Nebraska Law Review

Volume 101 | Issue 2 Article 9

2023

All Rise: Pursuing Equity in Oral Argument Evaluation

Rachel Stabler
Arizona State University Sandra Day O'Connor College of Law

Rachel Stabler*

All Rise: Pursuing Equity in Oral Argument Evaluation

TABLE OF CONTENTS

* Associate Clinical Professor of Law, Arizona State University Sandra Day O'Connor College of Law. I would like to thank Mary Bowman, Andrew Carter, Susan Chesler, Susan McMahon, and Judy Stinson for their helpful advice and feedback on earlier drafts of this Article. This Article also benefitted from helpful commentary from the attendees at the 2022 Legal Writing Institute Biennial Conference and the ASU Law Faculty Coloquium.

I. INTRODUCTION

Anonymous grading of written work has been a hallmark of legal education for decades.[1] The rationale behind anonymous grading is that, by removing the students' names, the professor can better focus on evaluating the substance of the work, rather than allowing peripheral factors associated with the student's identity to affect the grade.[2] In short, student anonymity helps guard against bias in grading.

However, one notable exception to anonymous grading in law school remains: oral argument. The nature of a traditional oral argument, where a student stands before a judging panel to present an oral argument based on a written brief,[3] makes anonymous grading impossible.[4] This introduces tension for those called on to evaluate oral arguments, whether as a required component of coursework, as part of a moot court competition, or in another setting. How can an evaluator who does not have the benefit of anonymity nonetheless guard against biases affecting the evaluation of an oral argument?

In addition to the problem of bias affecting the student's evaluation, oral argument presents a series of other inequities for students. One of the more common complaints about moot court is the judges' inconsistent and superficial engagement in the argument.[5] Further,

1. *E.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 n.5 (1995) (noting that anonymous grading had become a "now-pervasive practice of grading law school examination papers").
2. *See id.* (noting that an evaluation of written work can be "perhaps more reliable[ ] when any bias associated with the author's identity is prescinded"); Latonia Haney Keith, *Visible Invisibility: Feedback Bias in the Legal Profession*, 23 J. GENDER RACE & JUST. 315, 351 (2020) ("[T]he anonymous grading system has been law schools' long-standing protection against unconscious bias creeping into the evaluation of student performance and a student's ultimate course grade."); John M. Rogers, *Class Participation: Random Calling and Anonymous Grading*, 47 J. LEGAL EDUC. 73, 79 (1997) (stating that while anonymous grading may not be "strictly objective and free of all irrelevant considerations," it "at least strips out a large number of possible extraneous factors, such as race, gender, and whether the student is attractive or likeable").
3. This article focuses on such a traditional argument and encompasses both trial-level oral arguments before a single judge and appellate-level oral arguments before a panel of judges.
4. *See infra* notes 334–335.
5. *See infra* section III.C.

the norms and expectations that judges use to evaluate the argument are rooted in the classical rhetorical tradition and its emphasis on the elite warrior.[6] The continued use of these norms can be particularly burdensome on women and students of color—students who already face significant burdens in law school. Thus, while the oral argument is often described as a "rite of passage" for law students,[7] it remains plagued by several issues that contribute to an inequitable experience for students.

On the topic of oral argument, much scholarship has been written for students describing what makes a good oral argument and how to deliver one.[8] Some scholarship has been directed to moot court judges, guiding them on how they can better engage that role.[9] Other scholars have taken a broader evaluative approach, debating the value of the moot court experience in law school[10] and the value of oral argument in the courtroom.[11] Some scholars have also identified inequities in moot court programs for women and students of color and recommended reforms to those programs.[12]

This Article addresses a new perspective: that of the oral argument evaluator, as distinct but not necessarily divorced from the oral argument judge.[13] It encompasses both moot court programs as well as any other setting where an oral argument is evaluated, such as a law school course addressing oral advocacy. Regardless of the setting, any person seeking to evaluate oral argument fairly and equitably must navigate a minefield of challenges. This Article sets out to guide evaluators through that minefield, incorporating principles of cognitive psychology and implicit bias as well addressing the structural issues with the way oral argument is taught and conducted.

More specifically, Part II explains why, given the decline of oral argument in the courtroom, it should nonetheless be included in the law school curriculum. Part III describes the challenges that someone

6. *See infra* section III.B.
7. *E.g.*, Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills*, 22 LEGAL WRITING: J. LEGAL WRITING INST. 109, 149 (2018) (describing oral argument as "a blood-curdlingly terrifying event forever etched in students' memories and an important rite of passage").
8. *See infra* notes 36–60.
9. *E.g.*, Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 UNIV. MEM. L. REV. 45 (2006).
10. *E.g.*, Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178 (1997); Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court—NOT!"*, 17 REV. LITIG. 69 (1998).
11. *See infra* note 18.
12. *See infra* section III.B.
13. The judge is the one who sits on the panel during the oral argument and engages with the student in the conversation and questioning aspect of the oral argument. The evaluator is the one who evaluates the student's performance, as part of a course dealing with advocacy or as part of a moot court competition.

seeking to evaluate oral argument faces, including cognitive biases, traditional norms for presentation style that unfairly burden certain categories of law students, and the inconsistent experience that students may encounter with a judging panel. Part IV identifies concrete steps that an evaluator can take to reduce the possibility that those challenges will affect the students' oral argument, and Part V concludes.

II. ORAL ARGUMENT BELONGS IN THE LAW SCHOOL CURRICULUM.

Oral argument on hypothetical cases has long been a feature of the law student experience. In the United States, moot court was incorporated into legal education as early as the late eighteenth century,[14] and it flourished in the nineteenth century at schools like Harvard University, the University of Virginia, Northwestern University, Boston University, and the University of Mississippi.[15]

However, over the past two centuries, courts have shifted their main method of communication from oral argument to written briefs.[16] Now, oral argument has become the exception rather than the rule, at both the trial and appellate level.[17] And even in the exceptional case in which an oral argument is held, the chance that it will actually affect the ultimate outcome is quite small.[18] This has given

14. JAMES DIMITRI ET AL., THE MOOT COURT ADVISOR'S HANDBOOK 5–6 (2015).
15. *Id.* at 6; Darby Dickerson, *In re Moot Court*, 29 STETSON L. REV. 1217, 1224 (2000).
16. Nancy Winkelman, *"Just a Brief Writer?"*, 29 LITIG. 50, 50–51 (2003) ("By the turn of the [19th] century, the new form of legal argument—written rather than oral—was taking hold.").
17. *See* Richard E. Finneran, *Wherefore Moot Court?*, 53 WASH. UNIV. J.L. & POL'Y 121, 121–22 (2017); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 47 (2004); Jay Tidmarsh, *The Future of Oral Argument*, 48 LOY. UNIV. CHI. L.J. 475, 478 n.16 (2016). Recent data available from the U.S. Courts of Appeals indicates that in the twelve months before March 31, 2021, only nineteen percent of cases that were terminated on the merits went to oral argument. *Table B-1—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2021)*, UNITED STATES COURTS, https://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2021/03/31 [https://perma.cc/7JEY-GU59] (a total of 31,887 cases were terminated on the merits, 6,058 of which were decided after oral argument). Statistics for trial court oral argument are more difficult to find, but a 2009 report analyzing eight federal district courts indicated that oral argument was held on thirty-five percent of discovery motions, sixteen percent of Rule 12 motions, and thirty-one percent of summary judgment motions. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 45, 48, 51 (2009).
18. *See* Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC: JALWD 45, 53–55 (2017); Warren D. Wolfson, *Oral Argument: Does it Matter?*, 35 IND. L. REV. 451, 454 (2002) (stating

rise to a robust debate over what kind of role, if any, oral argument should occupy in the modern courtroom.[19] Moreover, many attorneys practice law in a non-litigation setting and will never set foot in a courtroom.[20] With these concerns about the practicality of oral argument, a threshold question arises: should oral argument still be part of the law school curriculum?

The answer to that threshold question is yes. Although the extent to which oral argument belongs in court remains in debate, most scholars do not advocate for eliminating oral argument altogether.[21] After all, there is still a chance—however small—that it could change the outcome of a case.[22] Moreover, even if oral argument does not affect the outcome of the case, it provides other benefits to the parties,

---

a "generous estimate" that oral argument "changes or makes up minds in about five to ten percent of the cases").

19. *See, e.g.*, Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986); David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeal: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119 (2012); Judge Marshall L. Davidson, III, *Oral Argument: Transformation, Troubles, and Trends*, 5 BELMONT L. REV. 203 (2018); Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121 (2007); Spencer D. Levine, *Differing Schools of Thought: Changing Perceptions of Oral Argument*, 31 ST. THOMAS L. REV. 133 (2019); Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986); Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25 (1999); Tidmarsh, *supra* note 17; Venter, *supra* note 18; Wolfson, *supra* note 18.

20. A 2021 report indicated that twenty-five percent of law firms' billable hours was for corporate work, while 28% was for litigation. GEO. L. CTR. ON ETHICS & THE LEGAL PRO. AND THOMSON REUTERS INST., 2021 REPORT ON THE STATE OF THE LEGAL MARKET 4 (2021) (The remaining practices areas included four percent for patent litigation, three percent for tax, five percent for patent prosecution, two percent for bankruptcy, seven percent for real estate, and eleven percent for labor and employment.). Additionally, over twenty-five percent of recent law school graduates work at jobs that do not require bar passage. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 63 (2020).

21. Davidson, *supra* note 19, at 212 ("Few would seriously contend that these criticisms justify the elimination of oral argument in every case . . . ."). Some scholars argue that oral argument's role should be expanded. *See, e.g.*, Cleveland & Wisotsky, *supra* note 19, at 141–42 ("Because of its importance to appellate justice, oral argument should be more common and of greater length, and should offer sufficient opportunity for litigants to clarify, persuade, and have their day in court."). Others argue that it should be more circumscribed. *See, e.g.*, Duvall, *supra* note 19, at 130; Martineau, *supra* note 19, at 32–33 (arguing that "[o]ral argument can and should continue to have a significant role" but that it should only be held if the court cannot ask for written answers to its question or when the written answers it receives are insufficient); Venter, *supra* note 18, at 80 ("Oral argument should be granted only for cases for which two judges are confident that oral argument could make a difference in the outcome, or for cases that are highly important to the public."). *See generally* Davidson, *supra* note 19, at 212–16 (describing proposals to reform oral argument).

22. *Supra* note 18.

the attorneys, the judges, the public, and the institution of the courts at large.[23]

Although oral argument may be in decline, there are no signs that it is going away anytime soon.[24] Moreover, the fact some students may not deliver oral argument as part of their future law practice does not mean they do not benefit from undertaking the experience in law school. The skills they learn through oral argument are translatable to many areas of practice.[25] And if practicality is a concern, a trial brief on a dispositive pre-trial motion with a corresponding oral argument can be used.[26] This type of exercise is more likely to be replicated in practice than an appellate oral argument.[27]

Therefore, oral argument still deserves a place in the law school curriculum. It remains an "invaluable pedagogical tool" in legal educa-

23. Cleveland & Wisotsky, *supra* note 19, at 138–41; Martineau, *supra* note 19, at 11–20; Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271, 285 (2016) ("[Oral] argument is consequential . . . and it undoubtedly matters in subtler ways as well—disciplining written submissions by forcing counsel to anticipate the possibility of being chewed out, promoting judicial engagement, and so forth."); Venter, *supra* note 18, at 74–78 (noting that oral argument "mak[es] justice visible," helps craft limits on rules, and "can make an opinion better").

