

## RECONSTRUCTING THE VOICE OF AUTHORITY

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### ABSTRACT

Notwithstanding the presence of three women on the United States Supreme Court, in terms of gender equality, surprisingly little has changed in the legal profession over the past twenty years. This stagnation is particularly apparent in the highest paying and most prestigious sectors, such as the Supreme Court bar, the top echelons of the top law firms, the judiciary, and the general-counsel's office. Even where objective facts suggest that female lawyers should be hired, billed out, or compensated at the same or higher rate than their male peers, subjective decisions informed, in part, by bias and stereotype drive a different result.

This Article proposes that, until we stop indoctrinating law students that a “good lawyer” looks, sounds, and presents like the Classical warrior—that is, a male—these barriers will persist. For many law students, the first place they get to model what it means to look, sound, and act like a lawyer is in moot court or other oral-argument exercises. Especially in light of an overall law-school culture that reinforces the significance of inborn abilities, it is not hard to see how moot court's frequent emphasis on “natural” oral-advocacy talent, and its implicit connection of that talent to traits traditionally associated with men, can influence how students—

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and later lawyers—develop rigid conceptions of what a good lawyer looks, sounds, and acts like. And continuing to uncritically teach the values of Classical rhetoric—values inherited from a culture that silenced women’s voices in the public sphere—exacerbates the problem. This Article explores the dynamics and consequences of reinforcing the male paradigm in the way we coach and judge moot court and other oral-advocacy exercises, highlights some barriers to change, and proposes concrete steps legal educators, practitioners, and judges can take to help change what the voice of authority sounds like in the legal profession. The proposed solutions should help increase inclusion not only for women but also for other traditionally underrepresented groups.

## I. INTRODUCTION

*“Mother, go back up into your quarters, and take up your own work, the loom and the distaff ... speech will be the business of men, all men, and of me most of all; for mine is the power in this household.” ~Telemachus to Penelope<sup>2</sup>*

*“What we need is some old fashioned consciousness-raising about what we mean by the voice of authority and how we’ve come to construct it.” ~ Mary Beard<sup>3</sup>*

Moot court exercises are as old as legal education itself. Oral argument of fictitious cases as a pedagogical tool seems to have originated in the English Inns of Court beginning in the

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<sup>2</sup> HOMER, THE ODYSSEY 1.

<sup>3</sup> Mary Beard, *The Public Voice of Women*, 36 LONDON REV. OF BOOKS 11 (2014), <http://www.lrb.co.uk/v36/n06/mary-beard/the-public-voice-of-women>.

sixteenth century.<sup>4</sup> The earliest American law schools used moot-court exercises to teach both advocacy and substantive law, and Harvard—the first university school of law in the United States—continued that tradition.<sup>5</sup> And much of the advice moot court provides on dress, demeanor, and delivery is older still, originating in the Classical rhetoric of ancient Greece and Rome.<sup>6</sup>

Today, virtually every law school includes moot court in its curriculum, whether as a required, first-year course, as an upper-division elective, or as an extra-curricular activity.<sup>7</sup> Not only is moot court a rite of passage for lawyers, it is also an invaluable pedagogical tool, helping law students to build skills in collaboration and teamwork, foster nimble thinking, develop professional identity, practice professionalism, exercise critical-thinking skills, and deepen learning in areas of substantive law.<sup>8</sup>

But moot court has a dark side. Although well intentioned, the ways in which we traditionally coach oral argument, counsel students on general presentation and advocacy skills, prepare moot-court judges to assess arguments, provide feedback during competition rounds, and praise competition winners may reinforce and perpetuate biases that inhibit women from

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<sup>4</sup> See Jeffrey D. Jackson & David R. Cleveland, *Legal Writing: A History from the Colonial Era to the End of the Civil War*, 19 J. LEGAL WRITING INST. 191 (2014). See also James Dimitri, Melissa Greipp & Susie Salmon, THE MOOT COURT ADVISOR'S HANDBOOK: A GUIDE FOR LAW STUDENTS, FACULTY, AND PRACTITIONERS 5 (2015) (explaining the history of moot court).

<sup>5</sup> Dimitri, Greipp & Salmon, *supra* note 4, at 6. See also Jackson & Cleveland, *supra* note 4, at 208-12 (discussing Harvard's use of the moot-court model to supply practical legal and skills training).

<sup>6</sup> See Daphne O'Regan, *Eying the Body to Find Truth: How Classical Rhetoric's Rules for Demeanor Distort and Sustain Our Legal Regime*, PACE L. REV. (forthcoming 2016) (on file with author).

<sup>7</sup> See, e.g., *ABA National Appellate Advocacy Competition*, UNIVERSITY OF ARIZONA JAMES E. ROGERS COLLEGE OF LAW, <https://law.arizona.edu/aba-national-appellate-advocacy-competition>.

<sup>8</sup> See Dimitri, Greipp & Salmon, *supra* note 4, at 8-17.

succeeding and advancing in, or even remaining in, the legal profession.<sup>9</sup> By reinforcing longstanding and exclusionary stereotypes regarding the traits that make an effective advocate and the traits that make an effective lawyer, moot-court programs may inadvertently help cement the implicit bias that impedes greater diversity and equality of access in the legal profession.

Little has changed in both moot court and the legal profession since Professor Mairi Morrison first attacked this issue over twenty years ago in her article, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the “Real World” of Practice*,<sup>10</sup> and her advice on how to teach moot court from a feminist perspective still holds.<sup>11</sup> In fact, most programs likely long ago implemented many of her suggestions, such as eradicating gender-based and racially-based language, striving to make judging panels more diverse, and including more diverse examples when highlighting great advocates.<sup>12</sup> Yet, more than twenty years after Morrison’s article, moot-court faculty and students across the country still report instances of biased judging and feedback eerily similar to those Morrison detailed in 1995.<sup>13</sup> And more than twenty years after Morrison’s article, the legal profession—most especially the highest-paying and most prestigious sectors of the legal profession—has made dismal progress in increasing the numbers of women and other traditionally underrepresented groups. It seems, then, that more remains to be done.

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<sup>9</sup> These methods can have a similarly pernicious effect on students of color, students with disabilities, LGBTQ+ students, and students of non-Judeo-Christian religions, and that is a serious issue worthy of additional discussion in several additional articles. This Article, however, focuses primarily on the impact on women.

<sup>10</sup> Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the “Real World” of Practice*, 6 UCLA WOMEN’S L.J. 49 (1995).

<sup>11</sup> See *infra* Part I.A.

<sup>12</sup> See *infra* Part I.B.

<sup>13</sup> See *infra* Part III.

This Article suggests that many of the ways in which law schools teach students how to be effective advocates also reinforce a paradigm of the male as the archetypal “good lawyer,” and that paradigm, in turn, feeds the implicit bias that causes many of the inequalities and injustices in the legal profession. The Article then proposes some changes that moot-court programs and moot-court competitions can make to stop contributing to the problem. Part II briefly documents the continuing existence of bias and barriers to ascent in the legal profession. Part III discusses law schools’ longtime—and, at one time, entirely intentional—contributions to inequality in the legal profession. Part III also illuminates how some of the ways we teach, coach, and judge moot court—particularly those inspired by the values of Classical rhetoric—continue to privilege style and demeanor traditionally associated with males, and it illustrates this phenomenon both with examples from articles and texts about how to succeed in moot court and with testimony from the moot-court trenches. Part IV highlights two psychological theories—mindset theory and stereotype threat—and explores the ways in which those theories may illuminate challenges and opportunities for mitigating the impact of implicit bias. Part V highlights some of the barriers to change, and Part VI proposes concrete solutions to the problem, including teaching “critical moot court” to students, faculty, and volunteer judges to increase awareness of the implicit bias that underlies much of the conventional—and Classical—wisdom about what makes a good advocate and a good lawyer.

I. CONTINUING BARRIERS TO ASCENT IN THE LEGAL PROFESSION FOR WOMEN AND  
OTHER NON-TRADITIONAL PARTICIPANTS IN THE PROFESSION<sup>14</sup>

A. 1995: Mairi Morrison's Moot Court

In 1995, Mairi Morrison published her article, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, identifying the problem of gender bias in moot court, tying it to gender bias in the profession, and proposing an agenda for reform.<sup>15</sup> Morrison—who was teaching first-year moot court and serving as faculty advisor for two moot-court teams at the time—began her piece with three “vignettes” illustrating the gender bias that permeated the moot-court experience in 1995 and teasing out the dilemma women face: To accommodate prejudice or to rail against it and suffer the consequences.<sup>16</sup>

In the first vignette, a female student approaches Morrison regarding a rumor that women would be graded down for wearing pantsuits to moot-court arguments.<sup>17</sup> Although Morrison disabuses the student of that notion, she remains troubled by the highly gendered nature of law-

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<sup>14</sup> This article—like Morrison’s original piece—primarily focuses on issues facing women. But this Article also seeks to highlight for further research and discussion the additional barriers and difficulties that women of color, women with disabilities, LGBTQ women, and women of non-Judeo-Christian faiths face. The theory of intersectionality, first named by Professor Kimberle Crenshaw, acknowledges that women of color confront additional and different biases and obstacles because they are both female and not white. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). Race “is not merely an added layer that makes them subject to additional challenges, but rather a component of their identity that intersects with gender to expose them to unique challenges.” Carla D. Pratt, *Sisters in Law: Black Women Lawyers’ Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1779. Gender and disability, gender and sexuality, gender and religion, gender and poverty, really gender and any of a variety of identities (or combinations of multiple identities) also intersect to create different challenges for different women. E.g., Kozue Kay Nagata, *Gender and Disability in the Arab Region: The Challenges in the New Millennium*, 14 ASIA PAC. DISABILITY REHAB. J. 10 (2003); Asma Lateef, *Gender Inequality and Poverty*, HUFFINGTON POST BLOG (Apr. 21, 2015, 12:08 PM), [http://www.huffingtonpost.com/asma-lateef/gender-inequality-and-poverty\\_b\\_7099856.html](http://www.huffingtonpost.com/asma-lateef/gender-inequality-and-poverty_b_7099856.html). This Article will touch briefly on the ways in which the male paradigm particularly excludes women of color, women with disabilities, and women with other intersecting identities.

<sup>15</sup> Morrison, *supra* note 10.

<sup>16</sup> Morrison, *supra* note 10, at 58-66.

<sup>17</sup> Morrison, *supra* note 10, at 58-59.

school dress-code advice.<sup>18</sup> In the second vignette, a judge at competition spends the post-argument feedback session providing comments about dress code, demeanor, and delivery directed “just to the girls,” including admonishing women that cocking their heads to one side—which some could interpret as a listening posture—was too “cutesy.”<sup>19</sup> In the third vignette, Morrison watches as three highly capable but traditionally attractive and feminine female competitors are relegated to consolation prizes in a male-dominated Sports Law competition, whereas another team—“three pretty women from the South”—receive courtly treatment from male judges as the team advances through a Family Law competition.<sup>20</sup> Morrison also cited similar examples from a study conducted by the Chicago Bar Association’s Alliance for Women, including one judge’s withering admonishment that “[t]his is not Gidget Goes to Law School.”<sup>21</sup> In recounting these vignettes, Morrison highlighted the fine line female advocates had to walk in 1995: “distract” the court with reminders that you are a woman, and risk not being taken seriously; behave too much like a man, and risk alienating your audience by being “strident” or “bitchy.”<sup>22</sup>

Morrison then analyzed the moot-court dilemma through the prism of three schools of feminism—first-stage/equal rights feminism, second-stage/difference feminism, and third-stage/postmodern feminism, and identified the strengths and failings of each approach.<sup>23</sup> The current approach to moot court, Morrison judged, followed the model of equality feminism in

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<sup>18</sup> Morrison, *supra* note 10, at 59-60.

<sup>19</sup> Morrison, *supra* note 10, at 62-63.

<sup>20</sup> Morrison, *supra* note 10, at 64-65.

<sup>21</sup> Morrison, *supra* note 10, at 67.

<sup>22</sup> Morrison, *supra* note 10, at 59-60.

<sup>23</sup> Morrison, *supra* note 10, at 68-78.

training women to be more like men and to suppress any “distracting” feminine traits.<sup>24</sup> This model both reinforces the notion of feminine traits as non-lawyerly distractions and sets up women—who cannot, after all, *be* men, and who may not be able to calibrate their approximation of masculine behavior perfectly to suit every audience—to fail.<sup>25</sup> The difference model, instead, would value stereotypically female traits and mannerisms and therefore counsel women to embrace feminine dress, demeanor, and delivery to the extent that they were genuine.<sup>26</sup> This model, Morrison noted, might disadvantage students when they enter the real world, where principled choices to defy stereotypes may have serious consequences.<sup>27</sup> The postmodern model would challenge the very notion of gendered traits as detrimental to women working in traditionally masculine areas.<sup>28</sup> Instead, in order to succeed, female advocates must adopt a sort of behavioral bilingualism, subverting the male paradigm from within by wearing its costumes and speaking with its voice while simultaneously promoting more holistic and egalitarian values and beliefs.<sup>29</sup>

Morrison ultimately advanced ten recommendations for reforming moot court and teaching it from a feminist perspective.<sup>30</sup> Many of her recommendations were in the vein of teaching the controversy: exposing students to feminist jurisprudence; highlighting flaws in traditional, precedent-heavy reasoning and providing examples of successful alternative techniques; explicit recognition of the ethical issues involved in presenting an argument from a

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<sup>24</sup> Morrison, *supra* note 10, at 73-74.

<sup>25</sup> Morrison, *supra* note 10, at 74.

<sup>26</sup> Morrison, *supra* note 10, at 74-75.

<sup>27</sup> Morrison, *supra* note 10, at 75.

<sup>28</sup> Morrison, *supra* note 10, at 75-77.

<sup>29</sup> Morrison, *supra* note 10, at 77-78.

<sup>30</sup> Morrison, *supra* note 10, at 81-83.

particular perspective;<sup>31</sup> continuing to eradicate gender- and racially-biased language; and deliberate consciousness-raising about gender bias and how it affects all participants in the justice system.<sup>32</sup> She also stressed the importance of diversity in judges, teachers, and models, posited that both male and female advocates should be taught to move smoothly between different argument styles, and urged deemphasizing stereotypical dress norms.<sup>33</sup> Finally, she argued for improving the status of those who teach moot court, suggesting that providing such professors with security and academic freedom would better enable them to do the hard work that needed to be done in reforming moot court and, by extension, the legal profession itself.<sup>34</sup> The suggestions I make in Section V build on Professor Morrison’s suggestions, but they also move into new areas, providing targeted suggestions drawn from psychological research regarding fixed mindset theory and stereotype threat theory, as well as detailed, practical advice for those administering interscholastic moot-court competitions.

