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Minimizing the Impact of Cognitive Bias in Transactional Legal Education

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This Article explores methods law professors can employ to address the cognitive biases their law students possess. This Article provides concrete thoughts on how transactional law clinics can utilize the social, political, and neuroscience research included in this symposium edition.



Minimizing the Impact of Cognitive Bias in Transactional Legal Education

ALINA BALL *

The partisan divide that evolved over appropriate measures to prevent the spread of COVID-19 has provided yet another public display of political tribalism, populace polarization, and epistemic authority.¹ During a presidential term pledged with brazen politics and mutual disdain for the other side,² even the global crisis of the pandemic has not been sufficient to close the chasm.³ There seems to be no better moment than the present to take seriously the themes raised in this symposium volume and reflect on the role law schools can have in making law students sensitive to the complexity of human decision making. Society relies on lawyers to reconcile conflicting interests, ensure flow of reliable information, minimize opportunism that might otherwise exist between opposing parties, and marshal evidence that facilitates problem solving in the midst of ambiguity. But lawyers, judges, and politicians are all themselves susceptible to the same cognitive vulnerabilities that breed the current political polarization and, more generally, exacerbate conflict. This Article explores methods law professors can employ to align these inconsistencies between the role of the lawyer and the humanity of lawyers. Clearly, law professors can make an impact on the lawyers their students become. This

* Professor of Law, UC Hastings College of the Law.

¹ See Cary Funk & Alec Tyson, *Partisan Differences Over the Pandemic Response Are Growing*, PEW RES. CTR. (June 3, 2020), <https://www.pewresearch.org/science/2020/06/03/partisan-differences-over-the-pandemic-response-are-growing/>; Marc J. Hetherington & Isaac D. Mehlhaff, *American Attitudes Toward Covid-19 Are Divided by Party. The Pandemic Itself Might Undo That.*, WASH. POST (Aug. 18, 2020), <https://www.washingtonpost.com/politics/2020/08/18/american-attitudes-toward-covid-19-are-divided-by-party-pandemic-itself-might-undo-that/>.

² Emma Green, *Americans Hate One Another. Impeachment Isn't Helping*, ATLANTIC (Nov. 2, 2019), <https://www.theatlantic.com/politics/archive/2019/11/impeachment-democrats-republicans-polarization/601264/>; Ryan Warner, *What Impeachment Says About Tribalism; Pushback on Polis*, CPR NEWS (Jan. 17, 2020), <https://www.cpr.org/show-episode/jan-17-2020-what-impeachment-says-about-tribalism-pushback-on-polis/> (recording at 24:10); Joel Rose, *Americans Increasingly Polarized When It Comes To Racial Justice Protests, Poll Finds*, NPR (Sept. 3, 2020), <https://www.npr.org/2020/09/03/908878610/americans-increasingly-polarized-when-it-comes-to-racial-justice-protests-poll-f/>; and Grace Sparks, *CNN Poll: Americans Are Divided Over Amy Coney Barrett*, CNN (Oct. 7, 2020), <https://www.cnn.com/2020/10/07/politics/cnn-poll-scotus-aca-october/index.html>.

³ See Alex Fitzpatrick, *Why the U.S. Is Losing the War on COVID-19*, TIME (Aug. 13 2020), <https://time.com/5879086/us-covid-19/> (describing a “disturbing partisan trend” regarding views on the pandemic).

Article provides some concrete thoughts on how transactional law clinics can utilize the social, political, and neuroscience research included in this symposium edition.

In her article, *Winning Isn't Everything*, Professor Carrie Menkel-Meadow argues that even though it is often rare that everyone in a legal matter will “win,” lawyers must recognize that they could do better for their clients by practicing problem-solving lawyering.⁴ She goes on to present problem-solving lawyering in opposition to conventional, adversarial lawyering.⁵ Problem solving, she argues, produces better solutions not by simply compromising⁶ or seeking to avoid conflict. Instead, problem solving requires collaboration and coordination between counterparties and adversaries.⁷ It also requires the lawyer to exercise creativity⁸ and engage in robust fact investigation to better understand context and consequences.

The narrative example of problem-solving negotiation is a story Professor Menkel-Meadow shares about her and her brother regularly fighting over a piece of chocolate cake.⁹ Their mom would let their fighting go on for a while and then eventually intervene by cutting the piece of cake down the middle.¹⁰ While this would stop the argument, it didn't resolve the issue between the siblings.¹¹ Both the young Professor Menkel-Meadow and her brother would walk away aggrieved¹² because she wanted the icing while her brother preferred the cake.¹³ If her mom had asked her and her brother what their underlying motives and goals were, her mom could have uncovered this difference in interests.¹⁴ Professor Menkel-Meadow uses this narrative as a tangible example of how, with problem-solving negotiation, even with finite resources, it is possible for opposing parties to get 100 percent of what they want if the lawyers understand each party's underlying interests.¹⁵ It is the role of the problem-solving lawyer to conceive the multiple possibilities that even a single piece of cake presents. Even when “the pie” cannot be expanded, it

⁴ Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 906 (2000).