24. *E.g.*, Pierre H. Bergeron, *Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193, 222–23 (2021) ("[Most of us] would readily acknowledge" that "we want this tradition of oral argument to endure.").

25. *See infra* notes 31–60.

26. *See* AMY VORENBERG, STRATEGIES AND TECHNIQUES FOR TEACHING LEGAL ANALYSIS AND WRITING 41 (2012) ("[C]onsidering that the vast majority of law graduates do not write many (if any) appellate briefs, you might want to explore assigning a trial-level memorandum to the court. Graduates are more likely to bring a motion to dismiss or a motion for summary judgment in practice.").

27. *See, e.g.*, John K. Larkins, Jr., *Oral Argument on Motions*, 23 LITIGATION 16, 69 (1997) ("Jury advocacy and appellate advocacy garner the glamor and the law school courses. Oral argument before a trial court and without a jury, which occurs much more frequently than jury or appellate arguments . . . is the blue-collar, day-in-day-out thing lawyers do routinely . . . ."); Letter from John Baker, President, Nat'l Inst. of Trial Advoc. (Apr. 2010), http://archive.constantcontact.com/fs086/1101948188932/archive/1103284312333.html [https://perma.cc/B5TH-JB3P] ("Most lawyers in civil practice spend the majority of their time in pre-trial discovery, depositions, motions hearings, negotiations, mediations, and arbitrations."); C. J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 203, 215 (2019) (arguing that law schools teaching legal advocacy for jury trials and appellate oral arguments "are failing to teach the skills modern litigators increasingly use every day in courtrooms across America: advocating to district judges"); Judge C.J. Williams & Judge Leonard T. Strand, *Judicial Advocacy: How to Advocate to a Judge*, 43 AM. J. TRIAL ADVOC. 281, 283 (2020) ("The reality is that attorneys spend much more time advocating to judges than they ever do advocating to jurors or appellate judges.").

tion.[28] Even the American Bar Association Standards require that a law school's learning outcomes include "at a minimum, include competency in . . . oral communication in the legal context."[29] Oral argument, whether through a first-year legal research and writing course or through a moot court program, is one of the best ways to achieve this outcome.[30]

Oral argument is a useful tool to achieve this outcome because it helps students develop numerous crucial skills. First, and perhaps most obviously, oral argument develops oral communication skills. Many students come to law school with little to no public speaking experience,[31] and oral argument develops that crucial skill. It is true that oral argument is given in a litigation setting in which many law students will not practice.[32] However, the oral communication skills that are developed during oral argument are necessary for lawyers in virtually all areas of practice.[33] "After all, attorneys converse with su-

28. Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 145 (2017).

29. *ABA Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N at 17 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf [https://perma.cc/HP5U-KLHD] (Standard 302(b)).

30. Another common method of teaching oral communication skills is requiring students to give an oral report to a partner. *See, e.g.*, Michael D. Murray, *The Positive Pedagogy of Presentations to Partners*, 21 SECOND DRAFT 11 (2006); Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 LOY. UNIV. CHI. L.J. 123, 174 (2007); Adam Lamparello & Charles E. MacLean, *A Proposal to the ABA: Integrating Legal Writing and Experiential Learning into A Required Six-Semester Curriculum That Trains Students in Core Competencies, "Soft" Skills, and Real-World Judgment*, 43 CAP. UNIV. L. REV. 59, 63 (2015). Other methods include requiring students to give oral presentations to the class or to a client. AM. BAR ASS'N, LEGAL WRITING SOURCEBOOK 116 (3d ed. 2020) [hereinafter SOURCEBOOK].

31. ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 1 (2d ed. 2018).

32. *Supra* note 20.

33. Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 594 (2009) ("[T]he . . . public speaking skills learned through simulated oral argument are easily translatable to other contexts."); DIMITRI ET AL., *supra* note 14, at 12 ("Even attorneys who never set foot in a courtroom must articulate their legal reasoning and analysis orally on a regular basis."); Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk About Law*, 54 J. LEGAL EDUC. 570, 571 (2004) ("Talking confidently about law is an important skill in legal practice . . . ."); John T. Burman, *Oral Examinations as a Method of Evaluating Law Students*, 51 J. LEGAL EDUC. 130, 132 (2001) ("[O]ral communicative skills . . . are central to success as a lawyer."); Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT AM. LEGAL SYS., UNIV. DENVER (July 26, 2016), https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient [https://perma.cc/R5DJ-8J2N] (noting that 80.1% of respondents indicated that the ability to "[s]peak in a

pervisors, advise clients, negotiate with adversarial counsel, and serve as interpreters of the law to lay individuals."[34]

And the skills developed through oral argument go beyond verbal communication. In a legal education that is heavy on the written word,[35] oral argument is one of the few opportunities that law students have to learn about—and apply—non-verbal communication techniques.[36] Students are explicitly instructed and evaluated on nonverbal communication techniques that are traditionally viewed as affecting the persuasiveness of their verbal message.[37] Thus, through oral argument, students begin "to not only understand the basic principles of nonverbal persuasion, but also to understand how to utilize those principles when appearing before a judge."[38] Additionally, for many students with a fear of public speaking, oral argument gives an opportunity to practice that skill and begin to overcome that fear.[39]

Next, oral argument reinforces the basic analytical skills that students are learning in the classroom. Just like a written argument in a memo, brief, or final exam, an oral argument requires students to understand the hierarchy of authority, synthesize rules, and use analogical reasoning.[40] And giving oral argument on a written brief can help the student better recognize the weaknesses in their written arguments and solidify their understanding of the legal analysis.[41]

Moreover, oral argument requires students to consider their analysis in a new, strategic light.[42] Unlike a written brief that allows the writer to control the order in which the arguments are presented and the amount of space devoted to each, an oral argument adds the un-

---

manner that meets legal and professional standards" was "[n]ecessary immediately for the new lawyer's success in the short term").

34. Stephanie A. Vaughan, *Experiential Learning: Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric*, 59 S. TEX. L. REV. 121, 122 (2017).

35. *See* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 UNIV. MICH. J.L. REFORM 51, 117 n.265 (1994).

36. Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 KAN. L. REV. 631, 634 (2009).

37. *Id.* at 634–35 (using effective non-verbal communication can make a strong verbal message more persuasive or even help overcome a weak verbal message). *But see* infra subsection IV.B.4.

38. *Id.* at 666–67.

39. SOURCEBOOK, *supra* note 30, at 112–13; Heidi K. Brown, *The 'Silent but Gifted' Law Student: Transforming Anxious Public Speakers into Well-Rounded Advocates*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 291, 319 (2012).

40. McElroy, *supra* note 33, at 592.

41. *Id.* at 591.

42. Finneran, *supra* note 17, at 126 (listing "strategic thinking" as the foremost lawyering skill that moot court teaches); *see also* McElroy, *supra* note 33, at 591 ("[M]ost oral advocates report that mooting a case . . . helps them to organize and frame their arguments.").

predictability of judges' questioning. This requires oral advocates to strategically consider how to organize arguments and how long to devote to each,[43] aware that there is no guarantee that they will be able to address all of them in the order they may desire. Moreover, students must make strategic decisions during oral argument, such as whether to affirmatively bring up a weakness or wait for the bench to ask about it.[44] Similarly, the student must decide whether to concentrate their argument on a judge's area of concern "or beat a tactical retreat and try to divert the argument to more fruitful areas."[45] Finally, oral argument also allows students to develop persuasive supporting arguments that may not be suited for a written brief.[46]

Along these lines, oral argument develops a student's ability to engage in nimble thinking and contemporaneous speaking.[47] During an oral argument, an advocate must respond to questions from the bench, which they may or may not have anticipated.[48] In engaging with those questions, the advocate must identify what type of question is being asked and how best to answer it.[49] The advocate must then determine when and how to return to their previous argument.[50]

43. JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 324 (2016) (advising students to determine "where the game will be played" and "spend the bulk of your time at oral argument addressing those issues").

44. *See* DWORSKY, *supra* note 31, at 12.

45. Kozinski, *supra* note 10, at 188.

46. ROCKLIN ET AL., *supra* note 43, at 320 (noting that "[s]ome material is more effectively presented at oral argument" rather than in writing, and advising students to "[s]av[e] [h]ypotheticals and [e]xamples for [o]ral [a]rgument").

47. DIMITRI ET AL., *supra* note 14, at 12; DWORSKY, *supra* note 31, at 1 ("Each oral argument will be different, requiring you to make moment-to-moment adjustments to fit the situation and the judges."); SOURCEBOOK, *supra* note 30, at 110–11 (noting that oral argument can "increase[ ] students' self-confidence in thinking and speaking contemporaneously in a professional setting"); Dickerson, *supra* note 15, at 1218; Kozinski, *supra* note 10, at 179 (noting that "thinking on their feet" is an important lawyering skill that moot court participants learn); Kritchevsky, *supra* note 9, at 47; Salmon, *supra* note 28, at 145; Tidmarsh, *supra* note 17, at 477 (oral argument requires "dynamism, flexibility, and responsiveness in presenting the argument").

48. JILL BARTON & RACHEL H. SMITH, THE HANDBOOK FOR THE NEW LEGAL WRITER 325 (2d ed. 2019) ("Although your goal is to be prepared for any question, the court may ask you a question that you did not expect, or opposing counsel may make an argument or give an answer that you did not anticipate."); ROCKLIN ET AL., *supra* note 43, at 326 ("Although you may sometimes be forced to answer an unanticipated question on the fly, you will be more articulate, and your answers will be more persuasive, if you have predicted which questions the judge or judges will ask and have prepared for them.").

49. BARTON & SMITH, *supra* note 48, at 321–22; DWORSKY, *supra* note 31, at 62; ROCKLIN ET AL., *supra* note 43, at 348–49.