### *B. Moot Court—and the Legal Profession—in the 21st Century*

Many moot-court programs have adopted a number of Morrison’s suggestions—selecting more diverse examples and role models, inviting more diverse judges, encouraging somewhat more diverse argument styles. In some ways, however, little has changed in moot court or the

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<sup>31</sup> This Article deliberately leaves aside some of the issues that Morrison raises about whether other values of law practice in the United States—heavy reliance on precedent, eschewing appeals to emotion or other values, the adversarial system, and others—affect the position of women in the legal profession. These issues are both fascinating and significant but are outside the intended scope of this Article.

<sup>32</sup> Morrison, *supra* note 10, at 81-83.

<sup>33</sup> Morrison, *supra* note 10, at 81-83.

<sup>34</sup> Morrison, *supra* note 10, at 83.

legal profession since 1995. Although certainly women and other historically marginalized groups have made significant inroads into the legal profession over the past few decades, white men still dominate the top tiers of the profession, and progress seems to have stagnated. “The ceiling may be shattered, but the pipeline to power remains elusive for most women.”<sup>35</sup> Although women have made up more than 40% of law-school graduates since the mid-1980s, as of 2004, women made up a mere 15% of equity partners in law firms.<sup>36</sup> As of 2015, women still comprise only 16.8% of equity partners.<sup>37</sup>

Particularly where subjective decision-making comes into play, women—and women of color, in particular—still fare relatively poorly in the legal profession. Even where women ascend to equity partnership, law firms seem to value their work less than that of their male peers. Although women bill comparable hours to their male counterparts, female lawyers at big firms earn 32% of what their male peers earn.<sup>38</sup> Even where women originate the same amount of business as their male counterparts, the men still earn more—sometimes a startling amount more.<sup>39</sup> And billing rates, which are set by firm executive committees with input from the heads of offices and practice groups, further highlight this disparity in how firms value the work of female lawyers: firms bill out their female partners’ work at an average of \$47 per hour less than they bill the work of equivalent male partners.<sup>40</sup> Women seldom ascend to the ranks of the top

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<sup>35</sup> Hannah Brenner & Renee Newman Knake, *Gender and the Legal Profession’s Pipeline to Power*, 2012 MICH. ST. L. REV. 1419, 1420 (2012).

<sup>36</sup> Julie Triedman, *A Few Good Women*, THE AMERICAN LAWYER (May 28, 2015); Stephanie A. Scharf, Roberta Liebenberg & Christine Amalfe, National Association of Women Lawyers, Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms 4 (Feb. 2014)[hereinafter NAWL].

<sup>37</sup> Triedman, *supra* note 36.

<sup>38</sup> Triedman, *supra* note 36.

<sup>39</sup> Triedman, *supra* note 36.

<sup>40</sup> Triedman, *supra* note 36.

billers.<sup>41</sup> Ninety-Six percent of AmLaw 100 firms report that their most highly compensated partner is male.<sup>42</sup> Law firms seem to know that this is a problem; in the 2014 survey by the National Association of Women Lawyers, a significant majority of firms refused to report compensation data by gender.<sup>43</sup>

This disparity is not isolated to big firms. As of 2012, only 27.1% of state and federal judges were women.<sup>44</sup> Although women make up 66.2% of Assistant Deans, they comprise only 20.6% of Deans.<sup>45</sup> Only 22.6% of general counsel at Fortune 50 companies are women.<sup>46</sup> And the select circle of advocates who argue before the United States Supreme Court (“SCOTUS”)—arguably the Holy Grail of appellate-advocacy competitions—is overwhelmingly male, even in 2016.<sup>47</sup> In the last term, women lawyers argued only 23% of the cases that appeared before SCOTUS, which is actually an improvement over the recent average of 18%.<sup>48</sup> Of the 66 lawyers most likely to have their clients’ cases heard by SCOTUS—dubbed the “elite” lawyers in a recent Reuters investigation—only eight are women.<sup>49</sup> And of the 56 advocates invited by

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<sup>41</sup> Triedman, *supra* note 36.

<sup>42</sup> NAWL, *supra* note 36, at 11.

<sup>43</sup> NAWL, *supra* note 36, at 4. Only 48 firms in the AmLaw 200 provided any data on compensation of equity partners. NAWL, *supra* note 36, at 10.

<sup>44</sup> Dina Refki, D.A., Abigya Eshete & Selena Hajiani, *Women in Federal and State-Level Judgeships: A Report by the Ctr. for Women in Gov’t & Civil Soc’y*, Rockefeller Coll. of Pub. Affairs & Pol’y, Univ. at Albany, State Univ. of N.Y. 1 (2012).

<sup>45</sup> ABA, *Comm’n on Women in the Profession, A Current Glance at Women in the Law* 4 (July 2014).

<sup>46</sup> Triedman, *supra* note 36.

<sup>47</sup> Tony Mauro, *Supreme Court Specialists, Mostly Male, Dominated Arguments This Term*, NAT’L L.J. (May 11, 2016), <http://www.nationallawjournal.com/supremecourtbrief/id=1202757437432/Supreme-Court-Specialists-Mostly-Male-Dominated-Arguments-This-Term?mcode=0&curindex=0&curpage=ALL>.

<sup>48</sup> Chris White, *Lawyers Appointed To Argue Supreme Court Cases Are Overwhelmingly White Males, Study Finds*, LAW NEWZ (May 16, 2016, 1:33 PM), <http://lawnewz.com/uncategorized/lawyers-appointed-to-argue-supreme-court-cases-are-overwhelming-white-males-study-finds/>.

<sup>49</sup> Joan Biskupic, Janet Roberts & John Shiffman, *At America’s Court Of Last Resort, A Handful Of Lawyers Now Dominates The Docket*, THOMSON REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/>. And of the 66, 51 work for big law firms of the type that routinely fail to value the contributions of female lawyers equally. *Id.*

SCOTUS to present amicus arguments on behalf of parties who have declined to participate in the proceedings or are unable to retain counsel, only 10% were women; of these, all but one came after 2010.<sup>50</sup>

The statistics are even bleaker for women of color. “There is little question that minority women—compared to white men, white women and minority men—face the most daunting obstacles to advancement in law firms.”<sup>51</sup> Fifty percent of minority attorneys leave their law firms within the first three years, and 75% leave within the first four, whereas the overall attrition rate is 43% after three years and 55.6% after four.<sup>52</sup> Only 2% of equity partners are women of color.<sup>53</sup> “Indeed, various reports over the past 10 years show that virtually no progress has been made by the nation’s largest firms in advancing minority partners and particularly minority women partners into the highest ranks of firms.”<sup>54</sup> And of the 66 “elite” Supreme Court lawyers? Three are non-white.<sup>55</sup> Only 5% of amicus invitations go to non-white lawyers.<sup>56</sup>

This problem is not limited to the legal profession, of course—although half the overall workforce is women, women make up only 3.5% of corporate CEOs, 14% of executive

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<sup>50</sup> Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations*, CORNELL L. REV. 101, 131 (forthcoming 2016) (on file with author) (“The current approach permits the justices to dole out the valuable asset of a Supreme Court argument to friends and former employees, in a way that is reminiscent of the cronyism and patronage that characterized government employment” before the Civil Service reforms of the 19th century.”).

<sup>51</sup> NAWL, *supra* note 36, at 15.

<sup>52</sup> Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 949 (2011).

<sup>53</sup> NAWL, *supra* note 36, at 6.

<sup>54</sup> NAWL, *supra* note 36, at 16 (citing various studies conducted between 2004 and 2013).

<sup>55</sup> Biskupic, Roberts & Shiffman, *supra* note 49.

<sup>56</sup> White, *supra* note 48.

managers, and 12.5% of corporate directors—but on average, women fare worse in the legal profession than they do in other sectors.<sup>57</sup>

Although the reasons that people leave the legal profession or fail (or choose not) to reach its top echelons are complex,<sup>58</sup> cognitive biases that reinforce pernicious stereotypes of women and of the traits that make a persuasive advocate or a good attorney contribute to the problem.<sup>59</sup> Despite progress—having three women on the United States Supreme Court at the same time is certainly an excellent start, for example—“inequities remain, often lurking in difficult-to-articulate domains of implicit bias and stereotyping.”<sup>60</sup>

At minimum, gender stereotypes are “an important factor explaining the glass ceiling effect and the underrepresentation of women lawyers in prestigious segments of the legal profession.”<sup>61</sup> Particularly where subjective decision-making comes into play—for example, compensation decisions, decisions about billable rates, and performance reviews—there is little

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<sup>57</sup> Ronit Dinovitzer & John Hagan, *Hierarchical Structure and Gender Dissimilarity in American Legal Labor Markets*, 92 SOC. FORCES 929 (Mar. 2014). The legal profession itself recently acknowledged the pernicious persistence of bias in the profession. In August 2016, the American Bar Association formally adopted revised Resolution 109, which amends its Model Rule 8.4 to include discrimination or harassment on the basis of “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status” in the definition of professional misconduct that will subject an attorney to discipline. ABA, *Report to the House of Delegates*, Res. 109 (Aug. 2016)[hereinafter *Report*]. The comments to the new Model Rule explicitly provide that it covers workplace discrimination and harassment. ABA, Comment, *Report to the House of Delegates*, Res. 109 (Aug. 2016). In its report endorsing the adoption of Resolution 109, a coalition of ABA commissions and committees that included the Commission on Women in the Profession noted that female lawyers report experiencing the effects of gender bias in their careers. *Report*.

<sup>58</sup> Commentators posit several factors that may contribute to this disparity. For example, some argue that fewer women aspire to leadership positions than do men. This lack of aspiration, of course, may be the result of longstanding barriers to women’s advancement, such as lack of adequate child care options, lack of social and familial support, and the difficulties of advancing in a workplace permeated by gender bias, among other barriers. Others emphasize gender stereotypes in the workplace, which prevent women from “receiving the work opportunities that would allow them to showcase their skills and earn promotion.” Pratt, *supra* note 14, at 1778-79.

<sup>59</sup> Brenner & Knake, *supra* note 35, at 1423.

<sup>60</sup> Brenner & Knake, *supra* note 35, at 1424.

<sup>61</sup> Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession’s Pipeline to Power: A Study on Media Coverage of the Supreme Court Nominees (Phase I, The Introduction Week)*, 84 TEMP. L. REV. 325, 340 (2012) (citing Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2274 (2010)).

question that stereotypes come into play. “Women do not share the presumption of competence held by men.”<sup>62</sup> Assumptions that women lawyers will be less assertive, less committed to clients, less hard-working, and less competitive lead reviewers and clients to latch onto objective facts that confirm those stereotypes rather than more numerous and significant facts that undermine them.<sup>63</sup>

### III. LAW SCHOOL’S CONTRIBUTION TO GENDER INEQUALITY

Although we cannot place responsibility for gender bias in the legal profession solely at the doorstep of law schools, law schools have long contributed to the problem. That law is an elitist profession is hardly a surprise to most, but it is also fair to say that U.S. university law schools were founded in part to exclude women and religious, ethnic, and racial minorities. At their beginnings, university law schools stood in contrast to the more democratic means of entering the profession: “reading the law,” which was the dominant mode of entry into the profession in the U.S. in the first half of the nineteenth century.<sup>64</sup> When university-affiliated law schools emerged later in the 1800s, they targeted a more affluent, upper-class audience, and they instituted mechanisms to exclude immigrants, members of racial, ethnic, or religious minorities, and women.<sup>65</sup> When more accessible schools arose, providing legal-education opportunities for a more diverse population, products of the elite university schools decried graduates of those

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<sup>62</sup> Brenner & Knake, *supra* note 35, at 1423.

<sup>63</sup> Wald, *supra* note 61, at 2256 and n.55 (citing ABA Comm’n on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 14 (2001)).

<sup>64</sup> Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1175-76 (2008).

<sup>65</sup> *Id.* at 1177.

schools—primarily immigrants or members of minority groups or lower socioeconomic classes—as not just unqualified but unethical.<sup>66</sup>

Although law schools are certainly less overt in these types of exclusionary tactics now, this inequality persists today, in the form of law-school rankings, class rank, admissions tests that disfavor certain groups, values communicated by some law-school career offices, biases in faculty hiring, and a general disdain for any education that seems too practical.<sup>67</sup> And law schools continue to elevate the upper-class, Anglo, Protestant male ideal in a variety of ways,<sup>68</sup> not least of all through moot court.

A. *Good Lawyers Look and Sound Like Men.*

Moot court often is one of the first opportunities that law students have to experience what it feels like to act and sound like a lawyer. Most law schools include some sort of moot-court-type activity in the first year, whether it be just a small part of the first-year legal-writing curriculum, a full-blown moot-court class, or an intramural competition.<sup>69</sup>

Much of what law schools teach about dress, demeanor, and delivery in moot court and other advocacy courses harkens back to techniques of Classical rhetoric.<sup>70</sup> And most of those techniques derive from the notion that the demeanor and delivery of the military leader or warrior—always a man—carries the most credibility and persuasive power.<sup>71</sup>

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<sup>66</sup> *Id.* at 1177-79.

<sup>67</sup> *Id.* at 1202-07.

<sup>68</sup> *Id.* at 1178-87, 1190, 1198, 1220.

<sup>69</sup> See generally ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016, Standard 305(a).

<sup>70</sup> See generally O'Regan, *supra* note 6.

<sup>71</sup> O'Regan, *supra* note 6 (manuscript at 8) (“The dominant elite tradition successfully imposed aristocratic, upper-class demeanor, including the physical habits of wealthy foot soldiers, as natural and linked to rationality and truth.”).

