures used to make admissions decisions in selective schools systematically underestimate the ability and potential of negatively stereotyped students relative to other students, it would be inappropriate to interpret such measures at face value in evaluating candidates for admission. To do so would be to discriminate against stereotyped students—to evaluate more highly and potentially to admit more nonstereotyped students over stereotyped students, even when the latter are more qualified and more likely to perform well.”).

<sup>164</sup> See David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 502 (2007).

<sup>165</sup> See, e.g., Stone et al., *supra* note 118, at 1213 (showing the threat could have an effect on innocuous tasks, like miniature golf).

<sup>166</sup> McClain, *supra* note 1, at 40–41.

- (iii) Reinforce the threat by providing repeated moments where students are required to manifest intelligence; and
- (iv) Exacerbate self-doubt by giving students limited feedback throughout the semester.

Without stretching the imagination even a little, it is easy to see how stereotype threat can impede law school learning.

Frustration is a natural part of the law school experience for every law student. From the first day of law school through the end of exams, students are confronted with extremely challenging readings, thrust into completely foreign and intimidating classroom learning environments, isolated from their peers, and they receive little feedback until the end of the semester. Indeed, students may spend several months submerged in frustration.

If students are subject to stereotype threat, then we expect these “normal” law school experiences to affect them more seriously. African-Americans and other students of color who experience frustration are also likely to experience the fear of confirming a negative group stereotype that they are not as bright as their peers.<sup>167</sup> Compare the experiences of two hypothetical law students, both of whom confront normal law school frustrations. The white student has trouble understanding antediluvian syntax in cases from the Queen’s Court. She thinks, “This is really challenging. I will have to read this again until I get it.” The black law student reads the same passage and experiences the same, normal frustration, but she thinks, “This is really challenging. I need to understand this before class. I don’t want people to see me as the dumb black student who doesn’t get it.” The African-American student may further be plagued by increased anxiety and reduced ability

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<sup>167</sup> Stereotype threat also may affect other groups in law school. For example, the typical law school teaching method has long been criticized as it relates to women. See Edward Adams & Samuel Engel, *Gender Diversity and Disparity in the Legal Profession: An Empirical Analysis of the Gender Profile in National Law Firms and Law Schools*, 63 *BUFF. L. REV.* 1211 (2015); Tanisha Bailey, Comment, *The Master’s Tools: Deconstructing the Socratic Method and its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 *MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS* 125 (2003); Banu Ramachandran, *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking From Experience*, 98 *COLUM. L. REV.* 1757 (1998).

to focus, limiting the student's ability to complete the task effectively.<sup>168</sup> The inability to prepare effectively likely affects the student's learning in the classroom. Even though both students experience the same task and the same initial frustration, their internalized responses—and, hence, their performance results—may be dramatically different.

As discussed above, stereotype threat will affect students more if they are more committed to their educational path—i.e., they identify with a particular domain. Law schools are filled with students who identify with the law domain. Many, if not most, law students have enrolled in law school with a desire to succeed in law—to graduate, pass the bar, and join the legal profession. It is important to them to do well and to avoid appearing as though they do not have what it takes. Moreover, the stakes are high. Failure at law school or on the bar exam means no admission to practice. Stereotype threat is bound to be even more acute for law students.

### *C. Mindset*

Psychologist Carol Dweck's research has focused on a different aspect of learning. In her work, Dweck focuses on two belief systems regarding intelligence.<sup>169</sup> One system, fixed mindset, regards ability as “carved in stone.”<sup>170</sup> Under a fixed mindset, people are more or less smart, or they have or do not have certain abilities.<sup>171</sup> Or, as Dweck puts it, one believes “you have only a certain amount of intelligence, a certain personality, and a certain moral character . . .”<sup>172</sup>

The other system, growth mindset, views intelligence, talents, and abilities as capable of transformation and growth.<sup>173</sup> According to Dweck:

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<sup>168</sup> See STEELE, WHISTLING VIVALDI, *supra* note 112, at 168; text accompanying *supra* note 156.