50. ROCKLIN ET AL., *supra* note 43, at 349–50; DWORSKY, *supra* note 31, at 66–67.

Another benefit of oral argument is that it can help develop collaboration and teamwork skills.[51] Many oral arguments, particularly in the moot court context,[52] will involve pairs or teams of students. Each pair or team must allocate the substantive work among the members and assist each other to develop the best work product. This teamwork reflects the reality of modern law practice, where attorneys often work collaboratively with other attorneys, paralegals, and others.[53]

Oral argument also allows students to develop their own professional identity.[54] By stepping into the role of a lawyer advocating for a client, students can explore where they fit in the legal culture and how their role fits in to the legal system as a whole.[55] They can begin to develop their own persuasive style and voice[56] as they become part of the legal community.[57]

Similarly, oral argument gives students additional practice understanding and adhering to the rules of professionalism.[58] Delivering an effective oral argument requires students to learn court rules and protocols—and follow them.[59] Students must do this not just when making their argument, but at all times when they are in or around the

51. DIMITRI ET AL., *supra* note 14, at 10; Salmon, *supra* note 28, at 145; Finneran, *supra* note 17, at 126; Dickerson, *supra* note 15, at 1218.
52. *See* DIMITRI ET AL., *supra* note 14, at 10.
53. *Id.*; Finneran, *supra* note 17, at 127 ("[T]he ability to work together with others is a critical aspect of a new attorney's practice of law, which moot court, almost uniquely among law school activities, teaches students in spades.").
54. DIMITRI ET AL., *supra* note 14, at 14; Salmon, *supra* note 28, at 145, 187; Hernandez, *supra* note 10, at 77–78 (describing "building character" as "perhaps the greatest benefit of moot court" and describing examples of personal and professional growth through oral argument); Kritchevsky, *supra* note 947, at 47 ("Moot court gives students a first opportunity to see how the law applies to a client and to discuss the law with a client's interests at heart."); Finneran, *supra* note 17, at 121 ("[M]oot court is among the most valuable experiences that a law student can have in terms of her professional development."); Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 PERSPECTIVES: TEACHING LEGAL RSCH. & WRITING 17, 17 (1998) (noting that many first-year students giving oral argument are "excited to have the opportunity to argue like lawyers").
55. E. Scott Fruehwald, *Developing Law Students' Professional Identities*, 37 UNIV. LA VERNE L. REV. 1, 4 (2015); Martin J. Katz, *Teaching Professional Identity in Law School*, 42 COLO. LAW. 45, 45 (2013).
56. BARTON & SMITH, *supra* note 48, at 313; DWORSKY, *supra* note 31, at 23; ROCKLIN ET AL., *supra* note 43, at 340.
57. Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 PACE L. REV. 379, 424 (2017) ("Oral argument is not only about allowing students to reason, but also allowing them to practice as attorneys in space and develop credible professional bodies that identify them, in their own eyes and those of others, as attorneys.").
58. DIMITRI ET AL., *supra* note 14, at 14; Salmon, *supra* note 28, at 145; BARTON & SMITH, *supra* note 48, at 325–26.
59. BARTON & SMITH, *supra* note 48, at 313, 325–26; ROCKLIN ET AL., *supra* note 43, at 323, 336–37, 339–40.

courtroom.[60] Thus, oral argument brings professionalism to life in a way that students do not experience from just writing a brief.

III. EVALUATING ORAL ARGUMENT POSES UNIQUE CHALLENGES.

Although oral argument has significant benefits for student learning, a number of challenges arise when someone—in particular, a legal writing professor or moot court judge—is tasked with evaluating that oral argument. Because the evaluation is inherently subjective, a number of implicit cognitive biases are poised to affect that evaluation. Additionally, standards for style and demeanor are rooted in classic rhetoric and may unfairly burden students of color and women. Finally, the nature of oral argument as a conversation between the advocate and judges can lead to inconsistent opportunities for students to demonstrate their skills.

A. Biases May Affect the Evaluation.

A major difficulty in evaluating oral argument arises from having to subjectively evaluate the performance of a student whose identity is known to the evaluator.[61] In this context, a variety of biases can affect the evaluation, including cognitive biases unrelated to stereotypes, like the halo effect and conformation bias, as well as implicit biases arising from stereotypes associated with the student's race, gender, or appearance.[62]

1. Cognitive Biases Unrelated to Stereotypes

a. The Halo Effect

The halo effect is "a cognitive bias leading to a homogeneous perception of a person."[63] Or, in simpler terms, it means "[t]he tendency

60. DWORSKY, *supra* note 31, at 32–33 ("Acting inappropriately while you aren't arguing can hurt your effectiveness as much as acting inappropriately while you are . . . . Even when you aren't aware of it, the judges or the court staff may be watching you or listening to you.").

61. *See, e.g.*, Burman, *supra* note 33, at 134 ("[O]ne cannot grade oral exams anonymously . . . . It is difficult, if not impossible, to be as objective when facing a known person as when grading anonymous [writing]."); Rogers, *supra* note 2, at 79 ("The problem with taking class participation into account in grading is that the evaluation is necessarily subjective and—a related problem—it potentially undermines the value of anonymous grading."); DIMITRI ET AL., *supra* note 14, at 80 (noting that judging moot court is "inherently subjective").

62. Pamela Steinke & Peggy Fitch, *Minimizing Bias When Assessing Student Work*, 12 RSCH. & PRAC. IN ASSESSMENT 87, 87 (2017).

63. Camille Sanrey et al., *A New Method for Studying the Halo Effect in Teachers' Judgement and its Antecedents: Bringing out the Role of Certainty*, 91 BRITISH J. EDUC. PSYCH. 658, 658 (2021).

to like (or dislike) everything about a person—including things you have not observed."[64]

Renowned psychologist Daniel Kahneman described his experience with the halo effect in his 2011 book *Thinking, Fast and Slow*.[65] When grading a set of essays, he would grade all the essays written by one student first, before moving on to the next student's essays.[66] Eventually, he noticed that the grades he gave to each individual student's essays were "strikingly homogeneous."[67] He described the effect as "simple: if I had given a high score to the first essay, I gave the student the benefit of the doubt whenever I encountered a vague or ambiguous statement later on."[68] Upon realizing this, he changed his grading procedure to grade by essay question, not by student.[69] In other words, he graded all the essays answering the first question before moving on to the essays answering the second question.[70] When grading this way, he found that his scores for an individual student's essays "often varied over a considerable range."[71] Although this variation in scores led to less confidence in his grading, Kahneman found this lowered confidence to be "a good sign, an indication that the new procedure was superior."[72]

Empirical research confirms Kahneman's experience, showing a halo effect when a single grader evaluates multiple traits within a single work.[73] For example, one study asked participants to grade middle-school level essays written on the same topic.[74] The participants were divided into groups, and the first four groups were asked to assign a score to one of the following four traits: development, organiza-

64. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 82 (2011); *see also* John M. Malouff et al., *Preventing Halo Bias in Grading the Work of University Students*, 1 COGENT PSYCH. 988937, 1–2 (2014) (The halo effect can occur when "prior knowledge of a person creates a positive or negative view of the person.").
65. KAHNEMAN, *supra* note 64, at 83–84.
66. *Id.* at 83.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 84.
72. *Id.* Kahneman attributed his lowered confidence to the "uncomfortable inconsistency" in "the same student doing very well on some questions and badly on others." *Id.* This inconsistency "reflected both the inadequacy of any single question as a measure of what the student knew and the unreliability of [his] own grading." *Id.*
73. Ian Dennis, *Halo Effects in Grading Student Projects*, 92 J. APPLIED PSYCH. 1169, 1175 (2007) ("Halo effects are likely to be at their strongest when graders are required to give separate grades for different qualities of the same piece of work. They will be weaker, but still present, when grades are given to distinct elements of a piece of work."); Emily R. Lai et al., *Differentiation of Illusory and True Halo in Writing Scores*, 75 EDUC. & PSYCH. MEASUREMENT 102, 102 (2015).
74. Lai et al., *supra* note 73, at 107–08.

tion, voice, or mechanics.[75] The fifth group was asked to assign a score to each of those four traits.[76] The study revealed more correlated scores among the four traits for the fifth group, which analyzed all four traits, than with the first four groups, which analyzed only one trait.[77] In other words, a grader who gave a good score on writing mechanics, for example, was more likely to give a good score on the other traits on the same paper (and vice-versa).[78]

Researchers have also seen a halo effect in post-secondary education.[79] One study at the University of Edinburgh analyzed scores received by undergraduate medical students on a semester-long research project.[80] Each student's supervisor for the semester submitted two scores: one for "overall performance" throughout the semester and one for a final written report on the project.[81] Additionally, a "second marker"—who did not know the student's identity or the student's overall performance score—graded the final written report.[82] After comparing those scores, the study's authors found "extremely compelling evidence . . . for the existence of a strong halo effect" in the supervisors' assessment of the final written report.[83] The authors concluded that the score on the written report "[wa]s not purely based on written performance, but that prior knowledge of continuous performance ha[d] a highly significant role to play."[84]

The halo effect can also occur when graders are evaluating unrelated assignments from the same student.[85] For example, in a 2013 study, the authors had participants—"academics and PhD students"[86]—watch one of two versions of a three-minute recorded presentation by an undergraduate student.[87] The authors described one version of the presentation as "poorer;" the other, given by the same

75. *Id.* at 108.
76. *Id.*
77. *Id.* at 120–22.
78. The study did acknowledge a small halo effect even in the first four groups, where the graders could have been influenced by other aspects of the writing that they were not asked to score. *Id.* at 121.
79. Margaret MacDougall et al., *Halos & Horns in the Assessment of Undergraduate Medical Students: A Consistency-Based Approach*, 3 J. APPLIED QUANTITATIVE METHODS 116, 123–25 (2008).
80. *Id.* at 118.
81. *Id.*
82. *Id.* at 118–19.
83. *Id.* at 123.
84. *Id.* at 124 (The supervisors were asked to give two grades: one for the student's overall continuous performance over the semester and one for the student's final written report.).
85. John M. Malouff et al., *The Risk of Halo Bias as a Reason to Keep Students Anonymous During Grading*, 40 TEACHING PSYCH. 233, 233 (2013).
86. Participants were required to have past experience in grading written assignments. *Id.* at 234.
87. *Id.*

student, was described as the "better" presentation.[88] After viewing the presentation, the participants were asked to grade it.[89] The participants were then given the same essay written by the student, on a topic unrelated to the presentation, and asked to grade it.[90] The participants who viewed the better presentation gave "significantly higher scores" to the written essay than the participants who viewed the poorer presentation.[91]

b. Confirmation Bias and Teacher Expectancy Effect

Another bias related to the halo effect is confirmation bias. Confirmation bias refers to the tendency humans have to "seek data that are likely to be compatible with the beliefs they currently hold."[92] This is not an explicit or conscious decision, but rather an "unwitting selectivity in the acquisition and use of evidence."[93] In the education setting, a teacher who already has a negative view of a student might be more likely to find and emphasize errors, whereas that teacher might be more likely to overlook an error by a student who is viewed as more competent.[94]

A recent literature review has confirmed that teachers develop expectations for their students based on the students' prior performance

88. In the "poorer" presentation, "the student wore casual clothes, had her hair in a ponytail, and wore no makeup. The content of her answer lacked depth and her presentation lacked fluidity and as somewhat repetitive." *Id.* In the "better" presentation, she "wore dressier clothes with her hair down and makeup on" and "provided detailed information in a fluid, if still nervous manner." *Id.* at 234–35. Specifically, she "showed more eye contact with the camera, used more varied speech tones, made fewer filler sounds such as 'um,' and overall showed more confidence." *Id.* at 235.