This demeanor includes what modern advocacy experts style the “neutral stance”: feet approximately shoulder-width apart, hands at sides, with highly controlled, if any, gesturing.<sup>72</sup> According to Aristotle, “a strong and manly posture derived from armed conflict or, at least, the gymnasium” (as opposed to the bent and servile posture more suited for slave labor) quite literally embodies rationality.<sup>73</sup> Under the rules of Classical rhetoric, a credible, authoritative speaking voice is low, controlled, and resonant; a high voice, by contrast, signifies lack of emotional self-control, irrationality, and lack of authority.<sup>74</sup> A speaker who shuns or is unable to emulate elite stance and delivery relegates himself to parity with “the insane, female, poor, children, slaves, the powerless”: in other words, the irrational and untrustworthy.<sup>75</sup>

Female speech was considered inherently untrustworthy under the Classical paradigm.<sup>76</sup> Women, ruled by their wombs and the hysteria those organs caused, speak from untrustworthy motives.<sup>77</sup> And speech that mirrored women’s speech—particularly “shrill” or “shrieking” tones reflecting lack of emotional control—conveyed a speaker’s lack of credibility.<sup>78</sup>

In fact, the very notion of a woman speaking in the public sphere—much less on issues relating to law or politics—violated the Classical social code. As classicist Mary Beard notes, “public speaking and oratory were not merely things that ancient women didn’t do: they were

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<sup>72</sup> O’Regan, *supra* note 6 (manuscript at 8) (citing Leonard Matheo & Lisa DeCaro, *The Eleven Most Frequently Asked Questions about Courtroom Presentation and Performance*, PRAC. LITIGATOR, Sept. 1999, at 17, 30).

<sup>73</sup> O’Regan, *supra* note 6 (manuscript at 12-13).

<sup>74</sup> O’Regan, *supra* note 6 (manuscript at 20-21, n.120-22).

<sup>75</sup> O’Regan, *supra* note 6 (manuscript at 18) (citing Joy Connolly, *The Politics of Rhetorical Education*, in CAMBRIDGE COMPANION TO ANCIENT RHETORIC 135 (Erik Gunderson ed., 2009) (“Cicero and Quintilian are policeman of behavior and style, encouraging students to cultivate a ‘naturally’ masculine attitude, and punishing those who had the look and sounds of the slave, the foreigner, the ill-educated man, or the woman.”)).

<sup>76</sup> O’Regan, *supra* note 6 (manuscript at 19, n.104).

<sup>77</sup> O’Regan, *supra* note 6 (manuscript at 19, n.104).

<sup>78</sup> O’Regan, *supra* note 6 (manuscript at 19, n.104).

exclusive practices and skills that defined masculinity as a gender.”<sup>79</sup> In the Classical view, women could not adapt their private speech—largely focused on domestic matters—to the “lofty idiom” of law and politics.<sup>80</sup> When a woman did insert herself into the public forum, she could be seen two ways: as an “androgynous,” hiding a “man’s nature” behind her woman’s form, or as an “unnatural freak” who irritates her audience with her “impudent” “yapping.”<sup>81</sup> As Beard observes, a “woman speaking in public was, in most circumstances, by definition not a woman.”<sup>82</sup> To the extent that the rare woman could be accepted as a speaker in the public sphere, her role and subject matter were limited: she could speak on her own behalf as a victim, or she could speak to defend her home and family.<sup>83</sup> She could not speak for men.<sup>84</sup>

The goal of the elite speaker was invisibility: “The speakers who are within the elite norm disappear; they leave behind what looks like disembodied speech.”<sup>85</sup> Deviations from this elite norm distract from the message. And women and members of other non-elite groups have less freedom to deviate.<sup>86</sup>

### *B. To Be or Not To Be...Feminine?*

According to conventional wisdom, appellate argument of the type practiced in most moot-court competitions calls for the elite dress, demeanor, and delivery of the warrior

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<sup>79</sup> Beard, *supra* note 3.

<sup>80</sup> Beard, *supra* note 3.

<sup>81</sup> Beard, *supra* note 3.

<sup>82</sup> Beard, *supra* note 3.

<sup>83</sup> Beard, *supra* note 3.

<sup>84</sup> Beard, *supra* note 3.

<sup>85</sup> O’Regan, *supra* note 6 (manuscript at 32).

<sup>86</sup> O’Regan, *supra* note 6 (manuscript at 42) (“By making the wrong gesture, the advocate slips backward into the non-legal world, of the body, deception, particularity, emotionality, irrationality, and finally, insanity. This is a particular danger for women and other non-elite groups. Their precarious position requires them to be constantly vigilant in the presentation of a rational, elite self.”).

rhetorician.<sup>87</sup> And, as modern moot-court wisdom would have it, the voice of authority is still a deep and resonant one. No lesser authorities than U.S. Supreme Court Justice Antonin Scalia and noted legal-writing expert Bryan Garner advise advocates to spend time on efforts to lower their vocal pitch, opining that “a high and shrill tone does not inspire confidence.”<sup>88</sup> Scalia and Garner hardly stand alone; advice about lowering vocal register pervades books and articles on effective oral advocacy.<sup>89</sup> Even those oral-advocacy experts who explicitly acknowledge the sexism that may underlie the connection between low voices and authority nonetheless counsel advocates to speak in the lower end of their vocal range. Alan Dworsky, for example, in his excellent *The Little Book on Oral Argument*, counsels: “Speak at a pitch in the lower end of your range. If sexism is the cause of the general perception that low voices have more authority than high voices, then perhaps as women occupy more positions of power this rule will change.”<sup>90</sup> And

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<sup>87</sup> O’Regan, *supra* note 6 (manuscript at 28, 39, 40). This Article deliberately leaves aside the question of whether the focus on appellate advocacy—which dominates the world of legal-skills competition and even the curriculum of first-year legal writing programs—exacerbates the problem. See Ass’n Legal Writing Dirs., Legal Writing Inst., Report of the Annual Legal Writing Survey (2014) (demonstrating that out of 176 schools reporting, 125 taught appellate argument, compared with 84 that taught pretrial-motion argument and 45 that taught trial-motion argument, and no school taught trial advocacy in the first year).

<sup>88</sup> ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 143 (West Publishing Co. 2008).

<sup>89</sup> See, e.g., CELIA W. CHILDRESS, PERSUASIVE DELIVERY IN THE COURTROOM 320 (1995) (quoted in BRYAN GARNER, THE WINNING ORAL ARGUMENT: ENDURING PRINCIPLES WITH SUPPORTING COMMENTS FROM THE LITERATURE 21 (West Publishing Co. 2009)) [hereinafter THE WINNING ORAL ARGUMENT] (“There is no doubt that people prefer to listen to low-pitched voices and ascribe stronger personality qualities to the low-pitched speaker.”); IAIN MORLEY, THE DEVIL’S ADVOCATE: A SHORT POLEMIC ON HOW TO BE SERIOUSLY GOOD IN COURT 46 (2005) (quoted in THE WINNING ORAL ARGUMENT, at 21) (“Deeper voices sound more persuasive—why is a mystery, but they just do.”); Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 652 (2009) (asserting that a deeper pitch is both more persuasive and more credible).

<sup>90</sup> ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 43 (Fred B. Rothman & Co. 1991). There is ample research suggesting that most people find deeper voices more credible and persuasive, and it could be a result of evolution. For example, one study found that women who use a sultry voice are better at persuading people than women with high-pitched voices. Cheng et al., *Listen, Follow Me: Dynamic Vocal Signals of Dominance Predict Emergent Social Rank in Humans*, 145(5) J. EXPERIMENTAL PSYCHOL.: GEN. 536 (May 2016) (“[We] found that when the voice ... goes down in pitch, people judge the person as wanting to be more influential, more powerful, more intimidating or more domineering.... Our study adds to the evidence that humans, like many other animals, use their voices to signal and assert dominance over others.”); *How To Use Voice Pitch To Influence Others In Seconds*, PSYBLOG (Apr. 21, 2016), <http://www.spring.org.uk/2016/04/how-to-use-voice-pitch-to-influence-others-in->

many of the texts warn of the consequences of a higher pitch, which range from simply being annoying to being less persuasive and less credible.<sup>91</sup>

Women must walk a particularly fine vocal line: Their voices, like men's, must be “low in pitch, loud and resonant,” and “certainly a few notes lower in register than the ordinary female voice,” but still “all feminine.”<sup>92</sup> The recent handwringing in the popular media and elsewhere about so-called “vocal fry”—which “occurs typically when speakers lower their vocal pitch to the lowest register they are capable of producing”<sup>93</sup>—illustrates the confounding contours of this advice: women who lower their voices too unnaturally, or who lower their voices irregularly or for emphasis, may be perceived as even less professional, credible, and persuasive than those

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seconds.php. Another study conducted by Meghan Sumner, Associate Professor of Linguistics at Stanford, showed how people preferred male voices when compared to female voices, even when the female voices were deemed trustworthy and the male voices, on their own, were deemed unreliable or unintelligent. See Vivian Giang, *How Unconscious Bias Is Affecting Our Ability To Listen*, FAST COMPANY (Sept. 8, 2016, 5:04 AM), <https://www.fastcompany.com/3063218/how-unconscious-bias-is-affecting-our-ability-to-listen> (discussing Professor Sumner's findings). Of course, this unconscious bias may only be reinforced in law schools. But, as Professor Jennifer Romig points out, by acknowledging that we have subconscious stereotypes, we may start to change them, especially in the legal profession. “[One] overarching fundamental legal skill is the ability to effectively assess and respond to the perspective of the recipient of the communication. This requires inclusive listening.

Inclusive listening makes other people feel valued and understood. When listening to others most of us tend to assume we understand and we reach conclusions based on our point of view and our implicit biases. Inclusive listening doesn't make assumptions. It requires one to actively engage in critical thinking: notice and question our assumptions, and recognize that assumptions are not truths.” Jennifer Romig, *Inclusive Listening: Pushing Through Bias and Assumptions*, LISTEN LIKE A LAWYER (Oct. 3, 2016), <https://listenlikealawyer.com/author/jenniferromig/>.

<sup>91</sup> See, e.g., Hon. Yvonne Kauger (as quoted in RUGGERO J. ALDISERT, *WINNING ON APPEAL* 325 (1992)) (“Don't whine. This applies to both sexes. . . Take a deep breath and lower your register.”); CHILDRESS, *supra* note 89, at 346 (quoted in *THE WINNING ORAL ARGUMENT*, at 21) (“High-pitched voices irritate more people than you can imagine.”); Jean Johnson Spearman, *General Communication Skills*, in *MASTER ADVOCATES' HANDBOOK* 285, 297 (D. Lake Rumsey ed., 1986) (“Some voices are naturally higher pitched than others. If the voice is too high and lacks variety, it can become annoying to your audience.”); MORLEY, *supra* note 89, at 46 (quoted in *THE WINNING ORAL ARGUMENT*, at 21) (“Tinny, light voices can sound plaintive, weak, sometimes desperate, appear to be shouts, sound out of control, and finally and most importantly, are difficult to listen to, and so in the end they can be ignored.”).

<sup>92</sup> CHILDRESS, *supra* note 89, at 297, 348 (quoted in *THE WINNING ORAL ARGUMENT*, at 18, 22).

<sup>93</sup> Vocal fry is described as “a voice quality accompanied by creaking, cracking, and popping noises.” Rindy C. Anderson et al., *Vocal Fry May Undermine the Success of Young Women in the Labor Market*, 9(5) PLOS ONE e97506 (2014) (cited in Michael J. Higdon, *Oral Advocacy and Vocal Fry: The Unseemly, Sexist Side of Nonverbal Persuasion*, 13 JALWD (forthcoming 2016) (manuscript at 3) (on file with author)).

who do not lower their voices at all, and certainly as less professional, credible, or persuasive than men who employ the same technique.<sup>94</sup>

Like the deep, resonant voice, the warrior stance also lives on in modern moot-court advice. Dworsky even explicitly ties it to the notion of strength, counseling advocates that “[y]our stance should be as solid as your argument. Face the judges squarely, with legs straight and both feet planted firmly on the floor about shoulder-width apart. Keep your head up and your back straight. An upright stance suggests honesty and strength.”<sup>95</sup> Some variation of this same advice appeared—sometimes multiple times—in virtually every book or article on oral advocacy that this author consulted, including those texts that spent little time on matters of demeanor and style.<sup>96</sup> One writer even confessed that the moot-court program at a law school at which he previously worked had codified this warrior bearing as the “Stetson Stance”: “The Moot Court people at that law school teach students to approach the podium, spread their legs further apart than their shoulders, and grasp the podium to center themselves.”<sup>97</sup>

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<sup>94</sup> Higdon, *supra* note 93 (manuscript at 6) (“among speakers using vocal fry, women are perceived more negatively than men.”). Indeed, one 2014 study found that young women using vocal fry are perceived as “less competent, less educated, less trustworthy, less attractive, and less hireable.” Higdon, *supra* note 93 (manuscript at 5) (citing Anderson et al., *supra* note 93).

<sup>95</sup> DWORSKY, *supra* note 90, at 38-39.

<sup>96</sup> See, e.g., SCALIA & GARNER, *supra* note 88, at 165 (“stand erect”) and 183 (“stand up straight and speak your piece”); DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 137 (Thomson/West 2003) (“The lawyer should stand tall and straight”); *Id.* (“an advocate should strive to achieve a professional posture, standing straight and tall to argue . . . .”); *Id.* at 191 (professional demeanor includes erect posture); Gerald Lebovits, Drew Gewuerz & Christopher Hunker, *Winning the Moot Court Oral Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 *CAP. U. L. REV.* 887, 917 (2013) (advocates “should stand erect with both feet on the ground approximately shoulder length apart”); *Id.* at 919 (“advocates should stand with both feet straight and on the ground. Their feet should be even with their shoulders.”); Higdon, *supra* note 89, at 643-44 (posture should be non-rigid but erect and confident); *Id.* at 657 (quoting BRADLEY G. CLARY ET AL., *ADVOCACY ON APPEAL* 116 (2001) (“plant your feet squarely on the ground and stand in one position”)); James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 *STETSON L. REV.* 75, 103 (2008) (“Your posture at the podium should be even. Stand up straight and face the bench. Do not stand leaning on one leg, and do not shift your weight from one leg to the other.”).

<sup>97</sup> Ronald J. Rychlak, *Effective Appellate Advocacy: Tips from the Teams*, 66 *MISS. L.J.* 527, 534 (1997).