<sup>169</sup> See generally CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (Random House 2016).

<sup>170</sup> *Id.* at 6.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 6–7.

In this mindset, the hand you're dealt is just the starting point for development. This *growth mindset* is based on the belief that your basic qualities are things you can cultivate through your efforts, your strategies, and help from others. Although people may differ in every which way—in their initial talents and aptitudes, interests, or temperaments—everyone can change and grow through application and experience.<sup>174</sup>

One's mindset can affect their motivation on tasks.<sup>175</sup> Imagine a young adult learning to play the piano for the first time. No matter the mindset, the student is bound to encounter difficulty when learning to play scales or even playing the simplest of songs. The more the student's mindset is fixed—meaning they believe they have limited ability—they will be convinced that regardless of the amount of work they put in, they will not be able to exceed their predetermined ceiling. This can lead to a pessimistic approach to learning resulting in reduced motivation. It is likely that the student will not practice as much in order to improve. On the other hand, if the student has a growth mindset, the student will see difficulty as an opportunity. The student will not view the present inability to play a scale as confirmation of their inability, but, instead, they will recognize that with practice, they will be able to play the scale eventually. Thus, the growth mindset student will be motivated to practice more, emboldened with the optimism that practice makes perfect.<sup>176</sup>

In simple terms, growth mindset says “I can, eventually” instead of “I can't.” It says, “This grade shows I didn't do well this time, but I will do better next time” instead of “This grade proves that this isn't my thing.” Growth mindset replaces “I'm not good at this” with “I can be good at this, with the right kind of training and effort.”

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<sup>174</sup> *Id.* at 7.

<sup>175</sup> DWECK, *supra* note 169, at 8–9; Corie Rosen, *Creating The Optimistic Classroom: What Law Schools Can Learn From Attribution Style Effects*, 42 MCGEORGE L. REV. 319, 337 (2011).

<sup>176</sup> I use this analogy deliberately. When presenting on this topic, I often have been asked, in essence, “Not everyone can be Beethoven, can they?” My response is that not everyone has to be a virtuoso, but perhaps nearly everyone can become a competent, even good, pianist.

Fixed mindsets can undermine law school learning in two significant ways—one of which is obvious, the other perhaps less so. First, if a student has a fixed mindset, she is likely to view frustration and setbacks as evidence of her limitations.<sup>177</sup> The pessimism encouraged by a fixed mindset can take root and affect the student's willingness to persevere through the normal difficulty that law school presents. The student's fixed mindset becomes a self-fulfilling prophecy.

Perhaps more concerning, however, is when a professor has a fixed mindset.<sup>178</sup> If a professor has a fixed mindset about his students, he is bound to be pessimistic about certain students' ability to succeed. Dweck points out that “[t]eachers with the fixed mindset create an atmosphere of judging. These teachers look at students' beginning performance and decide who's smart and who's dumb. Then they give up on the ‘dumb’ ones.”<sup>179</sup> In law, the fixed mindset professor will believe that some are really cut out for the law and others are not. For those whom the professor regards as unfit for law school, no degree of focus or effort will make a difference, so the professor is far less likely to expend the effort to nurture the development of these students. The professor's low expectations likewise become a self-fulfilling prophecy.

#### *D. The Perfect Storm*

Implicit bias and fixed mindsets can converge to create substantial obstacles to minority student learning compounding the negative implications of stereotype threat. The implicit adoption by members of the law school community of a belief that minority students have a fixed capacity and are less capable of achievement can prime stereotype threat and substantially interfere with the learning process.<sup>180</sup>

How might this happen in and out of the classroom? A professor subject to a fixed mindset, rooted in the implicitly biased judgment that minority students are less intelligent or less capable might inadvertently

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<sup>177</sup> DWECK, *supra* note 169, at 8–9, 39–44.

<sup>178</sup> *See id.* at 196–205 (discussing the importance of growth mindset in teachers).