89. *Id.*

90. *Id.* Participants were told to "[a]ssume . . . that the content is fine" and instead focus "on the basis of writing quality, including clarity, sentence structure, paragraph structure, punctuation, and spelling." *Id.*

91. *Id.* at 236. Specifically, there was a four-point difference on a one-hundred-point scale, "a difference of close to half a grade level." *Id.* The halo effect has not always been demonstrated. *See, e.g.*, Dennis, *supra* note 73, at 1174–75 (finding no difference in halos between graders who had previously supervised the student whose work was being graded and graders who had no previous experience with the student). This study speculated that the absence of this effect may have been due to the grader's knowledge that another person would grade the same project and discouraged too much reliance "on the outcome of a single study in this regard." *Id.*

92. KAHNEMAN, *supra* note 64, at 81.

93. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

94. Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195, 204 (2021).

and on the students' identity as part of social groups.[95] When a stereotype is positive, such as for students from a cultural-ethnic majority, the teacher tends to overestimate the performance of students in that group.[96] On the other hand, if the stereotype is more negative, the teacher will underestimate those students' performance.[97] The authors of this review found evidence showing a relationship between these teacher attitudes and students' actual outcomes.[98] This led the authors to conclude by recommending intervention to "reduce the negative effects of teachers' group associations and contribute to equal educational opportunities for all students."[99]

2. Implicit Biases Based on Stereotypes

a. Racial Bias

While little empirical research exists that examines how bias against students of color affects grades within legal education, one longitudinal study published in 2016 using data from two law schools found that "self-identification as a person of color . . . was a statistically significant negative predictor" of 1L grades and overall law school grades.[100] This finding remained true even after controlling for variables such as LSAT performance, undergraduate GPA, and other academic credentials.[101] The authors found it likely that this disparity "reflects something not merely about the students, but about legal education itself."[102] The authors went on to note the possibility that implicit bias in non-anonymous grading could explain much of the disparity in grades for students of color.[103]

Moreover, much has been written about the burdens that law students of color experience.[104] In 2008, Wendy Leo Moore wrote about

95. *See* Eddie Denessen et al., *Implicit Measures of Teachers' Attitudes and Stereotypes, and Their Effects on Teacher Practice and Student Outcomes: A Review*, 78 LEARNING & INSTRUCTION 101437, at 1 (2021).
96. *Id.* at 2.
97. *Id.*
98. *Id.* at 13. This is problematic because teachers' attitudes and expectations that are based on stereotypes have been shown to be less accurate. Sawomir Trusz, *Four Mediation Models of Teacher Expectancy Effects on Students' Outcomes in Mathematics and Literacy*, 21 SOC. PSYCH. EDUC. 257, 259 (2018).
99. Denessen, *supra* note 95, at 13.
100. Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success: A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 243 (2016). This included students who identified as "African-American, Latino/a, Asian-American, and Native-American." *Id.*
101. *Id.*
102. *Id.* at 244.
103. *Id.* at 244–47.
104. *Id.* at 244 (describing "substantial literature on how people of color, and those with less privileged socioeconomic backgrounds, can find law school alienating or

how, in law school, "students of color are systematically faced with hurdles that their white fellows do not encounter."[105] A more recent survey reports that law students of color often report a less favorable experience in law school than their white counterparts.[106] Indeed, students of color at an elite law school describe the climate as "racially isolating and unwelcoming, and report experiencing othering, marginalization, and tokenism."[107]

Additionally, the legal profession itself continues to show "substantial" racial disparities.[108] Recent data shows that Whites have had higher passage rates on the bar exam than persons of color.[109] This may explain why lawyers of color are underrepresented among law partners and general counsels of large corporations, and their compensation is lower.[110] Racial bias has been identified in how partners evaluate associates' work.[111] In one small, "now-notorious" study,[112] law firm partners rated the same writing sample lower when they were told it was written by African-American associate as compared to those who were told it was written by a Caucasian associate.[113]

---

a challenging adjustment, to the detriment of their performance"); *e.g.*, Jonathan P. Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFRO-AMERICAN L. & POLICY 71, 73–74 (2013).

105. WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 117 (2008); *see also* Emily A. Bishop, *Avoiding "Ally Theater" in Legal Writing Assignments*, 26 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 3, 5 (2017) ("Law students of color must work to overcome burdens that do not exist for white law students.").

106. L. SCH. SURV. STUDENT ENGAGEMENT, THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A 15- YEAR LSSSE RETROSPECTIVE 15 (2020), https://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE_Annual-Report_Winter2020_Final.pdf [https://perma.cc/QA4T-H8UM] [hereinafter LSSE] ("[W]hites as a whole consistently have the highest rates of overall satisfaction" with their law school experience.).

107. Yung-Yi Diana Pan & Daisy Verduzco Reyes, *The Norm among the Exceptional? Experiences of Latino Students in Elite Institutions*, 91 SOCIOLOGICAL INQUIRY 207, 215 (2021). This study focused on Latino students but noted that "other nonwhites. . . . experience similar marginalization and ascription within elite institutions." *Id.* at 225; *see also* Gordon, *supra* note 94, at 197 ("BIPOC and other underrepresented students . . . can feel tokenized, marginalized, and stereotyped – not only by their colleagues, but by their professors.").

108. Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 UNIV. CINCINNATI L. REV. 871, 874–75 (2018).

109. *New ABA Data Indicate Minorities Lagging in Bar Pass Rates*, AM. BAR ASS'N (July 5, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/bar-passage-rates/ [https://perma.cc/R9TQ-K6BR].

110. *Id.*

111. Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 3 (Yellow Paper Ser. No. 2014-0404).

112. SOURCEBOOK, *supra* note 30, at 350.

113. Reeves, *supra* note 111, at 4. The study authors received responses from fifty-three law partners who were asked to rate an office memo. *Id.* at 3. All partici-

Although little empirical research exists regarding the effect racial bias has on grading within legal education specifically, a wealth of research on how racial bias affects evaluation of students in other educational settings can inform legal educators. And that research shows the existence of significant "bias against . . . students who are members of specific ethnic or racial groups."[114]

Indeed, one 2020 study described a "vast research literature show[ing] that teachers give racially biased evaluations of student work."[115] The author of that study asked teachers from pre-kindergarten through twelfth grade to evaluate a writing sample purportedly written by a second-grade student.[116] The samples were identical other than the use of a name: "'Dashawn,' signaling a Black author," or "'Connor,' signaling a White author."[117] When asked to evaluate the sample on a relative grade-level scale, the teachers were nearly five percent less likely to rate the Black version as at or above grade level than the White version.[118]

Particularly relevant to oral argument, students of color may face accent bias, wherein "those in the minority who are perceived as sounding different are discriminated against."[119] When hearing accented speech, a listener invokes cultural meanings deriving from ste-

---

pants were told the same information about the writer as far as name, seniority, and alma mater. *Id.* The only difference was race: twenty-four participants were told the writer's race was African-American while the other twenty-nine participants were told it was Caucasian. *Id.* The partners who were told the writer was African-American rated it lower—specifically, 3.4 on average, while partners who were told the writer was Caucasian rated the exact same memo 4.2. *Id.* at 4.

114. John M. Malouff & Einar B. Thorsteinsson*, Bias in Grading: A Meta-Analysis of Experimental Research Findings*, 260 AUSTL. J. EDUC. 245, 249, 252 (2016); *see also* Mark J. Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers' Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566, 566 (2020) ("A vast literature in education shows that teachers treat students differently based on student race and that such differential treatment can affect students' learning.").

115. David M. Quinn, *Experimental Evidence on Teachers' Racial Bias in Student Evaluation: The Role of Grading Scales*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 376, 376 (2020).

116. *Id.* at 379–80.

117. *Id.* at 380.

118. *Id.* at 383. The study further found that "White teachers exhibited the largest bias against the Black student author" and were about eight percent less likely to rate the Black author's writing as being at or above grade level. *Id.* at 384. In fact, the "[w]hite teachers were also the only racial/ethnic group to show a statistically significant bias." *Id.*

119. William Y. Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Educational Opportunities to Students of Color*, 12 SCHOLAR 355, 357 (2010). This includes bias against speakers who are Black, Asian, Latinx, and Arab. *Id.* at 356.

reotypes attached to the speaker's race or ethnic group.[120] Thus, an accent "serves as a cue for race, ethnicity, and/or national origin, and the perpetuation of negative stereotypes."[121] Listeners who succumb to accent bias are also less able to assess and comprehend speech, which results in the speaker being considered less educated.[122] This accent bias has been documented in education and can result in lower grades for students of color.[123]

b. Gender Bias

Similar to racial disparities, gender disparities in law school have been studied for decades. One influential 1994 article studied "a typical, if elite, law school stratified deeply along gender lines" and found that women had a markedly different experience from men.[124] Specifically, it found that men received grades that were significantly better than the grades women received, both in the first year and throughout law school.[125] Subsequent articles reported similar findings of a grading disparity between men and women at other schools, particularly "highly selective law schools."[126]

More recently, however, research indicates that gender disparities in grading may be lessening. The 2016 study finding racial disparity in law school grades found that "long-noted gender disparities seem to have abated."[127] However, the study still found that male students had lower odds of being in the bottom quarter of law school GPA's, leading the authors to conclude that gender disparities, while abated,

120. Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CAL. L. REV. 1325, 1335 (1993). The study notes that this stereotyping can cut both ways, with the exact same accent having a positive or negative stereotype associated with it depending on the listener. *Id.*

121. Jason A. Cantone et al., *Sounding Guilty: How Accent Bias Affects Juror Judgments of Culpability*, 17 J. ETHNICITY CRIM. JUST. 228, 229 (2019).

122. *Id.* at 229. This result can also be reached for white speakers who speak with an accent that is associated with "white trash" or "redneck speech." *Id.* at 230.

123. Chin, *supra* note 119, at 374–75 ("[R]acial bias in grading can and does occur. Accordingly, accent bias as a form of racial bias can result in lower grades for students of color."). The accent bias can even affect grades for written work. *Id.*

124. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 UNIV. PA. L. REV. 1, 2 (1994). Specifically, the article studied the University of Pennsylvania Law School. *Id.*

125. *Id.* at 23.

126. Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 396 (2006); *see also* Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 J. GENDER, SOC. POL'Y & L. 511, 514 (2005) ("Academic performance also showed gender differences on average, with women somewhat less likely than men to graduate with top honors or receive high grades first year.").

127. Marks & Moss, *supra* note 100, at 205. The authors described this finding as "surprising." *Id.* at 244.

"are not fully gone."[128] Indeed, a study during the 2017–2018 school year at the University of Chicago Law School found a significant gender disparity in graduation honors, "suggest[ing] that women tend to receive lower grades than men at least to some degree."[129] At one school, men accounted for about two-thirds of moot court semi-finalists, finalists, and winners.[130]

Regardless of whether gender disparities in grading are abating, "women law students have different and inferior experiences of law school[,]"[131] as do students of color.[132] Women law students report feeling alienated and "disproportionately intimidated into silence."[133] They often report lower rates of satisfaction with their experiences at law school.[134]

Gender bias also remains problematic in the legal profession. Despite progress towards gender equity, "significant gender inequalities persist" in the legal profession to the disadvantage of female attorneys.[135] Specifically, female attorneys face disparities in compensation and are less likely to make partner than men.[136]

A 2012 study suggested that one reason women are less likely to reach partner was because of the effect of gender bias on their performance evaluation.[137] This study analyzed the performance evaluations of junior attorneys at a Wall Street law firm and found that male attorneys received higher numerical ratings than female attorneys.[138]

---

128. *Id.* at 246–47.

129. Mallika Balachandran et al., *Speak Now: Results of a One-Year Study of Women's Experiences at the University of Chicago Law School*, 2019 UNIV. CHI. L.F. 647, 679 (2019).

130. Balachandran et al., *supra* note 129, at 675. The study was conducted for the 2017–2018 year. *Id.* at 647. For the Moot Court statistics, the study took figures from the "past five years." *Id.* at 675. The study noted that "four survey respondents wrote about frustration with the way that the Moot Court competition is run and women's consistent failure to advance to later rounds in meaningful numbers." *Id.*

131. Dara E. Purvis, *Legal Education as Hegemonic Masculinity*, 65 VILL. L. REV. 1145, 1146 (2020).

132. *See supra* notes 104–107.

133. Purvis, *supra* note 131, at 1147–48.

134. *See* Balachandran et al., *supra* note 129, at 682. *But see* LSSE, *supra* note 106, at 15 ("White women tend to be more satisfied with their law school experience than any other raceXgender group.").

135. Rhode, *supra* note 108, at 872.

136. *Id.* at 872–73.