Similarly, like the Classical speaker, modern moot-court advocates are counseled to strive for invisibility lest their words be lost amongst distractions. Attire should not draw attention to itself or to the advocate's body, even (or especially) if that body is appealing.<sup>98</sup> Advocates are warned that everything from too many gestures, too few gestures, poorly timed gestures, gestures at the wrong height, improper vocal volume, and inappropriate vocal inflections could distract the court from the substance of even the most masterfully reasoned and worded argument.<sup>99</sup>

Even advice not so closely tied to the values of Classical rhetoric tends to favor dress, demeanor, and delivery associated with white men. Dworsky puts it most bluntly in talking about courtroom appearance: “[J]udges . . . tend to trust people who look like them.”<sup>100</sup> More than one source suggests that short hair lends an advocate more credibility, whether that advocate be male or female.<sup>101</sup> Women are counseled to wear updos if they are unwilling to cut their hair.<sup>102</sup> Long hair, at least in American culture, is more commonly associated with femininity, and, indeed,

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<sup>98</sup> DWORSKY, *supra* note 90, at 38 (“The guiding principle of dressing for oral argument is not to wear anything that draws attention to itself or your body. . . You are not allowed to use your body’s beauty to influence the judges.”) (!); *see also* Lebovits et al., *supra* note 96, at 916 (attire should be conservative and not distracting); Coleen M. Barger, *How to Make the Losing Oral Argument*, 41-SUM ARK. LAW. 16 (2006) (to make the losing argument, “wear the kind of clothing that will attract the Court’s attention.”).

<sup>99</sup> *See, e.g.*, Hon. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 205 (1995) (quoted in THE WINNING ORAL ARGUMENT, at 96) (“Try not to talk with your hands; that is distracting and unprofessional . . . Do whatever works to make your hands invisible.”); DWORSKY, *supra* note 90, at 24 (vocal and bodily mannerisms can be distracting); Lebovits et al., *supra* note 96, at 919 (too many hand gestures distracting); Lebovits et al., *supra* note 96, at 920 (hand gestures higher than chest level distracting).

<sup>100</sup> DWORSKY, *supra* note 90, at 38.

<sup>101</sup> *See* Higdon, *supra* note 90, at 654 (citing JUDEE K. BURGOON ET AL., NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE 402, 449); Lebovits et al., *supra* note 96, at 916 (hair should be short).

<sup>102</sup> Higdon, *supra* note 89, at 654 (citing TONYA REIMAN, THE POWER OF BODY LANGUAGE: HOW TO SUCCEED IN EVERY BUSINESS AND SOCIAL ENCOUNTER 222 (2007)) (“Ladies, long hair, worn down, no matter how nicely it is kept, no matter how good it looks, is not usually considered professional.”).

with female sexual attractiveness.<sup>103</sup> Vocal tics associated with women, including uptalk,<sup>104</sup> vocal fry,<sup>105</sup> and tag questions,<sup>106</sup> all draw disapproval. And the head tilt that one of the judges in Morrison's article characterized as offensively "cutesy" when coming from a woman seems to split the vote. According to one source, a head tilt increases credibility, depending, of course, on the direction of that head tilt.<sup>107</sup>

### *C. Teach, Coach, Judge: A Continuation or Revival of Classical Rhetoric Values?*

Oral-argument judges and coaches often amplify the gendered (and otherwise biased) nature of the Classical model and other conventional wisdom about dress, delivery, and demeanor. As I noted in the Introduction, depressingly little has changed since Mairi Morrison first tackled this issue in 1995. Many of the anecdotes I collected from my colleagues around the country<sup>108</sup> eerily echo those Morrison set forth in her piece twenty years ago and perpetuate Classical values that privilege white-male traits. For the most part, the days of moot-court judges

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<sup>103</sup> See JOHN KNOWLTON & STEVEN PEARCE, HANDBOOK OF COSMETIC SCIENCE AND TECHNOLOGY 495 (1993) (cited in Higdon, *supra* note 93 (manuscript at 2)).

<sup>104</sup> See Lebovits et al., *supra* note 96, at 921; DWORSKY, *supra* note 90, at 43 (avoid ending a sentence with a rising inflection); Yana Skorobogatov, *What's Up With Upspeak?*, UC BERKELEY SOCIAL SCIENCE MATRIX (Sept. 21, 2015), <http://matrix.berkeley.edu/research/whats-uptalk> (uptalk is most often associated with female speakers).

<sup>105</sup> *From Upspeak To Vocal Fry: Are We 'Policing' Young Women's Voices?*, NPR (July 23, 2015, 1:49 PM), <http://www.npr.org/2015/07/23/425608745/from-uptalk-to-vocal-fry-are-we-policing-young-womens-voices> (a tendency to draw out the end of words or sentences with a low, creaky voice is associated with women, although men also engage in those habits).

<sup>106</sup> See Betty Lous Dubois & Isabel Crouch, *The Question of Tag Questions in Women's Speech: They Don't Really Use More of Them, Do They?*, 4 LANGUAGE IN SOC'Y 289 (1975).

<sup>107</sup> Higdon, *supra* note 89, at 643.

<sup>108</sup> In all instances, these anecdotes are documented in emails on file with the author. That said, many of the sources requested anonymity. They attend or run moot-court competitions every year, and they value good relationships with competition administrators and with the judges they recruit. Thus, this Article omits nonessential information from the anecdotes to preserve anonymity, and, naturally, does not identify its sources by name.

who call male advocates “Mr. [Last name]” and female advocates their first names,<sup>109</sup> who reminisce sadly about the “good old days” when the profession did not include “those people,”<sup>110</sup> or who change the rules of the competition on the fly to award prizes to male advocates (after telling the only female advocate that she gave the best oral presentation),<sup>111</sup> are long passed.<sup>112</sup> That said, two email solicitations to listservs of moot-court and legal-writing professors quickly elicited an avalanche of examples of coaching or feedback that reinforced the male paradigm.

Unsurprisingly, many moot-court judges and coaches cloak gendered<sup>113</sup> critiques in the language of “avoiding distractions from the substance of an argument.” Just as Morrison pinpointed in her article, however, much of what conventional moot-court wisdom styles distractions from the substance are in fact simply deviations from the male norm.<sup>114</sup> Being notably female is distracting. Being a female of color is especially distracting. Female advocates are routinely told that suits that fail to disguise their large breasts or shapely figures are “distracting.” One advocate was told to center herself more behind the podium to hide her “distracting” breasts.<sup>115</sup> A woman wearing a skirt suit cut a bit above the knee and a blouse that hinted at the existence of cleavage was told that her clothing was “distracting.”<sup>116</sup> Female

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<sup>109</sup> See E-mail to Susie Salmon, Assistant Director of Legal Writing and Clinical Professor of Law, University of Arizona James E. Rogers College of Law (Sept. 4, 2015) (on file with author).

<sup>110</sup> See *id.*

<sup>111</sup> See E-mail from JR to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>112</sup> Then again, people did disclose some shockingly archaic conduct from recent years. A legal-writing professor reported that her student named “Chastity” was about to give her first oral argument when one of the judges leered at her and said, “You don’t look like a ‘Chastity.’” See E-mail from CK to Susie Salmon (Sept. 14, 2016) (on file with author). And one judge openly commented upon one competitor’s large breasts. See E-mail from AH to Susie Salmon (Sept. 5, 2015) (on file with author).

<sup>113</sup> And race-based, and heterocentric, and ableist...

<sup>114</sup> Morrison, *supra* note 10.

<sup>115</sup> In fairness, that judge was inebriated. See E-mail from AH to Susie Salmon (Sept. 5, 2015) (on file with author).

<sup>116</sup> See E-mail from EF to Susie Salmon (Sept. 14, 2016) (on file with author).

advocates are routinely told that long hair is “distracting.”<sup>117</sup> In essence, if a female advocate looks too much like a woman—or not enough like traditional conceptions of a woman—moot-court judges find that extremely distracting.

Many comments reinforce the Classical notion that the only acceptable voice for an advocate is a deep, resonant one. One coach reported that an older, white, male judge counseled her all-female team that women’s voices were “just too hard to listen to because they were high and shrill” and stated that his “best advice” would be to “lower their voices at least two octaves” so that they would not be “painful for men to listen to.”<sup>118</sup> One female advocate with a soft, relatively high-pitched voice was told she had a “baby voice” and that she “sounded like she lacked confidence, so it was harder to take her arguments seriously.”<sup>119</sup>

Oral-argument judges routinely devote the vast majority of their post-argument commentary to matters of style and appearance, but that feedback is frequently directed primarily or exclusively to women. Multiple coaches and advocates cited the example of one older female judge at a national competition who spent almost fifteen minutes lecturing primarily the female advocates on matters of dress.<sup>120</sup> Although she did mention tie color briefly, she spent the bulk of her time warning at great length against what she deemed to be inappropriate jewelry, hairstyles, and blouse styles. Meanwhile, at the same competition two years earlier, a coach observed a young male advocate who had added very noticeable—and very artificial-looking—grey streaks

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<sup>117</sup> See, e.g., E-mail from JR to Susie Salmon (Sept. 7, 2015) (on file with author).

<sup>118</sup> See E-mail from SC to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>119</sup> See E-mail from EF to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>120</sup> See, e.g., E-mail from RS to Susie Salmon (Sept. 15, 2016) (on file with author); Facebook Posting of HB (on file with author).

in his dark hair with a visibly powdery spray-on hair color; not a single judge on three panels mentioned it, and overall the advocate received strong scores.<sup>121</sup>

Some moot-court judges still seem to resist advocates who fail to visually evoke the tall, masculine Classical warrior. One petite female advocate reported being told that her argument was “adorable,” but that she was “too short to be a litigator.”<sup>122</sup> Another petite female advocate was told that the judge guessed the courts would need to implement step stools now that so many women were becoming lawyers.<sup>123</sup> Still another petite female advocate was counseled to “take up more space” at the podium.<sup>124</sup>

It is not unusual for judges to focus their appearance- or demeanor-based comments solely on the female competitors. In one round of a national specialty competition, a judge commented that a particular female advocate smiled too much.<sup>125</sup> None of the male advocates received feedback on their facial expressions. In the following round, which was a semi-final elimination round, the panel of four older, male judges provided no individual feedback, other than praising the female advocate on one team for her “gold star smile” and telling the only other female advocate—the same one who had been critiqued earlier for smiling too much—to smile more. The team with the “gold star smile” won the round and advanced to the finals.<sup>126</sup>

Moot-court judges seem to echo the advice of moot-court texts that short hair, or at least hair that is pulled back in a bun or twist so as to make it appear to be short, looks more

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<sup>121</sup> See Facebook Posting of MS (on file with author).

<sup>122</sup> See Facebook Posting of AS (on file with author).

<sup>123</sup> See E-mail from AM to Susie Salmon (Sept. 15, 2016) (on file with author).

<sup>124</sup> See E-mail from MB to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>125</sup> See E-mail from VL to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>126</sup> *Id.*

professional. Some moot-court programs even require female advocates to wear their hair back.<sup>127</sup> Men are counseled to have short hair; one judge—who himself was wearing a large, heavy bracelet that clunked on the bench every time he gestured—criticized one male advocate’s longer hair as “distracting” but “maybe ok for a civil-rights lawyer or something.”<sup>128</sup> One former competitor reported that a female judge subtracted five points from the competitor’s overall oral-argument score because the competitor wore her shoulder-length hair down and styled curly.<sup>129</sup>

Just as Classical values cast the female speaker as either an “androgynous” or as an “unnatural freak,” depending on whether she presented in a more masculine way or a more feminine one,<sup>130</sup> modern female moot-court advocates have to walk a fine line or risk harsh critique. One coach described a blond, female, exceptionally conventionally attractive female advocate wearing a conservative skirt suit being chastised by a male judge right out of the gate: “Don’t ever come into my courtroom and smile at me like that ever again! Don’t think that you can sway a judge’s opinion with your overt sex appeal. That is unprofessional.”<sup>131</sup> The advocate had done nothing any of the other advocates had not done; she had simply approached the podium and launched into her excellent oral argument. She had not smiled, and she certainly had not been flirtatious. At the same time, not being “feminine enough” poses a problem for some advocates. Another coach recounted an argument he observed where a female advocate whom he characterized as “presenting as a lesbian” gave a confident argument.<sup>132</sup> Her opponent, a woman

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<sup>127</sup> See E-mail from CK to Susie Salmon (Sept. 14, 2016) (on file with author).

<sup>128</sup> This author observed this particular incident.

<sup>129</sup> See E-mail from JO to Susie Salmon (Sept. 16, 2016) (on file with author).

<sup>130</sup> See *supra* Part II.A.

<sup>131</sup> See E-mail from GB to Susie Salmon (Sept. 5, 2015) (on file with author).

<sup>132</sup> See E-mail from SH to Susie Salmon (Sept. 4, 2015) (on file with author).

whose appearance was more traditionally feminine, struggled to answer fairly predictable questions. During the post-argument feedback, the judges told the first woman that perhaps she could smile more (her argument required her to defend the constitutionality of withholding hormone treatment for transwomen, hardly a smiley issue). By contrast, the judges praised her opponent's "thoughtfulness" and that she "took her time" to answer a question.<sup>133</sup>

And a female lawyer in a pantsuit still seems to unsettle a significant number of moot-court judges, even in 2016. Coaches and female competitors frequently reported women losing points for wearing pantsuits, being chastised in post-argument feedback for wearing pantsuits, or being subject to a school- or program-wide policy requiring female competitors to wear skirt suits.<sup>134</sup>

#### IV. ORAL ARGUMENT ABILITY IS "NATURAL": MINDSET THEORY AND STEREOTYPE THREAT

Aside from reinforcing the dress, demeanor, and delivery of the white male as "neutral" and "non-distracting," law school also perpetuates the notion that certain abilities are inborn, innate, or natural—and thus, by extension, inextricably bound up with other inborn traits such as sex, race, ethnicity, sexuality, or some forms of disability—and perhaps nowhere is this more true than in moot court. Section IV discusses mindset theory and stereotype threat theory and posits that employing these theories in teaching oral advocacy can help to sever the connection, at least in the minds of future lawyers, between inborn traits and oral-advocacy skill.

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<sup>133</sup> *Id.*

<sup>134</sup> *See, e.g.*, E-mail from LC to Susie Salmon (Sept. 14, 2016) (on file with author); E-mail from SH to Susie Salmon (Sept. 15, 2016). I should note that this advice may reflect the real world, at least as it existed in 2000. When I began my legal career at a large law firm in Los Angeles, other attorneys told me that the firm had a policy that female lawyers were not to wear pants suits to federal court. And I was told that the policy resulted from the policies of many of the judges in that court.