<sup>179</sup> *Id.* at 200.

<sup>180</sup> *See supra* Section II.A. through II.C.

make decisions not to cold-call on minority students, or might not hold them to the same standards in the classroom. Or the professor might be less willing to work through a difficult issue with a student in class or in office hours because of the implicitly biased judgment that minority students are not as capable as Whites of success in law school.<sup>181</sup> Likewise, biases of white students can have a negative impact. Implicit (or even conscious) biases of white students keep minority students out of study groups. This culture of exclusion occurs either consciously (i.e., white students deliberately exclude minorities from study groups out of a fear that they will drag study groups down) or tacitly (i.e., because of an implicit judgment that minorities are less qualified, Whites exclude minorities from these groups).

All of this triggers a worry grounded in stereotype threat for the minority student: “Maybe I do not belong here.” In addition, the law school environment further reinforces the stereotype threat. Once these students arrive at law school, they usually find that minorities are underrepresented on the faculty.<sup>182</sup> The same underrepresentation exists in the student body, and those minority students who are in the student body may trend towards the bottom of the class.<sup>183</sup> So minority students have fewer successful role models to follow. So, when these students encounter the extremely challenging material assigned in the law school curriculum, they already are primed to be subject to the threat. Indeed, they are hyper-primed.

When facing the difficult material of law school, then, stereotype threatened students are more susceptible to anxiety, decreased effort, and many of the other negative consequences of stereotype threat.<sup>184</sup> These consequences, in turn, produce low performance, which reinforces biases throughout the community. This, of course, reinforces the stereotype threat. These influences can compound over time, repeating themselves daily throughout the

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<sup>181</sup> Of course, this bias also can be explicit, either as a result of actual prejudice or the conscious belief that lower credentials—which, overall, happen to be proportionally correlated with students of color—translate to lesser capacity.

<sup>182</sup> See Marx & Goff, *supra* note 131, at 646 (discussing how the experimenter race has been shown to trigger race salience and, thus, stereotype threat). It follows that if stereotype threat can exist in the learning environment then the same triggers would exist in classes with non-minority professors.

<sup>183</sup> See Wright, *supra* note 77, at 20–21.

<sup>184</sup> See discussion *supra* Section II.B.2.

semester, creating a feedback loop that amplifies stereotypes and bias. This stress about confirming the negative stereotypes, especially when compounded throughout a law school semester, actually may lead to the result feared and cause students to perform worse than they would if these negative influences were neutralized.

### III. RACE-CONSCIOUS ACADEMIC SUPPORT

While stereotype threat presents clear implications for law school admissions, teaching, and bar passage support,<sup>185</sup> it also seems obvious that one of the greatest resources for dealing with the threat is a law school's academic support program. If it is true that the performance of minority students is being depressed as a result of pervasive stereotype threat, then surely it is incumbent upon law schools to do something about it. As ASPs have grown, they have, in large part shouldered the mantle for helping students adjust to the academic rigors of law school. Given that the academic rigors of law school are the very things that are likely to trigger the threat, then ASPs are in the best position to address the problem.

#### A. *A Roadmap for Race-Conscious ASPs*

The study of stereotype threat is not limited to proving its existence. Following up on the studies demonstrating the existence of stereotype threat, cognitive psychologists have done extensive work exploring what kinds of interventions can help militate against the effects of stereotype threat. These studies show that the effects of stereotype threat can be reduced or even eliminated, through deliberate modifications of the environment for learning, the process by which students approach learning, or the way that students think about themselves and the task with which they are confronted.<sup>186</sup>

These follow-up studies discussed below do more than show that differences exist when stereotype threat is primed and when it is not; they focus on affirmative interventions that have a measurable, reductive impact on the effects of stereotype threat. In this section, I propose that they provide a roadmap for qualities an ASP should have if it would address these threats.

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<sup>185</sup> McClain, *supra* note 1, at 40, 55.