137. Monica Biernat et al., *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 SOC. PSYCH. & PERSONALITY SCI. 186, 190 (2012).

138. *Id.*

The authors attributed this to "gender stereotypes [that] led to pro-male bias."[139]

This pro-male bias can be seen in the most elite sphere of law practice: arguing before the United States Supreme Court. Between 2009 and 2015, women accounted for less than 20% of advocates before the Court.[140] Two 2017 studies show that the women who do appear to advocate in the Court are treated less favorably than men.

The first of these studies, analyzing data from 1979 to 2013, showed that women arguing before the U.S. Supreme Court were interrupted with questions earlier than men and were interrupted more often than men.[141] It also showed that when Justices did interrupt an argument, they spoke longer when a woman was arguing than when a man was.[142] Moreover, only one of these variables—the length of time before the first interruption—improved for women attorneys as more women justices were added to the Court.[143] Even so, the disparity with frequency and length of interruption became even more dramatic when more women were on the bench.[144] The authors of this study concluded that "the unequal interruptions faced by female lawyers undermine their ability to persuade."[145]

---

139. *Id.* ("Technical competence mattered more for numerical ratings of men than women, and interpersonal warmth mattered more for numerical ratings of women than men.").

140. Jennifer Crystal Mika (Née Mullins), *The Noteworthy Absence of Women Advocates at the United States Supreme Court*, 25 J. GENDER, SOC. POL'Y & L. 31, 39 (2017). Mika connected this disparity to the gender disparity in clerkships and "the ongoing challenges women face in private practice generally." *Id.* at 40–41.

141. Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Arguments at the US Supreme Court*, 5 J.L. & CTS. 337, 354 (2017). This study analyzed the transcript of oral arguments from 1979 to 2013—a total of 3583 arguments. *Id.* at 341. The results showed that men spoke on average 225 words before being interrupted, as opposed to 192 average words for women. *Id.* at 345. Additionally, men were interrupted an average of 49.2 times during their argument, as opposed to women being interrupted an average 51.3 times during their argument. *Id.*

142. *Id.* at 354. Specifically, a Justice's interruption lasted an average of 25.7 words when a man was arguing, as opposed to 28.3 words when a woman was arguing. *Id.* at 345.

143. *Id.* at 353. When the study began, no women were on the bench; by the end of the study, there were three. *Id.* at 353–54.

144. *Id.* at 354. The authors suggest that this could be due to a "backlash hypothesis . . . regarding the increased presence of women in a highly masculine environment." *Id.*

145. *Id.* at 354. The study did find one exception to this treatment: when the issue before the court was related to gender, the justices were actually more deferential to women than to men. *Id.* Another interesting finding from the study related to previous research into the "winning side" effect, where advocates who ended up on the winning side were treated more deferentially. *Id.* at 350. It found that this effect benefitted only men, not women, leading the authors to conclude that "[f]emale lawyers are treated like losers whether they are on the winning side or not." *Id.* at 352.

The second study also found women were treated unequally before the U.S. Supreme Court.[146] The study also showed that women arguing in front of the Supreme Court were interrupted more often than men, resulting in women receiving less speaking time than men.[147] This study went further, analyzing the "emotive content" of the Justices' interruptions.[148] It found that the Justices used less positive language and more negative language when addressing women than when addressing men.[149] The authors concluded that "female attorneys face an uphill battle" when arguing before the Supreme Court.[150]

c. Other Stereotype-Based Biases and Intersectionality

In addition to biases based on stereotypes relating to race and gender, other biases may also affect how the student is evaluated. In particular, the ABA recently published a study showing that almost forty percent of lawyers who identify as having a disability or as LGBTQ+ reported experiencing "subtle but unintentional biases."[151] Biases related to the student's appearance can also affect how the student is evaluated. For example, researchers have found that "highly physically attractive students, compared to their unattractive counterparts, are the beneficiaries of more favorable judgments by teachers."[152]

146. Tiffany Lindom et al., *Gender Dynamics and Supreme Court Oral Arguments*, 2017 MICH. ST. L. REV. 1033, 1033. This study analyzed transcripts of oral argument from 1986 to 2010. *Id.* at 1044.

147. *Id.* at 1048, 1054.

148. *Id.* at 1045.

149. *Id.* at 1050. Specifically, the study found a thirty-three percent increase in use of "negativity or unpleasantness" when the justices interacted with women. *Id.* at 1051. This study also analyzed the effect of the justice's gender and found that while women were generally less negative, they were also generally less positive towards attorneys. *See id.* at 1052.

150. *Id.* at 1035.

151. Peter Blanck et al., *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 UNIV. D.C. L. REV. 23, 25 (2020) (collaborating with the Burton Blatt Institute at Syracuse University). Over twenty percent reported "subtle and intentional biases." *Id.*

152. Vicki Ritts et al., *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RSCH. 413, 422 (1992); *see also* Malouff & Thorsteinsson, *supra* note 114, at 252 (including bias against "less attractive students" as a "type[ ] of bias with significant meta-analytic findings); Gordon, *supra* note 94, at 204–05 (describing "the well-documented tendency for people to assume that those who are physically attractive are also superior performers"). This bias towards attractive people is often connected to the halo effect. *See* Giulio Gabrieli et al., *An Analysis of the Generalizability and Stability of the Halo Effect During the COVID-19 Pandemic Outbreak*, FRONTIERS IN PSYCH. 1, 1 (Mar. 24, 2021) https://www.frontiersin.org/articles/10.3389/fpsyg.2021.631871/full [https://perma.cc/46J9-SUUD] (describing the halo effect as being invoked when "a stranger who looks good is also perceived as intelligent or smart, even though intelligence and smarts are unrelated to physical attractiveness"). That said, this

Similarly, "negative attitudes toward students with obesity are pervasive and negatively impact perceptions of student ability."[153]

Finally, it is vital to recognize here that these biases are not necessarily discrete phenomena.[154] Rather, they are based on identities that intersect, which presents unique challenges for people whose identity includes multiple categories.[155] Considering specifically race and gender, the concept of intersectionality recognizes that "the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately."[156] One study has shown that, within the legal profession specifically, "women of color are about twice as likely as minority men to report unfair treatment based on race."[157] It also showed that women of color "report significantly lower levels of career satisfaction than all other race-gender cohorts."[158] A study of law students reported similar conclusions[159] by analyzing reported levels of overall satisfaction with the law school experience between 2004 and 2019, breaking down results by race and gender.[160] The results showed that "Black women [we]re the least likely of all

bias towards attractive people may vary depending on the setting. *See* Peggy Li, *Physical Attractiveness and Femininity: Helpful or Hurtful for Female Attorneys*, 47 AKRON L. REV. 997, 1002 (2014). For women in traditionally masculine jobs, being attractive can actually lead to less favorable evaluations. *Id.* at 1003–04.

153. Sarah Nutter et al., *Weight Bias in Educational Settings: A Systematic Review*, 8 CURRENT OBESITY REPS. 184, 195 (2019); *see also* Yueting Ji et al., *Weight Bias 2.0: The Effect of Perceived Weight Change on the Performance Evaluation and the Moderating Role of Anti-Fat Bias*, FRONTIERS IN PSYCH. 1, 1 (July 16, 2021) https://www.frontiersin.org/articles/10.3389/fpsyg.2021.679802/full [https://perma.cc/3WFW-XVHK] (describing weight bias as "one of the most pervasive forms of bias").

154. *See* Todd A. Collins et al., *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorneys*, 98 SOC. SCI. Q. 1642, 1645 (2017).

155. *See id.*; Blanck, *supra* note 151, at 35 ("People with multiple minority identifications experience among the largest disparities in employment and areas of daily life."); Daphna Motro et al., *Race and Reactions to Women's Expressions of Anger at Work: Examining the Effects of the "Angry Black Woman" Stereotype*, 107 J. APPLIED PSYCH. 142, 148 (2022) ("[M]embership in two or more demographic categories can have markedly different effects than membership in one category.").

156. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); *see also* Salmon, *supra* note 28, at 146 n.13 (stating that one of its goals was to highlight for further research additional barriers faced by "women of color, women with disabilities, LGBTQ women, and women of non-Judeo-Christian faiths" as compared to issues facing women in general").

157. Collins, *supra* note 154, at 1652.

158. *Id.* at 1653.

159. *See* LSSE, *supra* note 106, at 15.

160. *Id.* at 6–7. The study included men and women of the following racial categories: Native American, Multiracial, Black, Asian American, Latinx, and White. *Id.* at 7.

raceXgender groups to rate their overall experience as 'good' or 'excellent.'"[161]

B. Evaluating Oral Argument Can Perpetuate Norms that Burden Women and Students of Color.

In addition to the potential for biased evaluation, another problem in evaluating oral argument is that it can perpetuate norms that burden women and students of color—the very groups of students already facing burdens on account of their race, gender, or both. Traditional expectations for persuasive oral advocacy "tend[ ] to favor dress, demeanor, and delivery associated with white men."[162] This is because much of those expectations about presentation style[163] are rooted in legal education's focus on classical rhetoric.[164]

For the elite warrior, manifesting strength is the overriding priority.[165] He maintains a "strong and manly posture derived from armed conflicts or, at least, the gymnasium."[166] The elite warrior exudes self-control through stillness, avoiding frenzied movements and feral gesticulation; he does not pace, sway, or tap his foot.[167] He speaks in a deep voice[168] and wears "manly" attire showing that he is a member of the dominant class.[169] This is the same advice that is given to students learning oral argument in legal education still today. Students are taught to maintain a strong upright stance, avoid fidgeting, keep their hand gesturing under control, lower the pitch of their voice, and dress in dark-colored, conservative suits to avoid drawing attention.[170]

Indeed, scholars have written about how this presentation style advice is particularly challenging for women in the oral argument setting.[171] Women must "walk a particularly fine vocal line,"[172] finding a

161. *Id.* at 16.
162. Salmon, *supra* note 28, at 159; *see also* SOURCEBOOK, *supra* note 30, at 358 ("[L]aw as an institution historically has been structured around the perspectives of elite white men.").
163. This article uses the term "presentation style" to refer to dress, demeanor, and delivery.
164. *Id.* at 154; O'Regan, *supra* note 57, at 380.
165. O'Regan, *supra* note 57, at 398 n.93.
166. *Id.* at 393.
167. *Id.* at 395–96.
168. *Id.* at 402 ("Disordered movement and a high voice are also fatal.").
169. *Id.* at 397.
170. *See, e.g.*, DWORSKY, *supra* note 31, at 35–40.
171. Mairi Morrison identified gender bias as a problem in moot court in 1995. 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). Susie Salmon recently revisited the issue in 2017, finding that "little ha[d] changed in moot court or the legal profession" since then. Salmon, *supra* note 28, at 149; *see also* Keith, *supra* note 2, at 332 ("Studies further confirm . . . entrenched gender

pitch that is lower than "the ordinary female voice," but still feminine. And this must come across as natural and consistent.[173] They must also avoid uptalk, vocal fry, tag questions, and unacceptable vocal tics more often associated with women.[174] They must learn what is considered proper courtroom attire for women in each location[175] and dress in a way that minimizes potentially attractive or feminine features[176]—or risk drawing attention with their attire.[177] This is an added burden that men generally do not face.[178] Finally, while women must not appear too soft spoken, they must also avoid appearing aggressive or angry, as aggression is seen as a masculine trait.[179] Any display of emotion will confirm the stereotype that women are governed by their emotions instead of reason.[180]

Students of color also face additional burdens when giving an oral argument. Success in oral argument, and in academics generally, "requires linguistic and cognitive assimilation with the dominant

---

stereotypes, such as being mistaken for a secretary or paralegal, being called a term of 'endearment,' or being treated in a condescending manner.").