### A. *Mindset Theory*

Psychologist Carol Dweck calls this implicit belief that intelligence and talents are traits fixed at birth a “fixed” or “entity” mindset.<sup>135</sup> People with this fixed mindset see failure or even struggles in their first efforts in a particular area as an indicator of their innate abilities and their future potential for success in that area.<sup>136</sup> Their goals relate more to demonstrating and documenting—rather than developing—their abilities.<sup>137</sup> This leads people with fixed mindsets to avoid activities that might cause them to struggle or fail; instead, they will repeat tasks at which they have performed well in the past.<sup>138</sup> And people with a fixed mindset see effort as futile; why work hard if abilities are fixed at birth?<sup>139</sup>

Praise based on innate ability—rather than praise based on effort, on successful implementation of feedback, or on developing sound strategies for success—instill this fixed mindset.<sup>140</sup> Sometimes referred to as “ability praise,” it attributes accomplishments to something innate and outside the student’s control.<sup>141</sup> For example, praising a student who performs well on a math exam by saying, “You are so smart! You are so good at math!” reinforces the notion that

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<sup>135</sup> Carol S. Dweck & Ellen L. Leggett, *A Social-Cognitive Approach to Motivation and Personality*, 95 *PSYCHOL. REV.* 256, 259 (1988); CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* 11 (Ballantine Books 2006) [hereinafter *MINDSET*].

<sup>136</sup> See Carrie Sperling & Susan Shapcott, *Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 *LEGAL WRITING: J. LEGAL WRITING INST.* 39, 54 (2012).

<sup>137</sup> Dweck & Leggett, *supra* note 135, at 256.

<sup>138</sup> *MINDSET*, *supra* note 135, at 108-09.

<sup>139</sup> *MINDSET*, *supra* note 135, at 112, 114, 148.

<sup>140</sup> *MINDSET*, *supra* note 135, at 83-90.

<sup>141</sup> *MINDSET*, *supra* note 135, at 71-73.

an inborn intelligence and talent for math, rather than practice and study, predetermined that outcome.<sup>142</sup>

Moreover, an educator’s own implicit beliefs about talent and intelligence can influence a student’s mindset.<sup>143</sup> Not surprisingly, an individual’s implicit beliefs affect the type of feedback she provides; one who believes that abilities are fixed at birth is more likely to give ability-oriented feedback.<sup>144</sup> A coach who praises a student as a “natural advocate” or as being a “talented oralist,” for example, risks instilling or reinforcing a fixed mindset in students.<sup>145</sup>

An atmosphere that labels people based on “ability” can help induce a fixed mindset, and an environment that values people based on external indicia like grades or class ranking is the perfect breeding ground.<sup>146</sup> In *Mindset*, Dweck provides an example of an environment most likely to create a fixed mindset: a grade-school teacher seated students around the classroom in order of IQ, and rewarded only the high-IQ students with roles like carrying the flag, clapping the erasers, or ferrying notes to the principal.<sup>147</sup>

#### 1. Law School Induces Fixed Mindsets, and Moot-Court Values Can Exacerbate Them

Law schools arguably attract people more likely to have fixed mindsets—law students are generally high achievers accustomed to being praised for their intelligence and ability—but they

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<sup>142</sup> MINDSET, *supra* note 135, at 169-70.

<sup>143</sup> Sperling & Shapcott, *supra* note 136, at 72 (citing Kyunghiee Lee, *A Study of Teacher Responses Based on Their Conceptions of Intelligence*, 31 J. OF CLASSROOM INTERACTION 1, 9 (1996)).

<sup>144</sup> *Id.*

<sup>145</sup> See Corie Rosen, *The Method and the Message*, 12 NEV. L.J. 160, 167 (2011).

<sup>146</sup> MINDSET, *supra* note 135, at 16, 18, 141. See also Rosen, *supra* note 145, at 167 (“focus on extrinsic motivators is indicative of an environment that relies on ‘ability labeling,’ the process by which some people are labeled as smart and others are labeled as less so—the basic contours of a structure that promotes the entity mindset.”).

<sup>147</sup> MINDSET, *supra* note 135, at 6; Rosen, *supra* note 145, at 168.

almost certainly induce fixed mindsets in their students and even their applicants. Law students are selected, in part, based on their scores on the Law School Admissions Test, or LSAT, a test that purports to measure innate ability.<sup>148</sup> The Law School Admissions Council—the entity that administers the LSAT—is so certain that ability is fixed that it advises students that retaking the exam is unlikely to produce a different score, even if the student were to study diligently.<sup>149</sup> In fact, a student who materially raises his or her LSAT score in a second administration risks being investigated for cheating.<sup>150</sup>

Once a student reaches law school, the law-school culture cements this notion that ability is innate. The belief that “success in law school is exclusively demonstrated by high grades, appointment to a law review, and similar academic honors” is “entirely obvious at most law schools, whether elite or more typical.”<sup>151</sup> Grades in the first year of law school—often primarily

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<sup>148</sup> *About the LSAT*, L. SCH. ADMISSION COUNCIL, INC., <http://www.lsac.org/jd/lsat/about-the-lsat> (the LSAT “provides a standard measure of acquired reading and verbal reasoning skills”). Fortunately, there are signs of a trend against this overreliance on the LSAT. Many law schools took advantage of a short-lived ABA program that allowed them to admit a limited number of students without LSAT scores. Delece Smith-Barrow, *As Law Schools Undergo Reform, Some Relax LSAT Requirements*, U.S. NEWS (Apr. 2, 2015, 9:00 AM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/04/02/as-law-schools-undergo-reform-some-relax-lsat-requirements>. And Arizona Law, where this author teaches, recently received permission to admit students using either GRE scores or LSAT scores. Elizabeth Olson, *Law School That Accepts GRE Scores Can Continue On*, N.Y. TIMES (May 9, 2016), [http://www.nytimes.com/2016/05/10/business/dealbook/law-school-that-accepts-gre-scores-can-continue-on.html?\\_r=0](http://www.nytimes.com/2016/05/10/business/dealbook/law-school-that-accepts-gre-scores-can-continue-on.html?_r=0).

<sup>149</sup> *Repeating the LSAT*, L. SCH. ADMISSION COUNCIL, INC., <http://lsac.org/jd/lsat/repeating-the-lsat> (“If your score is a fairly accurate indicator of your ability, it is unlikely that taking the test again will result in a substantially different score. You should also be aware that there is a chance that your score will drop.”); James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1682 (“The LSAT people say that LSAT preparation courses do not help, since the LSAT tests knowledge and skills that cannot be improved by last minute cramming.”); see also Sperling & Shapcott, *supra* note 136, at 68-69.

<sup>150</sup> *Repeating the LSAT*, *supra* note 149 (“unusually large score differences are routinely reviewed by LSAC for misconduct or irregularity”); see also Sperling & Shapcott, *supra* note 136, at 69.

<sup>151</sup> Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002).

derived from a single exam in each class at the end of the semester<sup>152</sup>—determine eligibility for the high-status, high-paying jobs that law schools program their students to value most (and that, quite frankly, may be necessary to afford the student-loan debt many modern law students carry).<sup>153</sup> Dweck’s scenario where the grade-school teacher seated her students by IQ tests and reserved certain privileges for those with the highest IQs eerily mirrors the typical law-school practice of ranking students by GPA and granting the highest-ranking students special indicia of status like law review membership.<sup>154</sup> Few would argue that, in law school, grades and class rank function as labels of ability and worth, and no environment is more likely to instill a belief that ability is an entity fixed at birth. This belief even influences the prevailing method for ranking law schools, which heavily weights the LSAT scores of entering students, suggesting that one of the greatest indicators of a law school’s quality is the inborn aptitude of the students it is able to attract rather than anything that happens during the following three years.<sup>155</sup>

The values of Classical rhetoric feed into this fixed mindset. Quintillian, for example, believed that elite demeanor manifested good character: “a good orator is a good man.”<sup>156</sup> Aristotle advanced the belief that nature designated some men leaders from birth and others slaves.<sup>157</sup> One’s “natural” posture, gestures, and demeanor betrayed inborn qualities of credibility

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<sup>152</sup> Sperling & Shapcott, *supra* note 136, at 70 (citing Ron M. Aizen, Note, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765 (2004) and Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147 (2002)).

<sup>153</sup> See Krieger, *supra* note 151, at 123 (law students with the highest grades “immediately and significantly shifted away from service-oriented career preferences and toward lucrative, high-status career choices”) and n.4 (acknowledging that high debt load may play a role in this phenomenon, but asserting that it does not altogether explain it).

<sup>154</sup> See Rosen, *supra* note 145, at 168.

<sup>155</sup> See Jeffrey Evan Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Why Rankings Mislead*, 81 IND. L.J. 229, 244 (2006). See also Sperling & Shapcott, *supra* note 136, at 70.

<sup>156</sup> See O’Regan, *supra* note 6 (manuscript at 13).

<sup>157</sup> O’Regan, *supra* note 6 (manuscript at 13) (citing ARISTOTLE, *POLITICS* 1254b25 (W.D. Ross, trans.)).

and rationality; “good posture indicates the superiority of mind.”<sup>158</sup> Similarly, so-called “popular” delivery and demeanor—less restrained of gesture, more emotional and dramatic—reflected an inborn inner nature tending toward “vulnerability, cowardice, irrationality, deception, and flight.”<sup>159</sup>

Modern advice on oral argument—particularly that focused on demeanor and delivery—sometimes treats advocacy skill as “natural.”<sup>160</sup> And moot-court coaches and judges may also fall into this trap, praising a student as a “natural advocate” or having “talent” for oral argument.

## 2. The Antidote to a Fixed Mindset

Fortunately, however, mindsets are malleable.<sup>161</sup> In an early study, Dweck and other researchers were able to manipulate children’s implicit theories of intelligence by having them read passages that described the abilities of certain famous people as either fixed at birth or shaped through effort.<sup>162</sup> The children who read the passages describing intelligence as malleable were more likely to demonstrate traits associated with a growth mindset, such as choosing a problem with learning goals as their next assignment.<sup>163</sup> In another study with graduate students of business, researchers split the students into two groups: one was given a fixed mindset and

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<sup>158</sup> O’Regan, *supra* note 6 (manuscript at 13). Even Aristotle did allow for the occasional “soul in the wrong body” conundrum, however. *Id.* (manuscript at n.69).

<sup>159</sup> O’Regan, *supra* note 6 (manuscript at 26).

<sup>160</sup> *See, e.g.*, DWORSKY, *supra* note 90, at 24 (Some people “naturally possess a strong, confident, respectful-yet-conversational speaking style, naturally use effective gestures, facial expressions, and vocal dynamics, and naturally are free of distracting vocal and bodily mannerisms. . . .”); Lebovits et al., *supra* note 96, at 941 (some people have no talent for oratory; some are gifted speakers); Eric J. Magnuson, *Oral Argument – Learn By Listening*, ROBINS KAPLAN (Sept. 10, 2015), <http://www.robinskaplan.com/resources/articles/briefly-oral-argument-learn-by-listening> (to some, oral advocacy is a “natural born skill”).

<sup>161</sup> Carol S. Dweck et al., *Implicit Theories of Intelligence as Determinants of Achievement Goal Choice* (1982) (unpublished manuscript) (on file with Harvard Univ.).

<sup>162</sup> Dweck, *supra* note 161.

<sup>163</sup> Dweck, *supra* note 161.

told that the assigned task measured underlying capabilities, and the other was given a growth mindset and told that management skills were developed through practice.<sup>164</sup> The fixed mindset group fell short; the students in the growth mindset group “looked directly at their mistakes, used the feedback, and altered their strategies accordingly.”<sup>165</sup> Just as a coach or professor with a fixed mindset, providing ability-oriented praise, can foster a fixed mindset in students, so can a coach or professor with a growth mindset, providing praise that values learning and effort, help instill the belief that abilities—such as oral advocacy skill—are not inborn but rather malleable,<sup>166</sup> thereby helping to disconnect them from other inborn traits like gender.

#### *B. The Role of Stereotype Threat and Self-fulfilling Prophecies*

The phenomenon of stereotype threat likely exacerbates the impact of ingrained assumptions about what a good advocate looks and sounds like by making women and members of other groups perform more poorly than they otherwise would. Stereotype threat refers to the “social-psychological threat that arises when one is in a situation or doing something for which a negative stereotype about one’s group applies.”<sup>167</sup> Social-science research suggests that stereotype threat causes the person experiencing it to perform more poorly at the task than she ordinarily would, often creating a cycle of diminished achievement in that area.

For example, in a series of studies, social scientists Claude Steele and Joshua Aronson demonstrated that black students performed more poorly on a series of verbal GRE questions

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<sup>164</sup> MINDSET, *supra* note 135, at 111.

<sup>165</sup> MINDSET, *supra* note 135, at 111.

<sup>166</sup> Dweck, *supra* note 161.

<sup>167</sup> Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 614 (1997).

when they were reminded of their race or they were told that the test measured cognitive ability, a trait about which there are negative stereotypes relating to black people.<sup>168</sup> Simply asking the black students to identify their race at the beginning of the test adversely affected performance; black students not asked to provide racial or ethnic data either outperformed the white subjects or did just as well.<sup>169</sup> Where the students were told that the test measured inherent intellectual ability, the black students performed worse; where they were told that the same test measured problem-solving skills, about which there are no negative stereotypes about black people, the black students again performed as well as or better than the white students.<sup>170</sup>

A person can experience stereotype threat without any actual prejudice or bias in the immediate environment.<sup>171</sup> Rather, to provoke stereotype threat, a person generally need only be reminded of the negative stereotype and its relevance to a given task.<sup>172</sup> Explicit reminders—such as being required to fill in a bubble identifying one’s race before taking a standardized test, for example—are not necessary; however, simply being aware of the negative stereotype about a group to which one belongs suffices to create a “threatening intellectual environment” and trigger the negative effects of stereotype threat.<sup>173</sup> The more that an individual experiencing stereotype threat thinks about the negative stereotype, the more performance suffers.<sup>174</sup> And the reminder of the negative stereotype can take a variety of forms. For example, women

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<sup>168</sup> Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

<sup>169</sup> Steele & Aronson, *supra* note 168, at 801.

<sup>170</sup> Steele & Aronson, *supra* note 168, at 805-06.

<sup>171</sup> Geoffrey L. Cohen, Valerie Purdie-Vaughns & Julio Garcia, *An Identity Threat Perspective on Intervention*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 281 (Michael Inzlicht & Toni Schmader eds., 2012).

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

<sup>173</sup> Steele & Aronson, *supra* note 168, at 808.