⁵ *Id.* at 907.

⁶ *Id.* at 906, 911.

⁷ *Id.* at 910–11.

⁸ *Id.* at 912, 915.

⁹ *Id.* at 911.

¹⁰ *Id.*

¹¹ *Id.* at 911–12.

¹² *Id.* at 912.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

can be possible for the lawyer to creatively divide it to optimize client objectives.¹⁶

All lawyers have an ethical obligation to act in the best interest of their client.¹⁷ If problem-solving lawyering is in the best interest of the client, it is surprising that it is not the conventional form of lawyering. Far from the norm, Professor Menkel-Meadow explains that conventional lawyering is centered around a culture of adversarialism.¹⁸ As she explains, the hallmarks of the legal profession are argument, selective marshaling of facts, debate, competition, and performance of toughness, all of which often escalate conflict and lead to a stalemate.¹⁹ Conventional lawyering adopts the zero-sum mentality,²⁰ described by Professor Daniel Shapiro in *Overcoming Political Polarization*,²¹ which animates the dominant legal culture and performance of lawyers. Ultimately, Professor Menkel-Meadow argues it is a lack of creativity leading many lawyers to view scarcity or limited resources as zero-sum. “[A]dversarialism . . . leads us to argue in oppositional modes, to see black or white, to resist nuance and complexity”²² In other words, adversarialism fosters cognitive biases that impede a lawyer’s ability to represent their client. Too often, lawyers are failing to reach their minimum goals for their represented cases.²³ This phenomenon of dominant lawyering culture has serious consequences in the legal profession—consequences that attorneys have an ethical obligation to be mindful of—because this affects their clients. In light of this, law professors should attempt to mitigate dominant lawyering culture in their classrooms.

Professor Menkel-Meadow provides steps to becoming problem-solving lawyers. First, she advises that there are several questions problem-solving lawyers must ask: (1) what are the client’s needs and goals; (2) what are the motivations of the counterparty; (3) what are the underlying interests of the counterparty; (4) what is at stake in this dispute;

¹⁶ *Id.* at 916.

¹⁷ See MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. (AM. BAR ASS’N 1983) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); *id.* r. 1.7 cmt. (stating that a lawyer’s duty is to prioritize the client’s interest above the lawyer’s own).

¹⁸ Menkel-Meadow, *supra* note 4, at 907.

¹⁹ *Id.*

²⁰ *Id.* at 906.

²¹ See Daniel L. Shapiro, *Overcoming Political Polarization: The Power of the Civic Mindset*, 52 CONN. L. REV. _ (forthcoming 2020) (describing the tribal mindset and its emotional dynamics that foster political polarization).

²² Menkel-Meadow, *supra* note 4, at 909.

²³ James H. Stark & Maxim Milyavsky, *Towards a Better Understanding of Lawyers’ Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure*, 59 WASH. U. J.L. & POL’Y 173, 176–78 (2019).

and (5) what are the outcomes produced by a given process.²⁴ In the conventional model of lawyering, the lawyer is likely to stop their inquiry after contemplating the motivations of the counterparty. Professor Menkel-Meadow explains that moving beyond motivation to understanding the underlying interests of the counterparty, can provide meaningful information for the lawyer. The example of Ann Atwater and C.P. Ellis's relationship demonstrates why this can be a powerful tactic in moving towards problem solving.²⁵ Research demonstrates that lawyers should be skeptical of their ability to effectively ascertain the counterparty's underlying interests in an adversarial context.²⁶ Given that lawyers may not be readily adept at obtaining or understanding a counterparty's underlying interests, there is even more justification for why law schools should prioritize teaching and allowing students to cultivate this skill. Law school should be an opportunity for budding attorneys to develop this metacognitive awareness and development. Practice utilizing the problem-solving questions Professor Menkel-Meadow proposes, would better prepare law students to achieve the goals of their future clients and make them more likely to resolve what might otherwise lead to a stalemate in a negotiation.