<sup>186</sup> STEELE, WHISTLING VIVALDI, *supra* note 112, at 169–90.



*Explicit Discussion of Stereotype Threat.* At least one study has shown that directly acknowledging the existence of stereotype threat has the effect of neutralizing the primer.<sup>187</sup> In this study, women were given a challenging math test, which was presented to them in two different ways. One set of women was assigned the test and told it was a standardized test presented for the purposes of studying differences in gender performance in mathematics.<sup>188</sup> A second group was given the same instructions but told to consider that any anxiety they experienced on the test might be the result of stereotype threat.<sup>189</sup> Women in the second group performed substantially better, nearly eliminating the gender performance gap.<sup>190</sup> Researchers concluded that this showed that “informing members of stereotyped groups about the effects of stereotype threat can buffer their performance on stereotype-relevant tasks.”<sup>191</sup>

*High Standards/Effective Feedback.* Studies show that black students tend not to trust neutral or overly positive feedback.<sup>192</sup> Instead, the best feedback—meaning the kind that was trusted by students and motivated them to improve—both held students to a high standard and also affirmed a belief that the students had the capacity to meet that standard.<sup>193</sup> This reduced the effects of stereotype threat in that by

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<sup>187</sup> See Johns et al., *Half the Battle*, *supra* note 135, at 178 (discussing gender performance gap eliminated under conditions when primer was eliminated or when primer was present, but subjects were informed about nature of stereotype threat).

<sup>188</sup> *Id.* at 176.

<sup>189</sup> *Id.* Specifically, the participants were told “[I]t’s important to keep in mind that if you are feeling anxious while taking this test, this anxiety could be the result of these negative stereotypes that are widely known in society and have nothing to do with your actual ability to do well on the test.” *Id.*

<sup>190</sup> *Id.* at 176–78. Yet a third group was instructed to treat the task as a problem-solving task—something about which there is not a negative stereotype connected to gender. *Id.* at 176. Women in this group not only eliminated the performance gap; they outperformed men. *Id.* at 178.

<sup>191</sup> *Id.* at 178.

<sup>192</sup> Geoffrey L. Cohen et al., *The Mentor’s Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1302 (1999) [hereinafter Cohen et al., *Mentor’s Dilemma*]; see also Paula J. Manning, *Word to the Wise: Feedback Interventions to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students* 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 97, 119 (2018).

<sup>193</sup> Cohen et al., *Mentor’s Dilemma*, *supra* note 192.

holding the students to a higher standard, rather than a lower standard, and by affirming students' ability to meet the standard, feedback providers were able to defuse the internal narrative suggesting that poor initial performance was confirming a negative stereotype.<sup>194</sup>

*Presenting Positive Group Examples.* Several experiments have shown that presenting stereotype-threatened students with positive group images can improve their performance.

- i. *Group Achievement Identification.* Female math students who were presented with stories of high-achieving women have been found to perform better on academic tasks, even if the stories did not relate to success in the math domain.<sup>195</sup>
- ii. *Role Modeling.* Black college students who were given essays from successful black upper classmen about academic frustration and subsequent success got higher grades than those who did not receive such essays.<sup>196</sup> In a study of women in mathematics, women who were "interviewed" by a high-achieving woman performed at high levels, even where they were primed with a stereotype threat.<sup>197</sup>

*Conscious Reflection.* A number of studies show that positive internal reflection can have a positive effect on performance.

- i. *Self-affirmation.*<sup>198</sup> Black seventh graders who were asked to write for fifteen minutes about their most important

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<sup>194</sup> *Id.* See also STEELE, WHISTLING VIVALDI, *supra* note 112, at 162–63.

<sup>195</sup> Rusty B. McIntyre et al., *Alleviating Women's Mathematics Stereotype Threat Through Salience of Group Achievements*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 83, 87–88 (2003).