<sup>174</sup> Mara Cadinu et al., *Why Do Women Underperform Under Stereotype Threat?: Evidence For The Role Of Negative Thinking*, 16 PSYCHOL. SCI. 572 (2005).

outnumbered by men in a testing room performed worse on a series of GRE math questions than did women administered the same questions in a single-sex environment.<sup>175</sup> The women were not asked about gender or reminded in any other way of their gender or the stereotype that women have poorer math skills.<sup>176</sup> Simply being outnumbered by men in the testing environment was enough to invoke the stereotype and cause the effects of stereotype threat.<sup>177</sup> In fact, the negative effects of stereotype threat increased to the extent that the women were outnumbered; the greater the percentage of men in the room, the worse the women performed.<sup>178</sup>

Countless studies over the past twenty years have demonstrated the existence and effects of stereotype threat in a variety of situations involving a variety of groups.<sup>179</sup> One particularly interesting study showed that when Asian-American women were primed with reminders that they were female (and therefore stereotypically bad at math) before taking a math test, they performed more poorly than the control group; when another group of Asian-American women

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<sup>175</sup> 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, 368 (Sep. 2000).

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

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

<sup>178</sup> *Id.* at 369.

<sup>179</sup> See, e.g., Bettina Spencer & Emanuele Castano, *Social Class is Dead. Long Live Social Class! Stereotype Threat Among Low Socioeconomic Status Individuals*, 20 SOC. JUST. RES. 418 (2007) (observing effects of stereotype threat in academic performance of students of lower socioeconomic class); Thomas M. Hess et al., *The Impact of Stereotype Threat on Age Differences in Memory Performance*, 58 J. GERONTOL. B. PSYCHOL. SCI. SOC. SCI. P3 (2003) (observing effect of stereotype threat on memory-test performance of older individuals). See also CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 97 (2010) [hereinafter VIVALDI] (the effect of stereotype threat “has been observed in women, African Americans, white males, Latino Americans, third-grade American schoolgirls, Asian American students, European males aspiring to be clinical psychologists...French college students, German grade school girls, U.S. soldiers on army bases in Italy, women business school students, white and black athletes, older Americans, and so on.”); Jonathan Feingold, Note, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 231, 238 (2011).

were reminded that they were Asian (and therefore stereotypically good at math) before the same test, they performed better than the control group.<sup>180</sup>

Sadly, simply working harder at a task or being more invested will not help a person overcome the drag of stereotype threat; in fact, the opposite appears to be true. The more that a person cares about performing well at a given task, the more stereotype threat will hinder that performance.<sup>181</sup> In a study of black students at a high school in Southern California who were given a section of the SAT verbal exam, those students who self-identified as caring about academic performance suffered the impact of stereotype threat significantly more than those who self-identified as not caring about achieving in school.<sup>182</sup> In fact, the black students who self-identified as not caring performed no worse than did the white students who self-identified as not caring.<sup>183</sup> Unfortunately, though, caring less does not seem to be the answer to the dilemma: the black students who did not care about school still performed quite poorly on the test, even without the impact of stereotype threat.<sup>184</sup>

Moreover, stereotype threat is recursive; it creates a sucking downward spiral where each stereotype-threat-provoked underperformance strengthens the negative power of the stereotype.<sup>185</sup> An early stumble leads a student to be labeled unskilled in a particular area. Frustrations and apprehension about confirming the stereotype condemn the student to realize

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<sup>180</sup> See Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80-81 (1999).

<sup>181</sup> VIVALDI, *supra* note 179, at 56.

<sup>182</sup> VIVALDI, *supra* note 179, at 56-57.

<sup>183</sup> VIVALDI, *supra* note 179, at 57.

<sup>184</sup> VIVALDI, *supra* note 179, at 57.

<sup>185</sup> Cohen, Purdie-Vaughns & Garcia, *supra* note 171, at 285-87; VIVALDI, *supra* note 179, at 176 (citing to Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*, 313 SCI. 1307 (2006)).

her worst fears. The intensification of the negative stereotype amplifies the risk of future failure, virtually assuring it.

Why and how does stereotype threat affect performance? Anxiety plays a role; Steele concluded that the stress and anxiety added by the fear of confirming a negative stereotype “leaves little mental capacity free for anything else.”<sup>186</sup> Particularly where an individual’s group membership makes her the minority in a particular group—a woman in an advanced-level mathematics course, for example—researchers argue that the intense pressure to represent one’s group favorably distracts the person from the task at hand.<sup>187</sup> Studies have concluded that stereotype threat reduces working-memory capacity, which makes it more difficult for individuals to focus on and successfully complete tasks.<sup>188</sup> Stereotype threat is also associated with physiological symptoms of heightened arousal like elevated blood pressure.<sup>189</sup> One can easily imagine the effect that reduced working memory and symptoms of heightened arousal could have on an already-anxious oral advocate trying to think quickly, remember case names and a court’s rationale, and respond effectively to rapid-fire questions from the bench.

The flip side of stereotype threat is what some have called “stereotype boost,” or “stereotype susceptibility”: knowledge of a positive stereotype about one’s group can actually improve one’s performance in the relevant area.<sup>190</sup> The improved performance of the Asian-

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<sup>186</sup> VIVALDI, *supra* note 179, at 123.

<sup>187</sup> Delia S. Saenz, *Token Status and Problem-Solving Deficits: Detrimental Effects of Distinctiveness and Performance Monitoring*, 12.1 SOC. COGNITION 61 (1994).

<sup>188</sup> Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440 (2003).

<sup>189</sup> Jason W. Osborne, *Gender, Stereotype Threat and Anxiety: Psychophysiological and Cognitive Evidence*, 8 J. RES. EDUC. PSYCHOL. 109 (2006); Jason W. Osborne, *Linking Stereotype Threat and Anxiety*, 27 EDUC. PSYCHOL. 135 (2007).

<sup>190</sup> Shih et al., *supra* note 180. See also Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQ. L. REV. 163, 169 (2015).

American female test subjects when subtly reminded of their Asian identity—and of the stereotype that Asians excel at math—illustrated this phenomenon.<sup>191</sup>

Another mirror image of stereotype threat is something labeled “stereotype lift.” This occurs when a person gets a performance boost by being reminded of a negative stereotype about another group’s performance on a relevant task.<sup>192</sup> Unfortunately, this phenomenon most benefits people who either “believe in the legitimacy of negative stereotypes,” or are particularly invested in a hierarchy based in membership in favored groups.<sup>193</sup> People with low self-esteem seem to benefit more from stereotype lift, perhaps because they are more “likely to make downward comparisons to protect their self-image.”<sup>194</sup>

The way in which a professor, teacher, or other authority figure delivers constructive feedback can also affect the impact of stereotype threat. The most effective feedback both invokes high standards of achievement and conveys a faith in the student’s ability to meet those standards.<sup>195</sup> Called “wise feedback,” this mode of criticism proves significantly more likely to elicit student trust in the feedback and less likely to provoke the effects of stereotype threat than feedback delivered neutrally, feedback delivered with a more generically reassuring statement, or feedback that simply invoked high standard without an accompanying expression of faith in the student’s ability to meet that standard.<sup>196</sup>

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<sup>191</sup> Shih et al., *supra* note 180.

<sup>192</sup> Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 456 (2003).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Geoffrey L. Cohen et al., *The Mentor’s Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY AND SOC. PSYCHOL. BULL. 25, 1302 (1999); *see also* VIVALDI, *supra* note 179, at 162-63.

<sup>196</sup> Cohen et al., *supra* note 195, at 1304.

In one study, researchers had students write an essay that they were told could be published in a campus magazine if it were good enough.<sup>197</sup> All of the students were given individualized critical feedback about the grammar, style, and content of the essay.<sup>198</sup> They were also given a two-paragraph, handwritten general critique that was identical for all students.<sup>199</sup> One set of students was simply given this feedback.<sup>200</sup> A second set of students was given the feedback with an introductory statement that provided generic, bland encouragement like “overall, nice job,” and “you have some interesting ideas in your [essay] and you make some good points.”<sup>201</sup> The third set of students was given the feedback with an introductory statement that stated that the reviewer was applying high standards—an honest consideration of whether the essay was of publishable quality—and that the reviewer would not have devoted such time to the critique had the reviewer not believed that the student could meet the high standards.<sup>202</sup> The black students who received the third type of feedback were more likely to see the feedback as unbiased and therefore trustworthy and were more motivated to incorporate that feedback into their essays.<sup>203</sup>

In Steele’s view, these results showed that “wise feedback”—feedback that conveyed high standards and a belief in a student’s ability to meet those standards—told the students that their reviewer was not seeing them through the lens of any negative stereotypes about intellectual

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<sup>197</sup> Cohen et al., *supra* note 195, at 1305.

<sup>198</sup> Cohen et al., *supra* note 195, at 1306.

<sup>199</sup> Cohen et al., *supra* note 195, at 1306.

<sup>200</sup> Cohen et al., *supra* note 195, at 1306.

<sup>201</sup> Cohen et al., *supra* note 195, at 1307.

<sup>202</sup> Cohen et al., *supra* note 195, at 1307.

<sup>203</sup> Cohen et al., *supra* note 195, at 1309-10.

ability.<sup>204</sup> As a result, the weight of stereotype threat lifted and could no longer interfere with motivation or performance.<sup>205</sup> But one instance of “wise feedback” is not necessarily enough: “In sustained relationships with students, the wise mentor...does not simply speak of high expectations and a faith in students’ potential. He or she also buttresses this message through expenditures of time and effort, by giving detailed attention to the student’s performance, and by providing an empowering pattern of feedback over time.”<sup>206</sup>

Interestingly, exposing students to the incremental theory of ability—instilling a growth mindset—also helps to counteract the impact of stereotype threat.<sup>207</sup> In one study, researchers asked black and white Stanford students to write letters to imaginary minority elementary-school children in an economically- disadvantaged area.<sup>208</sup> The researchers gave the Stanford students a script detailing evidence of the malleability of intelligence, of people improving their intellectual abilities through hard work, and of changes that learning can create in the brain itself.<sup>209</sup> The black students, after reading this material and writing letters espousing the incremental theory of ability, improved their grades in the following semester.<sup>210</sup>

Even something as simple as writing a brief self-affirmation can reduce the impact of stereotype threat.<sup>211</sup> Near the beginning of the academic year, researchers had teachers ask some

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<sup>204</sup> VIVALDI, *supra* note 178, at 163 (citing to Cohen et al., *supra* note 195).

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

<sup>206</sup> Cohen et al., *supra* note 195, at 1316.

<sup>207</sup> See generally MINDSET, *supra* note 135; VIVALDI, *supra* note 179, at 169 (citing to 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 (2002)).

<sup>208</sup> VIVALDI, *supra* note 179, at 169 (citing to Aronson et al., *supra* note 207).

<sup>209</sup> VIVALDI, *supra* note 179, at 169 (citing to Aronson et al., *supra* note 207).

<sup>210</sup> VIVALDI, *supra* note 179, at 169 (citing to Aronson et al., *supra* note 207).

<sup>211</sup> Cohen et al., *supra* note 185; see also VIVALDI, *supra* note 179, at 172-73 (citing to Cohen et al., *supra* note 185).

of their seventh-grade students to list a value they found most important and then draft a short paragraph about why they found that value so important.<sup>212</sup> All but a few of the highest performing black students improved their grades after this exercise.<sup>213</sup> Black students not given the same affirmation exercise experienced declining grades.<sup>214</sup> And this increase or decline persisted for at least two years after the affirmation exercise.<sup>215</sup> Researchers concluded that this exercise worked for two main reasons. First, the affirmation of individual integrity and self-worth provided sort of a counter-narrative to the negative stereotype, reducing the significance of the negative stereotype.<sup>216</sup> Second, the self-affirmation “interrupted” the operation of stereotype threat, lessening the impact of earlier poor performance or evidence of stereotype.<sup>217</sup>

## V. TENSIONS AND BARRIERS TO CHANGE

Moot-court educators must navigate among several conflicting values in determining how to deal with the pernicious stereotypes that undergird much of the traditional advice regarding oral advocacy and success in moot-court competitions.

First, we face a broader, more philosophical tension: should marginalized groups “embrace the language of power, and risk being coopted by it, or reject the language of power,

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<sup>212</sup> Cohen et al., *supra* note 211, at 1307-08; *see also* VIVALDI, *supra* note 179, at 174 (citing to Cohen et al., *supra* note 185).

<sup>213</sup> Cohen et al., *supra* note 211, at 1308; *see also* VIVALDI, *supra* note 179, at 174-75 (citing to Cohen et al., *supra* note 185).

<sup>214</sup> Cohen et al., *supra* note 211, at 1309; *see also* VIVALDI, *supra* note 179, at 175 (citing to Cohen et al., *supra* note 185).

<sup>215</sup> *See* Cohen et al., *supra* note 211, at 1309; *see also* VIVALDI, *supra* note 179, at 175 (citing to Cohen et al. *supra* note 185).

<sup>216</sup> Cohen et al., *supra* note 211, at 1309; *see also* VIVALDI, *supra* note 179, at 176 (citing to Cohen et al. *supra* note 185).

<sup>217</sup> Cohen et al., *supra* note 211, at 1309; *see also* VIVALDI, *supra* note 179, at 176 (citing to Cohen et al. *supra* note 185).

and risk not being heard?”<sup>218</sup> This same tension underlies the conflict between the equality and difference theories of feminism, but it is also instructive in thinking about the dilemma facing most traditionally underrepresented groups. The equality theory of feminism holds that women only employ the demeanor, intonations, and speech styles of the disempowered because they have been socialized to do so; thus, women should emulate men in order to cast off this negative socialization and unmask their hidden potential.<sup>219</sup> The difference theory of feminism, on the other hand, posits that these disfavored speaking styles have no inherent fault.<sup>220</sup> Rather, they are disfavored and associated with lack of authority and power because they are traditionally associated with women.<sup>221</sup> Therefore, we should embrace the speaking style generally associated with women and accord it the respect and authority it deserves, rather than seeking to train women to speak more like white men. Moot-court educators need to make a conscious choice regarding which side of the line they choose, and they should provide their students with sufficient grounding in these theories to make informed decisions as well.

Second, counseling advocates to adopt the demeanor and speaking styles traditionally associated with authority may backfire: one linguistic perspective—which shares some philosophical underpinnings with the feminist dominance theory—suggests that, regardless of the speaker’s demeanor or speaking style, the identity of the speaker and her gender, race, and other traits determine whether her speech is valued.<sup>222</sup> For example, a woman who speaks loudly and with assurance may be characterized as “strident” or “combative,” whereas a man speaking

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<sup>218</sup> Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9-10 (1998).

<sup>219</sup> Stanchi *supra* note 218, at 48; *see also* Morrison, *supra* note 10, at 73-74.

<sup>220</sup> Stanchi *supra* note 218, at 49; Morrison, *supra* note 10, at 74-75.