Dominant lawyering culture is not the only hurdle that prevents lawyers from effective problem solving. Poor problem solving is also a result of cognitive biases, which impede one's ability to effectively problem solve for their clients. Professor Menkel-Meadow addresses this in her analysis of problem-solving lawyering. Reactive devaluation, where one cannot hear something because it is coming from the other side, is a cognitive bias that occurs when a proposal is devalued if it appears to originate from an antagonist.²⁷

Lawyers must acknowledge and overcome cognitive biases to effectively represent clients and for the legitimacy of the legal profession. Well-developed psychological evidence demonstrates that implicit bias is a strong cognitive bias that impedes human ability to effectively problem solve in social situations.²⁸ In the last decade, implicit bias has become the primary frame for contemporary discussion on social injustice, with

²⁴ Menkel-Meadow, *supra* note 4, at 916.

²⁵ *An Unlikely Friendship* (PBS television broadcast Feb. 1, 2019), <https://www.pbs.org/video/an-unlikely-friendship-tbnri0/>.

²⁶ See Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 448–73 (2008) (describing research from social and cognitive psychology that explores how people perceive and interpret information and make judgments).

²⁷ Menkel-Meadow, *supra* note 4, at 914.

²⁸ See, e.g., CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 19–20 (2017) (noting the effects of implicit bias on police encounters).

implicit bias on one end of the spectrum and deliberate, explicit racism, sexism, homophobia on the other end.²⁹ The idea of implicit bias has become ingrained in popular culture.³⁰ As Secretary Clinton mentioned during the 2016 presidential election, “[i]mplicit bias is a problem for everyone.”³¹ When invoked in popular conversation, implicit bias is often used to describe the attitudes that are beyond conscious awareness or control. As the narrative goes, individuals manifest implicit bias without necessarily knowing it. In other words, implicit biases reflect the unconscious biases that individuals are unaware of³² and, thus, do not control.

While the developing neuroscience does not support this popular concept of implicit or unconscious biases,³³ it is helpful to recognize that individuals possess unacknowledged biases. These biases are pervasive, deep seeded, and contrary to purported notions of fairness and justice. But if everyone is responsible, the old saying goes, then no one is responsible. Implicit bias can become the way that individuals absolve themselves of the consequences of their actions. Individuals can easily find themselves feeling comfortable because these biases are so pervasive there is little they can do about them. How does a law professor access what occurs beyond the conscious reach of the decision maker, which their introspection is not likely to reveal? Can a law professor do anything to bridge the gap between the dissociation of what students believe about themselves and what their biases reflect? These are the questions I continue to wrestle with because there are no easy answers or universal remedies.

I teach a corporate law clinic at UC Hastings College of the Law. My course prepares upper division law students to be corporate lawyers by having them represent social enterprise clients, businesses that use market-based strategies to achieve a social mission. For example, the clinic may represent a for-profit LLC marketing and design firm with the social

²⁹ Jonathan Kahn, *The 911 Covenant: Policing Black Bodies in White Spaces and the Limits of Implicit Bias as a Tool of Racial Justice*, 15 STAN. J. C.R. & C.L. 1, 2 (2019).

³⁰ See Shankar Vedantam et al., *Radio Replay: The Mind of the Village*, NPR: HIDDEN BRAIN (Mar. 9, 2018, 5:38 PM), <https://www.npr.org/2018/03/09/591895426/the-mind-of-the-village-understanding-our-implicit-biases> (discussing research about implicit bias and how it affects people’s perceptions).

³¹ John A. Powell, *Implicit Bias in the Presidential Debate*, OTHER & BELONGING INST., <https://belonging.berkeley.edu/implicit-bias-presidential-debate> (last visited Jan. 26, 2020); *Clinton on Implicit Bias in Policing*, WASH. POST (Sept. 26, 2016, 9:00 PM), https://www.washingtonpost.com/video/politics/clinton-on-implicit-bias-inpolicing/2016/09/26/46e1e88c-8441-11e6-b57d-dd49277af02f_video.html.

³² See *Implicit Bias Module Series*, KIRWAN INST. FOR STUDY RACE & ETHNICITY, <http://kirwaninstitute.osu.edu/implicit-bias-training/> (defining implicit bias as “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner”).

³³ LASANA T. HARRIS, *INVISIBLE MIND: FLEXIBLE SOCIAL COGNITION AND DEHUMANIZATION* 159–60 (2017).

mission to hire and promote nontraditionally trained graphic designers who have criminal records. The company mission serves as a means for not only providing living wage employment to individuals often excluded in the formal economy but also elevating the voices and perspectives of their employees. The legal matters the clinic might take on for this client could range from drafting and analyzing business-to-business contracts, to renegotiating its commercial lease agreement, to amending and restating its operating agreement over the course of the representation. Law students in my course gain and refine their substantive corporate law knowledge in a context where they are applying their technical lawyering skills and critical thinking to pressing social and environmental issues central to their client's corporate purpose. The course provides a rare opportunity to future corporate lawyers to meaningfully engage in issues of social and economic justice.