172. Salmon, *supra* note 28, at 157.

173. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS & ORAL ARGUMENT 355 (Nat'l Inst. for Trial Advoc. 2d ed. 2003).

174. Salmon, *supra* note 28, at 159.

175. DWORSKY, *supra* note 31, at 35 ("For women, professional dress . . . tends to vary more from place to place.").

176. Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. Rev. 1, 12 (2019) ("Compliance standards for women, however, are more complex. Questions arise about whether she must wear a skirt suit or whether a pantsuit would be permissible; if the latter, she may wonder how high her heels must be to sufficiently 'feminize' her look without overly sexualizing it.").

177. Indeed, failing to appease just one judge "who is a stickler for proper appearance, then you are starting off on the wrong foot in your responsibility to persuade." ALDISERT, *supra* note 173, at 355.

178. Maureen A. Howard, *Beyond a Reasonable Doubt: One Size Does Not Fit All When it Comes to Courtroom Attire for Women*, 45 GONZ. L. REV. 209, 211 (2010) (Physical appearance in the courtroom "plays out with more complexity in practice with respect to women."); Cooper, *supra* note 176, at 12 ("Whether business dress or business casual is expected, women often find themselves seeking to strike the correct balance between professionalism and femininity while ensuring they are not overly sexualized—concerns rarely shared by men.").

179. Todd A. Berger, *Male Legal Educators Cannot Teach Women How to Practice "Gender Judo": The Need to Critically Re-Assess Current Pedagogical Approaches for Teaching Trial Advocacy*, 45 J. LEGAL PRO. 1, 10–11 (2020).

180. Chris Chambers Goodman*, Nevertheless She Persisted: From Mrs. Bradwell to Annalise Keating, Gender Bias in the Courtroom*, 24 WM. & MARY J. WOMEN & L. 167, 189–90 (2017); Jessica M. Salerno et al., *Closing with Emotion: The Differential Impact of Male Versus Female Attorneys Expressing Anger in Court*, 42 L. & HUM. BEHAV. 385, 399 (2018) ("People used the positive aspects of anger, such as denoting conviction and power, to justify hiring an angry male attorney. Yet, they used the negative aspects of anger, such as being shrill and obnoxious, to justify not hiring a female attorney.").

group."[181] Students of color must downplay any attributes that distinguish them from the dominant group so that these attributes "remain unobtrusive."[182]

One such attribute may be accented speech.[183] For example, one author described how the simple act of introducing himself at oral argument required him to decide whether and how to mute his unique attributes as a Mexican-American.[184] In that introduction, he chose to pronounce an Anglicized version of his last name, rather than using the Spanish pronunciation, out of fear of being perceived as a "foreign intruder" or even "incompetent."[185]

Additionally, law students of color must also take extra care to avoid appearing emotional—in particular, angry.[186] For example, Moore described the experience of several students of color, each of whom was described as an "angry black man" despite suppressing outward displays of emotion.[187] More recently, scholars have identified this stereotype being invoked during the Derek Chauvin trial when a defense attorney repeatedly referred to an African-American witness as "angry."[188] One recent study has shown how black women in particular are subject to negative stereotypes, leading to poorer performance evaluations, when they verbally express anger.[189]

Finally, oral argument also forces both women and students of color to confront stereotype threat, the fear that their performance will confirm negative stereotypes about their identity.[190] Students ex-

181. Marcus Lind-Martinez, *Latinidad, White Supremacy, and Reforming First-Year Moot Court Competitions to Confront Racial and Ethnic Bias*, 23 HARV. LATINX L. REV. 125, 132 (2020).

182. *Id.* at 132–33.

183. *See supra*, notes 119–123.

184. Lind-Martinez, *supra* note 181, at 132–33.

185. *Id.* at 131–33; *see also* Kristymarie Shipley, *Should I Be "Shipley" or "Flores Collazo" Today? The Racialization of the Law Student and Legal Workplace Candidate*, 31 BERKELEY J. GENDER L. & JUST. 183, 199 (2016) ("I am constantly torn between covering my accent and embracing it.").

186. *See* MOORE, *supra* note 105, at 150 (describing the "powerful mechanism" by which the perspectives of students of color are dismissed as overly emotional).

187. *Id.* at 154–56. One student was described as an "angry black man" simply because the background of his laptop screen was a picture of the Black Panthers. *Id.* at 156.

188. Lateshia Beachum, *Chauvin's Lawyer Asked a Black Witness about Anger, Conjuring Centuries-Old Tropes, Scholars Say*, WASHINGTON POST (Mar. 30, 2021, 9:29PM) https://www.washingtonpost.com/nation/2021/03/30/chauvin-trial-donald-floyd-witness/ [https://perma.cc/EUU2-7PV3].

189. Motro et al., *supra* note 155, at 142. The study did not find a similar effect for black men. *Id.* at 148. The authors did, however, note that "the stereotype of the angry black woman is associated with yelling and verbal hostility" while physical aggression "would fall more in line with stereotypes for black men." *Id.* at 150.

190. Lind-Martinez, *supra* note 181 at 133; Salmon, *supra* note 28, at 168.

periencing stereotype threat are more likely to perform poorly, essentially causing a "cycle of diminished achievement in that area."[191]

Therefore, to the extent that students are evaluated on these norms,[192] they will continue to burden the same students who already face additional burdens on account of their gender, race, or both.[193] This will only serve to perpetuate these norms for future law students.[194]

C. It is Difficult to Ensure a Consistent Experience for the Students.

Another challenge facing the oral argument evaluator derives from the nature of oral argument as a conversation.[195] This can cause an unlevel playing field for students: their experience in delivering an oral argument depends largely on how the judge or judging panel engages in that conversation.[196]

In staffing the judicial panel for oral argument, a number of approaches can be taken. One common model of staffing the panel is to group the students' arguments into multiple sessions and have a different set of judges for each session.[197] The problem behind this approach is that the quality of judging may vary depending on the preparation and personality of the judges on the panel. Some judges may come prepared, having thoroughly reviewed the relevant materials; others may have just skimmed a bench brief, planning to rely on canned questions. Some judges may have significant practice experience with the substantive law; others may have no experience with it

191. Salmon, *supra* note 28, at 168.

192. It is no solution to instead adopt the demeanor of the elite warrior's rival, the popular speaker, who attempts to "forge a bond with the audience" based on "shared, non-elite experience." O'Regan, *supra* note 57, at 405. In the classical rhetorical tradition, the popular speaker rejects the elite warrior's demeanor, instead opting for "expansive gestures, raised voice, increased movement, informal posture, and informal, rumpled, or disheveled clothing." *Id.* As discussed above, neither women nor students of color would fare better with this more aggressive style. *See supra*, notes 179–180, 186–189.

193. *Supra*, subsections III.A.2, III.B.

194. *See* SOURCEBOOK, *supra* note 30, at 358 ("[L]aw as an institution historically has been structured around the perspectives of elite white men and their particular analytical processes. Student lawyers who learn from this monolithic frame of reference therefore replicate systems of analysis and reasoning that reinforce the existing power structure.") (citations omitted).

195. *See, e.g.*, Kritchevsky, *supra* note 9, at 62; BARTON & SMITH, *supra* note 48, at 321; Dworsky, *supra* note 31, at 23–24. Oral argument has also been described as a "carefully calibrated verbal dance between an attorney and a judge or judicial panel." Teri A. McMurtry-Chubb, *Oral Argument as a Dance Best Set to Music*, 19 PERSP.: TEACHING LEGAL RSCH. & WRITING 152, 152 (2011).

196. Barbara Gotthelf, *The Lawyer's Guide to Um*, 11 LEGAL COMMC'N & RHETORIC: JALWD 1, 21–23 (2014).

197. SOURCEBOOK, *supra* note 30, at 113–14.

at all.[198] Some judges may be more reserved with their questioning; others may be more aggressive.[199]

All of this leads to a lack of uniformity for the students' experience, which affects their ability to demonstrate the skills they are learning.[200] A student who excels under intense questioning may appear to be a stronger advocate than a student who had a quiet bench and thus never got the opportunity to show their ability to handle difficult questions. Or on the other hand, a student who struggles under difficult questioning may leave a weaker impression than if that student had a quiet bench.

Another approach is to have the same judging panel for every oral argument. Yet even if oral argument is conducted by the same judge or set of judges, variations can still occur. In particular, a judge who evaluates multiple oral arguments on the same topic will become much more familiar with the material by the end of the arguments. That judge will know which questions work well, and which ones do not. That judge will learn to expect—and challenge—common student answers. This leads to the very real possibility that the questions will be less superficial and more direct for the students who argue at the end of the schedule.

In summary, whether because of cognitive bias, expectations about presentation style, or judging inconsistencies, evaluating students' subjective oral argument performance is one of the most challenging tasks in legal education. The next section highlights some tactics an evaluator can adopt to better evaluate oral argument.

IV. EVALUATORS CAN TAKE STEPS TO ENSURE A FAIR, UNBIASED EVALUATION.

Evaluating oral argument is fraught with the challenges described above. While oral argument nonetheless deserves a place in the law school curriculum, the question remains whether it should be graded, considering these challenges. Therefore, this section addresses that question by discussing possible approaches to grading oral argument as a component of coursework.[201]

198. DIMITRI ET AL., *supra* note 14, at 73.

199. *See* Kritchevsky, *supra* note 9, at 64–65.

200. *See, e.g.*, SOURCEBOOK, *supra* note 30, at 114 ("[A] LRW professor who serves as a 'judge' has the opportunity to neutralize any unspoken agenda that guest judges might bring to the exercise, and to provide some degree of uniformity to the students' experiences if different outside judges participate for each oral argument team.").

201. This section is directed to oral argument as part of coursework, as opposed to oral argument as part of a moot court competition. When it comes to moot court competitions, oral argument must be graded; the nature of it being a competition requires as much.

Regardless of whether the oral argument is graded or scored, its delivery and evaluation should be a formative part of the students' experience. This Article thus goes on to provide concrete suggestions for helping ensure that any oral argument evaluation—whether graded or not—is fair and free from bias.

A. Approaches to Grading Oral Argument

When including oral argument as a required component of coursework, a professor must decide how—and indeed, whether—to grade it.[202] One approach is to make oral argument a percentage of the course grade and assign a score to that component.[203]

Alternatively, the professor can choose to require oral argument without making it a component of the course grade, likely in the form of a pass/fail requirement.[204] Students will still learn the skills necessary for oral argument, but any biases that exist and any inconsistency in the judging will not affect the student's grade in the course.

One of the drawbacks of not grading oral argument or grading on a pass/fail basis is that students who are strong in oral advocacy skills do not get the benefit of that strength to help improve their grade.[205] This may disproportionately impact students who come from a culture that prioritizes oral tradition.[206] For example, one scholar has posited that "the choice to evaluate students almost entirely through their written work may operate to the benefit of white students and to the disadvantage of African-American students."[207] Thus, the choice not to grade oral argument—in an attempt to avoid unfairly disadvantaging students based on the effects of bias—may nonetheless end up disadvantaging those same students.