<sup>221</sup> Stanchi *supra* note 218, at 48-49; Morrison, *supra* note 10, at 75.

<sup>222</sup> Stanchi, *supra* note 218, at 49.

in the same way would be perceived as “confident” and “assertive.” Similarly, a woman who pauses before answering a question may be seen as fumbling, whereas a man pausing for the same length of time is “thoughtful.”<sup>223</sup> Thus, a member of a traditionally marginalized group who changes her presentation style to comport with common moot-court advice risks making absolutely no difference in how moot-court judges perceive her argument.

Third, moot court is supposed to simulate real appellate practice. And law is—or at least it should be—a client-focused profession.<sup>224</sup> The attorney’s personal beliefs, ego, and sensitivities must recede in the face of the client’s cause. Thus, if it serves the client’s cause to pander to or accommodate pernicious stereotypes—by, for example, wearing a demure navy-blue skirt suit rather than a maroon pantsuit, or straightening natural African-American hair, or seeking elocution lessons to erase a regional accent or modulate a high-pitched voice—isn’t it incumbent on the attorney to pander and accommodate? Moot-court educators should explicitly explore this tension with their students, again to enable their students to make informed decisions regarding when and whether to challenge stereotypes or transgress norms in their advocacy style.

Fourth, moot court can and should be a learning experience, but teams (and their coaches and schools) also want to win. Many schools tout their moot-court victories in alumni publications, in new-student recruiting materials, in fundraising efforts, and on their websites.<sup>225</sup> At least one entity ranks law schools by their win/loss records in moot court and other legal-skills competitions,<sup>226</sup> and students interested in moot court and other advocacy programs can

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<sup>223</sup> Example borrowed from Stanchi, *supra* note 218, at 49-50.

<sup>224</sup> See MODEL RULES OF PROF’L CONDUCT rs. 1.0-1.18 (2016); see also Higdon, *supra* note 93 (manuscript at 6-7).

<sup>225</sup> For example, UC Hastings College of Law touts that its Moot Court is ranked a top 5 program in the nation for 5 years in a row. See *Awards and Honors*, UC HASTINGS COLL. OF L., <http://www.uchastings.edu/academics/pro-skills-team/moot-court/intercollegiate-competitions/Achievements/index.php>.

<sup>226</sup> The University of Houston Law Center’s Andrews Kurth Moot Court National Championship—billed as the “Moot Court Competition to determine the ‘best of the best’ Moot Court programs”—has developed a scoring

consult those rankings in selecting a school. If a coach knows that a certain presentation style, even one that panders to and reinforces pernicious stereotypes, will make a student advocate more successful at competition, does she not have an obligation to coach the student to adopt that style? And a coach quickly loses credibility with her team if judges blame behavior she condoned in explaining why a team lost a round.

Finally, moot-court coaches often have limited autonomy and discretion in how they coach students. At many schools, legal-writing faculty run moot-court programs. And, at most schools, legal-writing faculty are not eligible for tenure, often at the mercy of renewable short-term contracts.<sup>227</sup> This lack of status and job security makes them vulnerable, particularly if their coaching methods and philosophies do not produce winning teams, most particularly if students complain about this perceived coaching failure. And a significant percentage of moot-court coaches are adjunct professors or alumni volunteers with busy legal careers, giving them even less time to reflect on the consequences of coaching traditional moot-court demeanor and even less incentive to rock the boat. Some moot-court coaches are third-year law students, who may not have the knowledge, confidence, authority, or perspective to recognize and correct advice that has more to do with outdated stereotypes than with sound legal argument.

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system to rank schools by their performance at different moot-court competitions, based on factors like the type of award and the prestige of the competition. See *Rankings*, U. HOU. L. CTR., <http://www.law.uh.edu/blakely/mcnc/rankings.asp>.

<sup>227</sup> At many institutions, legal-writing professors and other faculty who teach “skills” courses often are accorded limited, if any, academic freedom, and they lack power even over their own curriculum and pedagogical choices. As a result, skills faculty, and even directors of skills programs, often must bow to faculty, administration, and student pressure regarding their curricular and pedagogical choices. See Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 267 (2004). This is unlikely to change anytime soon. As of 2014, the majority of legal-writing professors and directors still are not tenured or on the tenure track. *Report of the Annual Legal Writing Survey*, ASSOC. OF LEGAL WRITING DIRS., LEGAL WRITING INST. 64, <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf> (42 out of 178 schools reported that some of their legal-writing faculty are tenured or tenure track); *id.* at 35 (32 of 178 schools reported that the director of legal writing is tenured or on the tenure track).

## VI. A MENU OF SOLUTIONS

Twenty years have passed since Professor Morrison first challenged moot court programs to avoid perpetuating gender bias and other biases in the profession by avoiding race and gender-based language, raising consciousness of gender bias in legal education and the profession, and working to free students of stereotyped expectations.<sup>228</sup> But, as I've discussed in Section II, little progress has been made in increasing access to the highest echelons of the profession for women and other traditionally underrepresented groups. And, as I've discussed in Section III, legal education has and continues to contribute to that problem by reinforcing the notion that the archetypal good lawyer or good oral advocate looks, sounds, and acts like the Classical warrior, a role only available to upper-class white males. Thus, oral-advocacy educators must continue to implement and indeed build upon Morrison's suggestions. Although no one solution answers every concern or resolves every tension, moot-court faculty, coaches, and competition administrators can take several concrete steps to mitigate the impact of bias and minimize the opportunities to perpetuate bias.

### A. *Suggestions for Educators*

At the outset, these concerns argue for a moot-court program primarily run by at least one full-time faculty member<sup>229</sup> who devotes a significant portion of her time to the study and

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<sup>228</sup> Morrison, *supra* note 10, at 81-83.

<sup>229</sup> Ideally, this person—despite her focus on practical skills—would also be a tenured member of the faculty. It's extraordinarily well documented that “legal education has a back of the bus, and it's legal writing.” Melissa H. Weresh, *Stars Upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(C) “Tenure-Like” Security of Position*, 34 LAW & INEQ. 137, 146-47 (2016). As discussed earlier in this Article, legal writing faculty are seldom tenured. They're also overwhelmingly female; as of 2013, approximately 73% of legal-writing faculty were female. *Id.* at 139. By contrast, a significant majority—at least 62%—of tenured faculty are men. *Id.* As Weresh notes, when students observe this type of apparent gender bias, it sends a message to students about their own future opportunities in the legal field, and it cannot help but reinforce the notion that roles associated with women are less prestigious or desirable and that women are less qualified for the roles that are more prestigious or desirable. *Id.* at 148.

teaching of advocacy, and preferably one assisted by practitioners who devote their careers to appellate advocacy. Moot-court programs exclusively run by students are notorious hotbeds of bias perpetuation because they tend to value oratorical flair over sophisticated, substantive argument.<sup>230</sup> Having a full-time faculty member devoted to running a coherent advocacy program also facilitates some of the other solutions outlined later in this section; by developing a program that educates its faculty, coaches, judges, and students in these theories and best practices, a full-time faculty member is best positioned to implement a program-wide philosophy that best balances the interests of preparing students for the realities of practice in a biased profession while at the same time permitting a diverse array of students to find effective voices as advocates and perhaps even become agents for change in the profession.

A program that can be effective in this way must first educate its faculty, coaches, and students in the key psychological theories of mindset and stereotype threat. By translating the research about mindset theory and stereotype threat into how they provide written and oral feedback to advocates, coaches and professors can do much to undermine the notion that the skills that make a good lawyer are inborn and inextricably tied to one sex (or any other immutable trait). They can also disrupt the stereotype-threat mechanism that turns negative

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<sup>230</sup> See Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 881-83 (2006). Some student-run programs have student boards that see moot court as an area where less academically successful students can find a place to shine. This means that students who did well in their first year of law school may be excluded from moot court (or may choose activities like law review over moot court). Most second- and third-year law students, particularly those who did not do as well in their first-year classes, likely lack the knowledge, judgment, and experience to discern whether an oral argument is substantively strong or simply delivered with flair, and so student boards select student competitors who may be heavy on style and short on substance. Vitiello argues that these types of student-run programs risk perpetuating these skewed values year after year as students select other students who share their values. *Id.* at 883. And this likely also pollutes the judging pool, which often consists primarily of alumni of the school's moot-court program. *Id.* at 883-84. Moreover, students generally lack the real-world appellate experience to know what real appellate courts value, or to appreciate the reality that the most stylish oral argument cannot carry the day if the legal reasoning is flawed. *See id.* at 891-92; *see also* Alex Kozinski, *In Praise of Moot Court—NOT!*, 97 COLUM. L. REV. 178, 185 (1997).

stereotypes about women lawyers into self-fulfilling prophecies that, in turn, perpetuate the stereotype.

The research demonstrates that efforts to instill a growth or incremental mindset in students can both avoid the pernicious effects of the fixed mindset and neutralize stereotype threat.<sup>231</sup> Moot-court educators should introduce their students and their team members to the idea that talents and intelligence are incremental, rather than inborn, and that individuals can improve their abilities and skills through effort. Because praise based on “natural ability” helps foster the fixed mindset—and because it likely also reinforces the idea that oral-advocacy ability is inextricably linked with other inborn traits like race or gender—coaches should avoid praising students as “natural speakers” or “born advocates.” Rather, coaches should encourage the notion that oral advocacy is a skill that can be learned and cultivated by focusing praise on how student effort from practice session to practice session has improved that student’s performance. Coaches—particularly those who have a professional record of success in oral advocacy—can recount their own mistakes and disappointments and describe techniques they used to improve their own advocacy skills.

Another way educators might bolster a growth mindset would be to educate moot-court board members, student coaches, and teaching assistants about mindset theory and feedback techniques that instill a growth mindset. Not only will this—like the letters the Stanford students wrote to the fictional elementary-school students<sup>232</sup>—reinforce the growth mindset in the students learning and applying these techniques, it will also insure that the students receiving

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<sup>231</sup> See *supra* Part IV.

<sup>232</sup> See *supra* notes 208-10 and accompanying text.

feedback are getting a uniform message, at least in the moot-court program, that talents and abilities are not fixed at birth.

Other solutions may involve implementing additional techniques proven to counter stereotype threat. For example, coaches should consider exploiting the stereotype-boost phenomenon and re-framing some oral-argument tasks as ones at which women stereotypically excel when coaching female students. For example, women are stereotypically better at verbal tasks, like verbal memory and verbal fluency.<sup>233</sup> To provoke a boost from this stereotype, coaches may try emphasizing how persuasive precise word choice can be, or how the ability to accurately recall and recount the key facts, holding, and reasoning of a significant case and apply them to detailed facts of the case at hand can help the appellate advocate respond to the court's concerns most effectively. Similarly, some stereotypes hold that women have better listening skills.<sup>234</sup> And few things aid the appellate advocate more than listening attentively to—and really hearing—the court's questions and concerns.<sup>235</sup> Or coaches could stress social sensitivity, which is the ability to read nonverbal cues, another essential tool for advocates trying to assess whether

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<sup>233</sup> Einar M. Skaalvik & Richard J. Rankin, *Gender Differences in Mathematics and Verbal Achievement, Self-perception and Motivation*, 64 BRITISH J. EDUC. PSYCHOL. 419 (1994); Ann-Charlotte Smedler & Bertil Törestad, *Verbal Intelligence: A Key to Basic Skills?*, 22 EDUC. STUD. 343 (1996).

<sup>234</sup> Jennifer Romig, *Do Men and Women Listen Differently?*, LISTEN LIKE A LAWYER (Sept. 6, 2016), <https://listenlikealawyer.com/2016/09/06/do-men-and-women-listen-differently/> (“Despite the popular reception of gender asymmetry in the way we talk with, listen to, and interact with one another, considerable research suggests that sex differences may actually play only a minimal role.”) (citing Stephanie Lee Sargent & James B. Weaver III, *Listening Styles: Sex Differences in Perceptions of Self and Others*, 17 Int’l J. Listening 5 (2003)).

<sup>235</sup> See, e.g., SCALIA & GARNER, *supra* note 88, at 191 (advocates careful listening to the court's questioning of self and of adversary); THE WINNING ORAL ARGUMENT, *supra* note 89, at 164-67 (stressing importance of listening to questions from court and to adversary's argument); Interview by Brian Garner with Hon. Ruth Bader Ginsburg (Nov. 13, 2006) (quoted in THE WINNING ORAL ARGUMENT, *supra* note 89, at 165) (“You will do best if you concentrate on the questions you are being asked.”); Hon. John Roberts, Address at the Ninth Circuit Judicial Conference (July 13, 2006) (quoted in THE WINNING ORAL ARGUMENT, *supra* note 89, at 165 (when asked what he would do differently if he were an advocate again, Chief Justice Roberts replied that he would “listen a little more carefully to what the questions are”); Vitiello, *supra* note 230, at 887 (what really matters in oral argument is ability to answer court's questions thoroughly).

a given argument resonates with the bench, and another skill stereotypically associated with women.<sup>236</sup>

Educators can also take advantage of Steele’s “wise feedback” philosophy, providing written and oral feedback that both communicates that the coach sets high standards and conveys a personal belief in the student’s ability to meet those standards.<sup>237</sup> Over the long term, wise mentoring is hard work; it requires an investment of time and attention in each individual student’s success. Not only does the wise mentor need to deliver wise feedback consistently, she needs to communicate to each student that she cares about that student’s success and believes in her capacity to achieve.<sup>238</sup> Wise mentoring is not easy with every student—coaches do not always connect on a personal level with each and every individual—and it can be particularly challenging where the moot-court coach is a time-strapped practitioner or a faculty member with a burdensome course-load of labor-intensive skills classes. But the value it can provide to students and to shaping a more just and accessible profession make it worth the effort.

Because the research shows that simple self-affirmation exercises can neutralize the impact of stereotype threat,<sup>239</sup> moot-court educators might take a page from the playbook of their clinical colleagues and have students and team members write short, periodic reflection papers or

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<sup>236</sup> See Anne M. Koenig & Alice H. Eagly, *Stereotype Threat in Men on a Test of Social Sensitivity*, 52 *SEX ROLES* 489 (2005).

<sup>237</sup> See *supra* notes 195-96 and accompanying text.

<sup>238</sup> See *supra* notes 195-96 and accompanying text.