<sup>196</sup> STEELE, WHISTLING VIVALDI, *supra* note 112, at 165–66. A different version of this study had black college students write essays to elementary school students about expandable intellect. The students who wrote these essays got higher grades than other students who did not write them. *Id.*

<sup>197</sup> David M. Marx & Jasmin S. Roman, *Female Role Models: Protecting Women's Math Test Performance*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1183, 1188–90 (2002).

<sup>198</sup> See generally Geoffrey L. Cohen et al., *Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap*, 324 SCI. 400 (2009); Geoffrey

personal values at the beginning of each school term received higher grades during each term than students who were asked about their least important personal values.<sup>199</sup> This positive effect did not occur for the white students who were given the same tasks.<sup>200</sup> The key to the success of this particular intervention is that early in the educational process, it changed the students' internal narrative—from one infused with threat to one about personal motivation to face challenges—thus avoiding a feedback loop of failure and threat confirmation.<sup>201</sup>

- ii. *The nature of intelligence.* Another experiment focused on writing about the nature of intelligence.<sup>202</sup> When prompted to write about whether intelligence was innate and fixed or was something that could be nurtured and grown through effort, students tended to perform better in a testing environment.<sup>203</sup>
- iii. *Mindfulness.* Mindfulness refers to meditative relaxation induced by focusing on the present moment.<sup>204</sup> This kind of reflection, by design, is not substantively focused.<sup>205</sup> But

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L. Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*, 313 SCI. 1307 (2006); Andy Martens et al., *Combating Stereotype Threat: The Effect of Self-Affirmation on Women's Intellectual Performance*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 236 (2006); Akira Miyake et al., *Reducing the Gender Achievement Gap in College Science: A Classroom Study of Values Affirmation*, 330 SCI. 1234 (2010); Gerardo Ramirez & Sian L. Beilock, *Writing About Testing Worries Boosts Exam Performance in the Classroom*, 331 SCI. 211 (2011); David K. Sherman & Gregory L. Cohen, *The Psychology of Self-Defense: Self-Affirmation Theory*, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 183 (2006).

<sup>199</sup> STEELE, WHISTLING VIVALDI, *supra* note 112, at 174–75.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Joshua Aronson et al., *Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 113, 124 (2002) [hereinafter Aronson et al., *Reducing the Effects*]; Lisa S. Blackwell et al., *Implicit Theories of Intelligence Predict Achievement Across an Adolescent Transition: A Longitudinal Study and an Intervention*, 78 CHILD DEV. 246, 247–53 (2007).

<sup>203</sup> Blackwell et al., *supra* note 202, at 253; Aronson et al., *Reducing the Effects*, *supra* note 202.

<sup>204</sup> Weger et al., *supra* note 135, at 472.

<sup>205</sup> *Id.*

even this has been shown to reduce or eliminate the threat, most likely by letting the mind focus on the task at hand and by reducing anxiety related to the task.<sup>206</sup>

- iv. *Emotion Regulation.* Persons subject to stereotype threat may tend to suppress the stressful emotions they experience as a result of the threat.<sup>207</sup> Properly regulating these emotions, rather than suppressing them, can reduce the threat.<sup>208</sup>
- v. *Social-Belonging.*<sup>209</sup> Stereotype threat can be reduced by teaching students that academic struggles are normal and temporary, as opposed to being signs that one does not belong in a particular academic environment.

*Presenting the threat as a challenge.* Two studies showed that stereotype threat-affected students performed better on tasks that were presented as formative rather than evaluative.<sup>210</sup> In other words, when the task was presented as a measure of ability (e.g., “This test will measure your academic ability.”), subjects did worse.<sup>211</sup> On the other hand, when the task was presented as a positive tool of academic development (e.g., “This test will help you learn.”), students did better.<sup>212</sup>

*Establishing Mastery Goals.* Focusing on mastering skills or subject matter, rather than focusing on performance, can improve performance in stereotype-threatened students.<sup>213</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> Michael Johns et al., *Stereotype Threat and Executive Resource Depletion: Examining the Influence of Emotion Regulation*, 137 J. EXPERIMENTAL PSYCHOL. 691, 693 (2008).