One option, short of grading the oral argument, can ameliorate this disadvantage. The professor could acknowledge high-performing oral advocates by incorporating a "high pass" option or providing an award for excellence. Indeed, most moot court competitions already incorporate a "best oralist award."[208] A professor could take a similar ap-

202. SOURCEBOOK, *supra* note 30, at 115.
203. *See id.*
204. *See id.*
205. *See id.* ("Grading the argument acknowledges the skills of students who naturally excel at oral advocacy or who work diligently to acquire those skills, but who may be slow to develop skills in written advocacy.").
206. Greenberg, *supra* note 35, at 105–06. Greenberg notes that "African American communities often have a strong and distinctive tradition of oral language that emphasizes narratives and poetics." *Id.* at 105; *see also* Glen Stohr, Comment, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L.J. 679 (1999) (describing the challenges that cultures with strong oral traditions, such as Native Americans, face in the legal system).
207. Greenberg, *supra* note 35, at 108.
208. DIMITRI ET AL., *supra* note 14, at 104.

proach to acknowledge high performers in the class with an honor that could go on the student's transcript or resume.[209]

Another concern with pass/fail grading is that some students will not take the experience seriously or put much effort into it if it is not a graded component.[210] But there are ways to address this concern. For example, the professor could have a graded course component for participation and professionalism and deduct points from that component for students who do not prepare for oral argument.[211] Or, in extreme cases, the professor could even withhold course credit for students who fail to participate.[212]

Ultimately, the decision to grade oral argument should be made after weighing two key concerns. First, the professor should consider how much time can be devoted to oral argument skills during the course.[213] If the professor spends sufficient class time teaching the skill, and if the professor expects students to invest a significant amount of time learning the skill,[214] then grading it would be a fair recognition of that. On the other hand, if oral argument is a minor part of the course that requires less significant class time and preparation, the professor may be better served by using a pass/fail system.

Second, the professor should consider the number of steps they can take to ensure fair grading. If a professor determines that the skill is one worth devoting significant class time to such that grading it is the only fair course of action, then the professor should also devote the

209. *See, e.g.*, Amanda L. Sholtis, *Guest Post: Cut the New Kid Some Slack (Even if That New Kid Is You),* APP. ADVOC. BLOG (July 30, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/07/guest-post-cut-the-new-kid-some-slack-even-if-that-new-kid-is-you.html [https://perma.cc/ZWW5-8M58] (describing receipt of an award for having one of the best oral arguments during a first-year legal writing class).

210. Leslie Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading Is More Consistent with Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 123, 129 (2011); *see, e.g.*, SOURCEBOOK, *supra* note 30, at 115, 208 (noting that students focus more time and attention when an assignment is graded and advising that professors "provide other performance incentives" when using ungraded assignments).

211. *See* Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 UNIV. DAYTON L. REV. 57, 87–88 (2012); Sophie M. Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 113, 151 (2007).

212. VORENBERG, *supra* note 26, at 37 (providing sample professionalism standards, including one stating that "[f]ailing to complete assignments could result in your disenrollment from the course").

213. SOURCEBOOK, *supra* note 30, at 111.

214. *See id.*

time and effort needed to ensure the skill is graded fairly[215]—for example, by basing the grade on a recording of the argument rather than the live performance.[216] And even if the argument does not count towards a student's grade, the evaluator should still take steps to minimize bias and unfairness. The goal should be to provide a fair playing ground on which to base an unbiased evaluation of the student, regardless of whether that evaluation affects the student's grade. The section below outlines the steps that can be taken to ensure such a fair evaluation.

B. Steps to Minimize Bias and Maximize Fairness in the Evaluation Process

1. Increase Awareness of Bias.

Unconscious biases can be overcome.[217] The first step in minimizing cognitive bias is to be aware that it exists.[218] This awareness should also include "the direction and magnitude of the bias."[219] This means the oral argument evaluator should be aware of the biases described above.

Specifically, the evaluator should be aware of the halo effect and how the mind is inclined to "subconsciously replace one specific question . . . [with] a general one."[220] When applied to the oral argument setting, evaluators should understand how grading one component or aspect of the argument could affect the grading of other components. And for an evaluator who has already graded some of the student's previous work—such as a professor evaluating oral argument as a re-

215. *See* Steven Friedland, *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 211 n.50 (2002) ("If the true importance of evaluation is recognized, however, teachers might make room for more serious pursuits of evaluation creation and implementation. Further, teachers might be more aware of how to circumnavigate obstacles to anonymous and fair exams.").

216. *See infra*, note 304.

217. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1580 (2013); Rachel D. Godsil, *Breaking the Cycle: Implicit Bias, Racial Anxiety, and Stereotype Threat*, 24 POVERTY & RACE RSCH. ACTION COUNCIL 1, 8 (2015).

218. Nickerson, *supra* note 93, at 211 ("[A] critical step in dealing with any type of bias is recognizing its existence."); *see also* Christopher T. Robertson, *Why Blinding: How Blinding: A Theory of Blinding and Its Application to Institutional Corruption* 26, in BLINDING AS A SOLUTION TO BIAS: STRENGTHENING BIOMEDICAL SCIENCE, FORENSIC SCIENCE, & LAW (Christopher T. Robertson & Aaron S. Kesselhim, eds., 2016) (noting that the first step to "de-bias mental contamination" is to "be aware that mental contamination exists"); Bassett, *supra* note 217, at 1580 ("[Unconscious] biases can be reduced, if not eliminated, through the use of appropriate awareness-enhancing measures."); Gordon, *supra* note 94, at 227 ("Law professors can and should seek education on internalized bias and the link to discriminatory outcomes.").

219. Robertson, *supra* note 218, at 26.

220. Sanrey et al., *supra* note 63, at 672; *see supra* subsection III.A.1.a.

quired course component. The evaluator should understand that any such previous evaluation could predispose the evaluator to giving a similar evaluation on the oral argument.

Evaluators should also be aware that biases based on the student's race, gender, and physical appearance exist.[221] Thus, evaluators should understand that their evaluation of the oral argument may be affected when the student delivering the argument is a student of color, a woman, a student who appears less physically attractive, an obese student, a student who speaks with an accent, or an LGBTQ+ student—or any combination of these.

While awareness of potential bias is a critical first step to minimizing bias, it is not sufficient by itself.[222] The rest of this section provides additional steps that can help both reduce the existence of bias and help prevent any remaining bias from affecting the oral argument evaluation.

2. Consciously Challenge Potential Biases.

The next step beyond being aware of the existence and extent of biases is to consciously challenge it.[223] Research has shown that people are better able to avoid biases when they are not just aware that they exist, but also encouraged to work against them.[224] Indeed, people who remain skeptical of their own objectivity are "better able to guard against biased evaluations."[225]

Research has shown that the halo effect can be reduced by minimizing expectations from past performance.[226] In particular, one recent study showed that the strength of the halo effect increased as teachers reported being more certain about their expectations for how their students would perform.[227] In other words, the more certain

221. *Supra*, subsection III.A.2.

222. In fact, some research indicates that bias awareness messaging can "backfire and actually increase its occurrence." Michelle M. Duguid & Melissa C. Thomas-Hunt, *Condoning Stereotyping? How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes*, 100 J. APPLIED PSYCH. 343, 354 (2015) (concluding that this can happen when such messaging makes biases a social norm); *see also* Godsil, *supra* note 217, at 2 ("Indeed, research suggests that some forms of anti-bias education may have detrimental effects, if they increase *bias awareness* without also providing skills for managing anxiety.").

223. *See* SOURCEBOOK, *supra* note 30, at 351 ("[T]he best way to neutralize implicit bias and its negative impact is to thoughtfully and actively confront it."); Nickerson, *supra* note 93, at 211 ("[A]ttempting to think of reasons for and (especially) against a judgment that is to be made" can help improve "the appropriateness of people's confidence in their judgments."); Keith, *supra* note 2, at 351.

224. *See* Duguid & Thomas-Hunt, *supra* note 222, at 354.

225. Godsil, *supra* note 217, at 8.

226. *See* Sanrey et al., *supra* note 63, at 671.

227. *See id.* This study involved elementary school students and teachers. *Id.* at 665. Based on their previous experience with the students, the teachers were asked to

teachers were about their expectations based on prior impressions, the stronger the halo effect was when they evaluated their students' performance.[228]

Thus, evaluators who have already graded some of the students' work—such as a written brief—should examine whether they have internalized any expectations about the students' oral argument performance and challenge those expectations. Professors are often encouraged to teach students about the importance of having a growth mindset.[229] It is equally important for professors to evaluate oral argument through the lens of that growth mindset, reminding themselves that their students' skills are not unchangeable—they can be learned and improved with time.[230] Approaching oral argument with this mindset and lowering the certainty of any previous impressions about the student, will help lessen the halo effect.[231]

3. Use a Rubric.

The evaluator should use a rubric when grading oral argument. It is important to acknowledge here that using a rubric will not prevent cognitive biases from affecting the evaluation.[232] In fact, using one may lead an evaluator to a false sense of security that they are evaluating the student based on the objective elements of the rubric and not their own unseen biases.[233]

---

predict how each student would perform on a test. *Id.* They were also asked to rate their level of certainty about their predictions. *Id.* When compared with the students' actual performance on the test, the teachers' predictions showed a halo effect that was "more pronounced among teachers who reported a high degree of certainty." *Id.* at 671.

228. *Id.*

229. *See, e.g.*, Megan Bess, *Grit, Growth Mindset, and the Path to Successful Lawyering*, 89 UMKC L. REV. 493 (2021); Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355 (2016); Carrie Sperling & Susan Shapcott, *Fixing Students' Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 39 (2012).

230. Sanrey et al., *supra* note 63, at 672; *see also* Gordon, *supra* note 94, at 231–33 (highlighting the significant benefits enjoyed by students, particularly students of color, when their professors cultivate personal growth mindsets and foster classroom environments that promote the development of those mindsets in students).

231. *See* Gordon, *supra* note 94, at 231–33.

232. Malouff & Thorsteinsson, *supra* note 114, at 253; MacDougall et al., *supra* note 79, at 124 (using detailed rubrics did not prevent halo effect); Lai et al., *supra* note 73, at 122; Gordon, *supra* note 94, at 243 ("[R]ubrics [can] serve to replicate and amplify bias in our classrooms if not carefully audited.").

233. Salmon, *supra* note 28, at 184 ("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.").

Nonetheless, research has shown that using a rubric does reduce the effects of cognitive biases, even if it does not prevent those effects.[234] Indeed, a recent meta-analysis of bias in grading showed that the effect of cognitive biases—although still statistically significant—was much lower when graders used a rubric than when they did not.[235]

And this rubric should be specific.[236] To minimize a possible halo effect, researchers have recommended that teachers

> [G]ather specific information on each academic skill their students are supposed to acquire and not rely on a general impression. In other words, [teachers] must carefully assess the specific competencies of their students so that they are able to decorrelate in their judgements the errors made by students in different domains.[237]

Thus, the rubric should clearly differentiate between the skills assessed to ensure that there is no overlap between them that would allow a halo effect to occur.[238]

4. Omit or Minimize Evaluation of Presentation Style.

While an evaluator should use a rubric, that rubric should not include presentation style as a graded component. As discussed above, the typical expectations for presentation style are rooted in classical rhetorical techniques that pose additional burdens on women and students of color.[239] The problem is that these techniques are not inherently more persuasive, but rather "historically determined, arbitrary markers."[240] Therefore, the rubric should omit presentation style and instead focus on the substance of the argument.[241] After all, "[c]ontent

234. Malouff & Thorsteinsson, *supra* note 114, at 253; Quinn, *supra* note 115, at 386 (finding evidence of racial bias when teachers used a "vague relative grade-level scale," but not when teachers used a "more descriptive rubric with absolute criteria"); Keith, *supra* note 2, at 353.