<sup>239</sup> See *supra* notes 211-17 and accompanying text.

journal entries<sup>240</sup> that identify a student’s transcendent values and goals and how she is applying those values and working toward those goals through her work in moot court.<sup>241</sup>

In teaching students in moot-court classes or in coaching teams, professors and coaches can and should expose students to the advice of oral-advocacy experts and to the teachings of Classical rhetoric. Building on Professor Morrison’s suggestions that fall in the vein of “teaching the controversy,”<sup>242</sup> professors and coaches should encourage students to think critically about the biases and cultural contexts that underlies this advice, particularly when it comes to dress, demeanor, and delivery. We should teach a “critical moot court” that interrogates the biases behind assumptions about what makes a good oral advocate and permits students to make informed choices about which approaches they wish to adopt and why. In this way, professors and coaches may strike a balance between preparing students for the realities of current law practice and arming students to change what the voice of authority sounds like in the legal profession.

Many experts on oral advocacy counsel students to “be yourself.”<sup>243</sup> Although this advice may seem glib, it has particular merit when partnered with other advice. For example, the tale of vocal fry shows us that attempting to lower one’s voice below its natural register may backfire; a coach may counsel a student that, generally, studies have shown that people find lower voices more pleasing, but only to the extent that the lower voice falls within the speaker’s natural vocal range.<sup>244</sup> Gestures should not seem calculated but should fit with the speaker’s inflection,

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<sup>240</sup> See Karen Hinett, *Developing Reflective Practice in Legal Education*, UK CTR. FOR LEGAL EDUC. (2002), <http://law2.wlu.edu/deptimages/Externship%20Program/developingreflectivepractice.pdf>.

<sup>241</sup> Doing so might also enhance learning in other ways, stimulating metacognition. *Id.* at 7. And taking advantage of the opportunity for professional-identity formation.

<sup>242</sup> Morrison, *supra* note 10, at 56.

<sup>243</sup> See, e.g., SCALIA & GARNER, *supra* note 88, at 142.

<sup>244</sup> See *supra* notes 88-94 and accompanying text.

intonation, and expression.<sup>245</sup> An advocate will be most persuasive when she seems genuine, and extreme changes to voice and demeanor can ring false with an audience.

When it comes to competition teams in particular, issues related to implicit bias and the teaching opportunities that arise from bad or unfair judging make it especially important that at least one coach—preferably an adjunct or full-time faculty member, but at least a practitioner volunteer rather than a student—attend the competition with each team. Most competitions permit coaches to sit at the back of the courtroom during competition rounds. Coaches should take notes during the arguments, of course, to provide formative feedback to the students. But coaches should also take notes during the post-argument feedback from the judges. If a coach disagrees with a particular item of feedback from the bench, or if a coach fears that a student will misinterpret that feedback because of the manner in which it was delivered or because of that particular student’s personality, the coach should take time between argument rounds to discuss that feedback with the students during a debriefing session.

Coaches who observe objectionable, bias-driven behavior by judges during a competition round should report that behavior to the competition administrators, preferably in writing, but perhaps also orally and in person (particularly if the behavior is egregious). Some competition administrators actually provide comment forms. If the competition does not, a letter documenting the behavior in detail—including concrete examples and quotations, where appropriate—will do the job. Provide examples and quotations if possible. If a competition has systemic problems with judges being unprepared or manifesting bias, consider not returning to that competition the following year—and tell the competition organizers why your team will not be returning.

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<sup>245</sup> See Higdon, *supra* note 89, at 645-46 (research on nonverbal communication suggests that smiles, nods, and gestures can be more persuasive than their absence, but must be “synchronized with and supportive of the vocal/verbal stream”).

And, of course, professors and coaches must be scrupulously attuned to their own unjust biases and avoid letting them influence interactions with students. Every professor and coach should explore the Project Implicit website, for example, and maybe even take the Implicit Associations Test.<sup>246</sup> Most people whom this author knows who have taken the test report being surprised by implicit biases of which they were not consciously aware but which made sense to them upon further reflection and self-examination. The mere fact that an educator is herself female, of course, does not mean that she does not harbor implicit—or explicit—biases against certain traditionally female traits, or that she does not inadvertently reward or deter conduct-based sex and gender stereotypes.

#### *B. Suggestions for Competition Administrators*

Moot-court competitions may be the most challenging arena for change. Finding enough lawyers and judges willing to volunteer hours of their time to prepare for and judge rounds of moot-court oral argument—particularly a large competition with many competitors and many rounds, requiring sometimes nearly a hundred judges—can be time-consuming and challenging. And moot-court judges often participate in these competitions because they have strong feelings about what a good oral advocate looks, sounds, and acts like. But educators, student moot-court boards, and others who administer intramural or intermural moot-court competitions can take several steps to prevent judges and others from reinforcing pernicious stereotypes about what a good lawyer looks and sounds like.

The first and perhaps most challenging step—and one that arguably enhances the academic impact of moot court overall—is to shift the focus from style to substance. Placing

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<sup>246</sup> *Preliminary Information*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html>.

more emphasis on accurate and thoughtful discussion of the law, apt and accurate answers to questions from the bench, and demonstrated understanding of the legal, factual, and policy issues the problem implicates can help eliminate some of the more subjective elements of moot-court judging. Many competitions already do much to bring substance to the forefront. For example, in most competitions, the brief score comprises up to fifty percent of an advocate's overall score, and this often persists through final rounds of competition.<sup>247</sup> As a general rule, brief scorers have no information about the name, sex, race, ethnicity, religion, or sexuality of the brief's author.<sup>248</sup> Often, the brief score affects initial pairings in oral argument rounds; much like the ranking system in the college basketball tournament, teams are seeded based on brief score, and then teams with higher brief scores compete against teams with lower brief scores in the initial oral-argument rounds.<sup>249</sup> This makes it more difficult for a team with a flashy oral-argument style but weak grasp of the substance to take advantage of an ill-prepared or superficial bench to vault over a more substantively strong team.

Many competitions also use scoring rubrics to shift the focus from style to substance. Substantive issues—such as knowledge of the law, knowledge of the record, and responses to questions from the bench—increasingly make up a larger percentage of the overall score, with

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<sup>247</sup> See ABA NAT'L APPELLATE ADVOCACY COMPETITION RULES art. 11(3)(f)-(g) (2015), [http://www.americanbar.org/content/dam/aba/events/law\\_students/2015-2016NAACRules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/law_students/2015-2016NAACRules.authcheckdam.pdf) [*hereinafter* ABA RULES]. See also JEFFREY G. MILLER NAT'L ENVTL. LAW MOOT COURT COMPETITION OFFICIAL RULES r. V(B)(2) n.4 (2017), [http://www.law.pace.edu/sites/default/files/NELMCC/2017\\_Official\\_Rules.pdf](http://www.law.pace.edu/sites/default/files/NELMCC/2017_Official_Rules.pdf) [*hereinafter* PACE RULES]; NAT'L NATIVE AM. LAW STUDENTS ASS'N ANNUAL MOOT COURT COMPETITION OFFICIAL RULES Appendix A(4) (2015), [http://media.wix.com/ugd/c50703\\_2f8f3c46d6b148a6b753eea0fb974ec4.pdf](http://media.wix.com/ugd/c50703_2f8f3c46d6b148a6b753eea0fb974ec4.pdf) [*hereinafter* NALSA RULES].

<sup>248</sup> See ABA RULES, *supra* note 247, art. 11(1). See also PHILIP C. JESSUP INT'L LAW MOOT COURT COMPETITION OFFICIAL RULES r. 6.15 (2017), <https://www.ilsa.org/jessup/jessup17/2017%20Rules%20Final%20PDF.pdf> [*hereinafter* JESSUP RULES]; PACE RULES, *supra* note 247, r. III(C); NALSA RULES, *supra* note 247, rs. 5.4(a), 8.4(a).

<sup>249</sup> See ABA RULES, *supra* note 247, art. 8(1)(c). See also JESSUP RULES, *supra* note 248, r. 8; NALSA RULES, *supra* note 247, r. 9.8(a).

categories like demeanor, speaking style, and courtroom presence receiving as little as ten or twenty percent of the overall point total. The risk of rubrics, however, is that they may mask particularly pernicious bias; a judge may conscientiously believe that she is allocating points for knowledge of the law when, in fact, she is allocating points for how well she perceived a competitor to have communicated that knowledge, and that perception may be influenced by implicit bias.

Competition administrators also can do more to encourage and enable judges to reward a strong substantive legal argument over a more superficially pleasing one. Many moot-court critics identify poor judging as the biggest obstacle to achieving the exercise's pedagogical goals.<sup>250</sup> And the biggest obstacle to good judging may be poor preparation. Ill-prepared judges who have only a superficial understanding of the legal and factual issues involved often “reward cleverness and poise over persuasiveness and sound argumentation.”<sup>251</sup> Judges who are not thoroughly familiar with the record or the law either recognize that they cannot accurately assess the substantive arguments and therefore fall back on easy, canned comments about style or demeanor, or they risk being bamboozled by an advocate who delivers inaccurate or oversimplified legal arguments with confidence and panache.<sup>252</sup> In fact, as much as possible, the best moot-court judges approach the moot argument as they would if they were real judges who needed to decide real legal arguments.<sup>253</sup> Although the moot-court judge should avoid scoring the advocates based on which side might win in a real case, the judge should focus on how much

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<sup>250</sup> See e.g., Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45 (2006); Vitiello, *supra* note 230; Kozinski, *supra* note 230.

<sup>251</sup> Kritchevsky, *supra* note 250, at 49.

<sup>252</sup> Kritchevsky, *supra* note 250, at 48-49.

<sup>253</sup> Kritchevsky, *supra* note 250, at 55-73.

the advocate's argument would assist a real court in arriving at a just decision rather than on whether an argument was delivered with flair or panache.

Possibly the most important thing a competition administrator can do to encourage judges to focus on substance is to create a simple and achievable problem. Many who draft problems for moot-court competitions seem to strive to make them as complex and challenging as possible, introducing students (and judges) to labyrinthine statutory schemes, complicated interactions between different areas of law, and cutting-edge issues. Although, of course, a competition wants to present an intellectual challenge to students, and the problem should be interesting to both students and judges, the difficulty arises when judges—often busy attorneys and judges with little time to prepare, working from bench memos and case summaries—attempt to get their heads around these complex issues in a short period of time. This makes it difficult for those judges to distinguish between a glib but confident argument and a more nuanced and accurate presentation of the type that would be more likely to carry the day in a real appellate court. In creating problems and bench memos, then, competition administrators should focus on making the key legal and factual issues ones that busy lawyers and judges can quickly assimilate.

Even relatively simple legal issues can involve dozens of lengthy cases that a student might cite, and often specialty competitions focused on niche areas of law have little choice but to delve into complex issues. Moreover, a problem that is too simple risks failing to engage both the students and the judges. Creating a closed-universe problem—that is, one where all the necessary sources of law are provided with the assigning materials—permits a competition to create an intellectually challenging problem while making it easier for the competition to prepare judges to accurately assess any cases students might cite or arguments students might assert. It deprives the students of all of the skill-building experience that conducting the research would

provide, but that might be a small but necessary price to pay to improve the overall quality of judging.

Even with a complex, open-universe problem, competition administrators can build better-prepared benches by providing exhaustive briefing and training before the competition. Yes, this will be time-consuming, and yes, recruiting an adequate number of qualified judges is challenging enough when they simply must attend a couple of hours of arguments and read a bench memo. That said, if you offer your judges a free, high-quality presentation on the legal issues involved in your moot-court problem, and if you work with your state bar to offer those judges hours of CLE credit for that session, you may find that you are actually able to recruit more judges and that those judges will be better prepared to assess and score the arguments and provide good, substantive feedback. Some states will permit you to offer CLE credit for judging the arguments themselves and even for some preparation time, which also helps busy attorneys justify devoting their time to the endeavor. Creating a webinar or other online course will make it even more convenient for your judges to access the content that you provide on their own time.

This focus on substance over style does not mean, of course, that competition judges should not penalize competitors for communicating disrespect for the court through demeanor, word choice, or tone, or for using overly casual language or gratuitous slang or profanity in oral argument. But scoring rubrics and judge-training materials should provide clear and concrete examples of the kinds of conduct that should and should not result in point deductions in those categories. And scoring rubrics and judge-training materials should warn judges against letting superficial and inoffensive style and demeanor issues affect scoring in substantive areas. These materials also should strongly discourage judges from commenting on the physical appearance or dress of the advocates.

Competition administrators can also help judges to avoid acting on implicit bias by making judges aware of their own biases. The judging memo or CLE materials can include a link to the Project Implicit website where judges can take the Implicit Association Test (IAT), which identifies biases individuals often do not even realize they possess.<sup>254</sup> Simply exposing them to the test and the website can make your judges more aware of the impact of implicit bias and the fact that even well-meaning people can harbor pernicious biases based on immutable traits like race or gender.<sup>255</sup> A caution: do not try to use the IAT to pre-screen judges for bias. The test’s creators admonish that the IAT was not designed for that purpose, and using it for that purpose “could lead to undesired and unjustified consequences.”<sup>256</sup>

And, just like coaches and students, judges can be educated on mindset theory and stereotype threat and encouraged to deliver feedback that fosters a growth mindset and conveys belief in a student’s ability to meet high standards. You might include brief materials on the theories in your judging memo or CLE packet, and you can model how to frame feedback there, as well.

Even with all of this planning and preparation, judges may behave badly. Judges may honestly disagree with the competition’s philosophy regarding comments on demeanor and appearance, or judges may be ill-prepared or difficult. Competition organizers should develop systems to monitor judges—providing team coaches with comment cards is one good method—and counsel judges who make inappropriate comments. Should a judge remain intractable or display gross bias or prejudice toward a competitor because of an innate trait, the competition

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<sup>254</sup> PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit>.

<sup>255</sup> *Overview*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html>.

<sup>256</sup> *Ethical Considerations*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/ethics.html>.

should not ask that judge to return. This can be difficult when a judge is a significant donor or a luminary within the legal community, so competition organizers should make sure that key stakeholders understand and buy into the competition's philosophy regarding these issues.

## VII. CONCLUSION

Moot-court competitions, programs, and exercises present one of the first opportunities for law students to try on a professional identity and to contemplate what it means to look, sound, and act like a lawyer. As moot-court educators, judges, competition directors, and board members, we have the opportunity and obligation to teach students that the voice of authority in the legal profession comes in a variety of pitches and physical packages. We need not discard the lessons of Classical rhetoric—although we may challenge a few—but we should deliver them with an acknowledgment of the context from which they arose, a context in which women's voices were largely silenced, at least in the public sphere. This can only increase access to all aspects of the profession, not just for women but for members of all groups traditionally marginalized both in law school and in the legal profession.