<sup>208</sup> *Id.*

<sup>209</sup> See generally Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCI. MAG. 1447 (2011).

<sup>210</sup> Jane G. Stout & Nilanjana Dasgupta, *Mastering One's Destiny: Mastery Goals Promote Challenge and Success Despite Social Identity Threat*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 748, 752–54 (2013).

<sup>211</sup> Alter et al., *supra* note 147, at 169.

<sup>212</sup> *Id.*

<sup>213</sup> Stout & Dasgupta, *supra* note 210, at 753–54.

*Engagement Regulation.* As a positive means to protect self-esteem, non-stereotype-threatened students may disengage from negative feedback and engage positive feedback.<sup>214</sup> To engage with feedback means that a person identifies with the feedback as reflecting the person's character.<sup>215</sup> For example, if a student gets negative feedback and engages with it, that student will have lower self-esteem as a result, because the students will view the feedback as meaning that the student has low capacity. Similarly, if that student engages with positive feedback, the student will view herself as having high capacity. Engagement regulation helps stereotype threatened students manage how they engage with feedback. In other words, engagement regulations permit students to engage with positive feedback while disengaging with negative feedback. This kind of engagement regulation is healthy, and the resulting positive effects on self-esteem have been tied to higher academic performance. ASPs should, therefore, coach students to regulate their engagement positively can reduce the threat.

### B. Characteristics of a Race-Based ASP

#### 1. Following the Roadmap

Given that studies of stereotype threat interventions have set forth a relatively clear roadmap for ameliorating stereotype threat, ASPs do not have to reinvent the wheel. ASPs should include programs explicitly designed to address stereotype threat.

*Explicit Discussion of Stereotype Threat.* First, ASPs should talk about stereotype threat with their threat-vulnerable students. Some academic support professionals may be reluctant to do so because of a concern that pointing out the threat may trigger the threat—put another way, there is a worry that concerns about the threat will create a self-fulfilling prophecy. But part of the problem with stereotype threat is the fact that threat-vulnerable students are already affected and may not understand why.<sup>216</sup> These students are already experiencing the anxiety

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<sup>214</sup> Jordan B. Leitner et al., *Succeeding in the Face of Stereotype Threat: The Adaptive Role of Engagement Regulation*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 17, 25–26 (2013).

<sup>215</sup> *Id.*

<sup>216</sup> Johns et al., *Half the Battle*, *supra* note 135, at 175.

associated with the threat, and they would be better served if ASPs could help put a name to the experience.

To discuss the threat effectively, academic support professionals should become familiar with the literature on stereotype threat in order to discuss it effectively. Also, because the topic is one that is sensitive, these professionals should have earned the trust of their students in a way that will allow them to receive the message.<sup>217</sup> It is critical that students both trust and are encouraged by ASP professionals. As discussed above, trust comes from, among other things, holding students to a rigorous academic standard.<sup>218</sup> Encouragement comes from the ASP professional's expression to the student of the professional's belief that the student has the ability to meet the teacher's high expectations.

*High Standards.* ASPs must expect more of their students.<sup>219</sup> This means that ASPs should offer challenging material that, while working to help students develop critical skills, requires students to exert great effort and to dig deeper within themselves. This should flow naturally if academic support professionals have developed a growth mindset. In other words, ASPs will hold students to a higher standard if those running ASPs believe students can meet that standard.

This belief in students' ability to succeed is reinforced by keeping ASP offerings from being "remedial." I am using "remedial" in its most pejorative sense here. Of course, taken in a positive sense, ASPs exists in no small part to help remedy problems like unpreparedness for law school or stereotype threat. When I say that ASPs should not be "remedial" I mean that ASPs should not be "dumbed down" or taught to the lowest common denominator. This goes to the substance of the ASPs and also to certain aspects of their design and administration.