Moreover, this is a class that affords me the bandwidth to help students recognize and confront their biases in the process of becoming better problem solvers.³⁴ In early iterations of my course, I began by asking students early in the semester (as part of a due diligence memo) to identify any biases that they may have going into this representation. But what I found is that students—like most of us—often do not have the tools to self-assess and be meaningfully reflective regarding cognitive biases, especially those that are contrary to their ideas of fairness, justice, and equity. I maintained the question as a part of the assignment for years, but was rarely satisfied with the responses it elicited from students. Regularly a student would write that they had no biases going into the representation. Once that response was provided, it would effectively end the conversation on their biases and provide me no basis to help them dig deeper. It occurred to me the assignment may be more harmful than productive in regards to bias reduction.

Recently, I adopted another method to the assignment with promising results. In my new iteration of the same due diligence memo, I have removed the explicit question about biases altogether. Instead, I now ask students to map out the client and its counterparty, or other key parties in the transaction, preferably in a sketch or diagram.³⁵ The prompt asks them to draw the relational dimensions of the client and other parties involved. Lastly, the prompt asks the student to identify the role of the lawyer and opportunities for the lawyer to influence the outcome of the transaction

³⁴ See generally Mark Neal Aaronson & Stefan H. Krieger, *Teaching Problem-Solving Lawyering: An Exchange of Ideas*, 11 CLINICAL L. REV. 485 (2004) (discussing the interaction between substantive legal knowledge and critical thinking skills in legal education).

³⁵ See JAY A. MITCHELL, *SKETCH PAD AS LEGAL PAD: PICTURING CORPORATE PRACTICE* 3 (2015) (discussing the benefit and practice of transactional lawyers sketching clients and deals).

consistent with the client's goals.³⁶ Transactional lawyers commonly sketch transactions and client matters. In the context of the due diligence memo assignment, the benefit of this diagramming and sketching is that it invites law students to memorialize their assumptions about distributions of power within the transaction or legal matter. Completing this assignment often requires the law students to make assumptions and draw conclusions outside of the facts of the client file.

When I debrief with the student teams, I then ask them to identify where their assumptions and cognitive biases are at play in the depiction. This is an attempt to not only identify, but begin to disrupt their cognitive biases.³⁷ During our conversation, I also invite the law students to think about the biases of the other actors in the representation. Some of the questions I ask them are, "What assumptions are other parties likely to have about your client? About you?" In this way, I am helping students become more aware and self-reflective of their cognitive biases and how biases impact their ability to represent their clients. This exercise is one concrete example of an attempt to debias my law students during their time in my course.

Professor Menkel-Meadow's model of problem-solving lawyering asks lawyers to answer a series of questions before attempting to problem solve.³⁸ This slowing down of the problem-solving process is intended to help the lawyers better identify the underlying interests of the counterparty, what is at stake in this dispute, and the outcomes produced by a given process.³⁹ These questions are also a useful debiasing technique. Her model of problem-solving lawyering allows law students to reflect on their own biases towards their clients, and how those might be contributing to the marginalization of their client in the representation. Lawyers have an opportunity to be architects and engineers of justice.⁴⁰ Lawyers have the capability to leave the world a better place. I believe that wholeheartedly and try to instill this notion in my students each semester.

As future transactional lawyers, I want my law students to understand they have the ability and the ethical responsibility to think outside the box, be creative, and engineer solutions that are structured around justice. By helping them acknowledge their cognitive biases early in the client representation, I believe I am facilitating them in becoming the better

³⁶ See Alicia Plerhoples, *Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur*, 19 LEWIS & CLARK L. REV. 301, 313 (2015) (explaining the utility of pictographs to memorialize client goals).

³⁷ See Joan C. Williams & Sky Mihaylo, *How the Best Bosses Interrupt Bias on Their Teams*, HARV. BUS. REV. (Nov.-Dec. 2019), <https://hbr.org/2019/11/how-the-best-bosses-interrupt-bias-on-their-teams>.

³⁸ Menkel-Meadow, *supra* note 4, at 909–10.

³⁹ *Id.*

⁴⁰ *Id.* at 910.

problem-solving lawyers that society desperately needs. More importantly, I am heartened by the experiences in my clinical course that there is even more transactional courses can do to make law students sensitive to the complexity of decision making and better prepared to defuse conflicts. If law professors are willing to engage with their students in the struggle of their ideological becoming, I believe the next generation of lawyers will be the change-makers this moment requires.