Skills-only courses or courses containing only as much substance as is necessary to teach a skill, standing alone, run the risk of leading the student participants to think that we believe they are capable

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<sup>217</sup> Cohen et al., *Mentor's Dilemma*, *supra* note 192, at 1303.

<sup>218</sup> *Id.*

<sup>219</sup> See DWECK, *supra* note 169; Cohen et al., *Mentor's Dilemma*, *supra* note 192.

only of pedestrian tasks.<sup>220</sup> These kinds of skills courses should be coupled with challenging course material to be the most effective. ASPs should not “dumb down” course material.<sup>221</sup>

*Presenting Positive Group Examples.* ASPs should find ways to infuse positive role modeling. This can be accomplished in different ways. First, ASPs can employ upper-level students from threatened groups as examples of law school success. Second, ASPs can rely on successful alumni as mentors. In either case, this provides stereotype threatened students with the opportunity to see that they not only belong in the environment, but that they can succeed in it. Seeing that others have walked the path, successfully, before provides a level of confidence.

*Conscious Reflection.* Whether in the mode of self-affirmation or on the subject of the nature of intelligence, ASPs should encourage students to ground themselves by engaging in reflective writing designed to allow them to focus on themselves and build the personal, internal capacity to face challenges without succumbing to the threat of negative stereotypes.

*Mindfulness/Emotion Regulation.* ASPs should include programs that help students manage stress and anxiety effectively. This can include wellness programming like meditation and other programs that encourage focus and reduction of anxiety.

*Social-Belonging/Presenting the Threat as a Challenge.* Every student in law school struggles. Every law student is anxious at times. ASPs should remind their stereotype threatened students that some degree of struggle is normal and that it is not a sign that students do not belong in law school. But in addition, ASPs should let stereotype threatened students know that some of the anxiety they experience may be the result of stereotype threat. This, coupled with other efforts, can minimize the threat.

*Establishing Mastery Goals.* If ASPs do anything well, they help students work on improving their mastery of skills and subject matter,

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<sup>220</sup> See Interview with Ruth Ann McKinney, *supra* note 20, at 5:03 (discussing weaknesses in an academic support program that sets low goals for its students).

<sup>221</sup> *Id.*

rather than performance. A fundamental characteristic of any ASP is that it teaches students the foundational skills necessary to learn in law school. These skills include reading course materials effectively, preparing for class, time management, outlining, and exam writing. This is a strength of ASPs that should be retained.

*Engagement Regulation.* Finally, if stereotype threatened students do not perform well, ASPs must work with them to avoid a fixed mindset response that low performance is a reflection of the students' academic limitations.

## 2. ASPs should actively target students of color

To state the obvious, an ASP that is designed to minimize stereotype threat should focus on color.<sup>222</sup> More specifically, ASPs should target *all* students of color rather than targeting merely *low-performing* students of color. If stereotype threat is pervasive and has a tendency to affect all students of color, then students across the performance spectrum, including those in the middle and higher tiers of the class, can benefit from its amelioration.

## 3. ASPs should provide meaningful early intervention

Many ASPs are designed to address academic problems indicated by poor grades.<sup>223</sup> In other words, after the first semester of law school, those students performing at the bottom of the class are targeted for voluntary or mandatory participation in the ASP. This kind of intervention is important, of course, but, as it relates to stereotype threat, it comes too late. If stereotype threat occurs in light of academic frustration, then there is a high likelihood that students affected by this threat in law school will experience its effects most frequently and profoundly throughout the first semester of law school. Intervention during the second semester, then, likely comes after students already

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<sup>222</sup> Surely, an ASP director's ability to target racial and ethnic minorities officially could be limited by political pressure from dissenting faculty members or staff, a lack of faculty status and hence the ability to effectively make meaningful program changes (the case for many ASP professionals) and limited human resources. ASP directors also can develop official or unofficial relationships with student groups or with individual students in order to achieve this objective.

<sup>223</sup> Knaplund & Sander, *supra* note 15, at 159.



have experienced repeated cycles of stereotype threat, fear, and failure. Intervention must occur before those “confirming” failures have occurred.

This may take the form of pre-law or early semester programs designed to prepare students for the academic challenges of law school, but any such program must focus on more than just skills. In my view, based on all we understand from the study of stereotype threat, intervention-free, skills-only programs are not as likely to counter the effects of stereotype threat.

#### 4. Undergraduate Minority Pipeline Program

An undergraduate pipeline program should meet the goals of preparing prospective minority students<sup>224</sup> for the transition to law school by:

- a. Providing a sense of belonging to and familiarity with law school. If students feel as though they belong in the law school environment, stereotype threat should be reduced, even when students encounter normal challenges.
- b. Mastering certain law school skills. Teaching pre-law minority students the basics of reading a judicial opinion, note-taking, and outlining, and memo and exam writing will help students feel capable in the law school setting because they will recognize that much of the success in law school is tied to mastery of skills (leading to mastery of substance), not to innate intelligence.
- c. Promoting logical and critical thinking. Like teaching skills, teaching students to challenge themselves intellectually will help them experience growth and recognize that critical thinking, like more tangible skills, can be developed over time with effort.
- d. Combating stereotype threat generally. This will be valuable for all of the reasons described above.

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<sup>224</sup> Stereotype threat is not limited to minority students, so these programs also should be open to other students who are likely to be subject to the threat, including students from lower socio-economic backgrounds.

- e. Infusing growth mindset optimism into pipeline coursework, teaching students how to respond optimistically to academic challenges.

All of the courses described above can be infused with some kind of minority-based ASP focus. In addition to teaching skills to students, courses should feature minority role models—successful minority lawyers, law professors, and law students—who can frame a narrative of law school success for the participants. In addition, the courses will help students explore the idea that goal mastery, rather than innate intelligence, is a means of achievement. The course should have students engage in positive reflective writing exercises, with interventions that occur at the beginning of each course and are reinforced throughout each semester.

### 5. Orientation

Like the pipeline program described above, a pre-law orientation program can provide the benefit of helping students become comfortable with the law school environment and learning process. The duration of this kind of orientation program limits the ability to master skills, but it provides adequate opportunity to introduce stereotype threat.

It carries with it the risk of burning students out once the real semester begins. With that concern, the model above could be reduced to two weeks or even a single week, but the skills development would diminish accordingly. A rigorous schedule is desirable, because it gives ASPs the opportunity to reinforce, in a slightly more controlled environment, that the challenges of law school are normal.

### 6. Other Targeted Academic Support

In addition to the normal academic support workshops and events during the first-year, academic support professionals should coordinate with minority student groups throughout the year to conduct workshops relating to stereotype threat. This should include sessions that explicitly discuss the threat and assist students in reframing the threat as a challenge. Incorporating stereotype threat remediation into one-on-one work also could be useful. The benefit is that students will be less likely to respond negatively to difficulty, but instead will be

more able to understand that the frustration of law school is normal and temporary—as opposed to its being reflective of innate intelligence.

### 7. Bar Preparation

Most of the study of stereotype threat has explored and documented the substantial effect of the threat on performance on standardized tests.<sup>225</sup> ASPs should address stereotype threat for their students and graduates who are about to take *the* standardized test, using the methods described above.

### CONCLUSION

Academic support programs were created in response to a demonstrated need to support the academic success of minority students. Over time, however, ASPs have drifted away from this original focus, which has had the effect of removing a foundation for success that these students need. The need exists not because the students are inherently incapable of succeeding, but because the learning environment in law school is riddled with barriers to their success. These barriers include (i) implicit bias, which can deprive students of the attention and support that all students need, and (ii) stereotype threat, which can undermine student performance from the inside. Academic support programs should retain a race-conscious focus that enables them to include programming that addresses these insidious concerns.

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<sup>225</sup> See *supra* notes 118 & 135.