235. Malouff & Thorsteinsson, *supra* note 114, at 253.

236. *See* Keith, *supra* note 2, at 353–56.

237. Sanrey et al., *supra* note 63, at 672.

238. Lai et al., *supra* note 73, at 122. In that study, graders used a rubric with four categories: voice, organization, development, and "conventions" (writing mechanics such as spelling and grammar). *Id.* at 108. The scores among the first three categories were "too highly correlated to provide useful distinctions." *Id.* at 122. Ultimately, the authors found it more accurate to use only two categories—one for "writing ability" that encompassed the first three categories and one for conventions. *Id.* at 120, 122. Yet even then, the authors still noted a high correlation between those two categories. *Id.*

239. *Supra*, section III.B.

240. O'Regan, *supra* note 57, at 444.

241. *See* Gordon, *supra* note 94, at 243; *see also* Kozinski, *supra* note 10, at 185 (complaining that moot court "teaches students the perverse lesson that the strength of the client's case . . . is irrelevant, and the only thing that counts is how well the lawyer engages in repartee with the judges").

is a much better indication of truth than physical demeanor."[242] Consider eye contact for an example. While students in the United States are told to increase eye contact during oral argument to enhance persuasiveness,[243] such demeanor could indicate anger, unpleasantness, and unapproachability in East Asian cultures.[244]

Moreover, some of the traditional presentation style advice is becoming obsolete in light of the combination of modern technology and the COVID-19 pandemic. At the start of the pandemic, oral argument in courtrooms and law schools moved online.[245] While some oral argument has returned to in-person proceedings, many predict that online oral argument will persist.[246] But in an online oral argument, the participants cannot have direct eye contact.[247] Also, online oral arguments are often conducted with the advocates sitting down,[248] sometimes obscuring posture, body movements, and attire.[249] The

242. O'Regan, *supra* note 57, at 448 n.305. Indeed, many cues that are commonly thought to indicate deceitfulness—such as excess gesturing and averting eye contact—are not actually related to deceit. ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 141 (2015). Thus, "it turns out that we are quite bad at ferreting out deception." *Id.* ("In a recent analysis of more than two hundred studies, participants were able to identify lies and truths correctly just 54 percent of the time, only marginally better than chance.").

243. Higdon, *supra* note 36, at 640–41.

244. Hironori Akechi et al., *Attention to Eye Contact in the West and East: Autonomic Responses and Evaluative Ratings*, 8 PLOS ONE e59312, at 1 (Mar. 13, 2013), https://doi.org/10.1371/journal.pone.0059312 [https://perma.cc/CT78-3K37].

245. Eric M. Fraser & Krissa M. Lanham, *Remote Appellate Oral Arguments*, ARIZ. ATT'Y, Mar. 2021, at 12, 12–13 (2021) (courtrooms); Christine Tamer & Melissa Shultz, *The Adaptable Law Professor: Ten Tips for Keeping the Magic of an Oral Argument Competition Alive on Zoom*, 52 Syllabus (Winter 2021) at 7, 7 (law schools).

246. Fraser & Lanham, *supra* note 245, at 19; Bergeron, *supra* note 24, at 204, 219 (reporting that appellate judges are "open[ ] to a future in which video arguments will continue to play an on-going role" and arguing that courts should embrace virtual oral arguments for "at least limited use"); Tessa L. Dysart, *In Favor of Remote Arguments*, LAW PROFESSOR BLOGS NETWORK: APP. ADVOC. BLOG (Feb. 7, 2022), https://lawprofessors.typepad.com/appellate_advocacy/2022/02/in-favor-of-remote-arguments.html [https://perma.cc/9LEV-EJ3H] (arguing that oral argument "can be done just as well (if not better) remotely").

247. *See* John Brandon, *The Crazy Reason Why Zoom Fatigue Happens Will Really Surprise You*, FORBES (Apr. 26, 2021, 9:50 AM) https://www.forbes.com/sites/johnbbrandon/2021/04/26/the-crazy-reason-why-zoom-fatigue-happens-will-really-surprise-you/?sh=d8cee867bc37 [https://perma.cc/PY7R-KTQJ] ("On any Zoom call, it is physically impossible to look someone in the eye. . . . On most laptops or even a desktop computer with an external webcam, when you look at the camera itself, you are presenting an image of yourself that shows eye contact but you are not seeing the eyes of the other person. Look them in the eye (meaning, at the screen itself), and they won't see your eye contact. You can't win either way.").

248. *See* Fraser & Lanham, *supra* note 245, at 14–15 (noting that many courts allow advocates to choose whether to sit or stand).

249. *See* Tamer & Shultz, *supra* note 245, at 9 ("In the world of Zoom, one only *needs* to dress professionally on the top half because that is all that can be seen on

lessened formality of online oral arguments[250] means that many of the expectations associated with traditional presentation style will continue to change and perhaps even become irrelevant.

Even though presentation style should not be a graded component of oral argument, students can—and should—still be taught what elite presentation style means. The reality remains that this elite presentation style acts as "a badge of professional identity that signals inclusion in the professional world from which, at least, historically, other parts of students' and attorneys' identities might exclude them."[251] Failing to educate law students about these expectations would be a disservice to them. Yet this elite presentation style should be presented thoughtfully and in a way that acknowledges its arbitrariness.[252] This approach will allow them to choose whether and when to use that presentation in their own practice—and when to challenge it.[253] With this thoughtful approach, students can become "attorneys and judges [who] work properly with a wider variety of in-

---

Zoom."); *see, e.g.*, Stephanie R. Williams, *Moving from Pandemic Emergency Zoom Oral Arguments to True Oral Argument Online: Preparation and Professionalism*, LAW PROFESSOR BLOG NETWORK: APP. ADVOC. BLOG (June 27, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/06/moving-from-pandemic-emergency-zoom-oral-arguments-to-true-oral-argument-online-preparation-and-prof.html [https://perma.cc/SL2D-6TNB] (describing how some attorneys made oral argument appearances "*sans* pants, from closets and bathrooms"); Debra Cassens Weiss, *Lawyers Are Dressing Way Too Casual During Zoom Court Hearings, Judge Says*, ABA J. (Apr. 15, 2020, 9:24 AM), https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says [https://perma.cc/P6GQ-Y447] ("A Florida judge is reminding lawyers appearing in remote court hearings through Zoom that they should not dress like they are poolside. Nor should the lawyers remain in bed during the hearings.").

250. *See* Bergeron, *supra* note 24, at 205 ("[D]espite all efforts to maintain formality, a reduced formality necessarily comes with Zoom."); Megan Schmidt, *A Psychologist Explains How to Cope With Video Chat When You're Socially Anxious*, DISCOVER MAG. (May 15, 2020 11:14 AM), https://www.discovermagazine.com/technology/a-psychologist-explains-how-to-cope-with-video-chat-when-youre-socially [https://perma.cc/LW6E-XRU2] (stating that it is harder to follow the "standard rules of face-to-face communication" with video chats).

251. O'Regan, *supra* note 57, at 443.

252. *Id.* at 444.

253. *See* Elizabeth Berenguer et al., *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 206 (2020) ("We must train our students to work in this legal universe, to be successful practicing attorneys, but to also think outside of it to ethically and successfully challenge its existing boundaries."); Morrison, *supra* note 171, at 83 ("Students should be made aware that there is choice in the area of appearance and that there is room for subversive or disruptive lawyering experiments.").

dividuals" and perhaps even "promote reassessment of the rules governing trial and practices of decision making."[254]

Therefore, even if presentation does not contribute to the grade, it could still be included as an ungraded portion of the rubric, allowing the evaluator to provide feedback on it despite it not being a component of the score. That said, this approach risks the halo effect being invoked. The halo effect, in this instance, would mean that a student's high performance in presentation style would bolster their score on substance—and vice versa for a low performance in presentation style.[255]

To minimize the risk of the halo effect, the evaluator should separate feedback on substance from feedback on presentation style as much as possible.[256] The evaluator would first analyze and score substance[257] without considering presentation style. Then, after finalizing the student's score on substance, the evaluator would move to presentation style.

Finally, there may be circumstances where the evaluator cannot remove presentation style as a graded component of the rubric.[258] If presentation style is included on the rubric, it should be minimized to account for a small percentage of the score—perhaps no more than ten percent.[259] Additionally, the evaluator should evaluate presentation style independently, as described in the paragraph above, to ensure that the student's score on presentation style does not unnecessarily affect the score on the other components.

5. Thoughtfully Select and Train Judges.

Thoughtfully selecting the person or persons who will participate as a judge in the oral argument—even if they do not also evaluate the

254. O'Regan, *supra* note 57, at 445; *see also* Morrison, *supra* note 171, at 83–84 (explaining the importance of raising consciousness of bias in existing structures with law students while simultaneously equipping them with the tools and confidence to seek change).

255. *See supra* subsection III.A.1.a.

256. *See supra* notes 236, 238.

257. And any other graded component.

258. For example, adjunct professors teaching in a director-led program may need to follow a set of consistent grading criteria and standards for oral argument. SOURCEBOOK, *supra* note 30, at 361. Moot court judges will also likely be provided with a standardized rubric. DIMITRI ET AL., *supra* note 14, at 68.

259. Many moot court competitions have already shifted to focus more on substance and less on style, "with categories like demeanor, speaking style, and courtroom presence receiving as little as 10% to 20% of the overall point total." Salmon, *supra* note 28, at 184; *see also* DIMITRI ET AL., *supra* note 14, at 72 (recommending mechanics and decorum "be given the least weight to avoid having the oral argument judges become unduly focused on style over substance").

oral argument[260]—can help to minimize bias and better achieve a fair evaluation for all students. People often demonstrate an implicit bias towards others who are like them.[261] Therefore, someone putting together a judging panel should prioritize diversity.[262]

Additionally, studies have shown that inexperienced graders are more likely to be affected by bias than experienced graders.[263] This effect, however, can be mitigated by training graders.[264] Therefore, to the extent possible, judges who have already had experience judging oral arguments should be also be prioritized.[265] Judges who have little or no such experience should be trained on the process of judging oral arguments, including how to use a rubric and what components to prioritize.[266]

In addition to ensuring judges are prepared and trained in the process of oral argument, all judges should be trained in two areas before participating in the argument. First, all judges should be reminded of the negative effect of possible implicit biases and encouraged to be vigilant against them.[267] Second, all judges should be trained on the subject matter of the oral argument because, regardless of any past experience judging oral arguments, all of the judges will likely be new to the particular fact pattern the students are arguing.[268] To accomplish this training, at the very least, a bench brief should be provided to the judges.[269] An additional live training session before the oral arguments begin would also help ensure judges are sufficiently prepared in these two respects.[270]

260. For example, when appellate oral arguments are part of course work, the professor will invite others to act on the judging panel; however, those judges generally do not evaluate the oral argument. *See* SOURCEBOOK, *supra* note 30, at 114–15.

261. *E.g.*, Scott Barry Kauffman, *In-Group Favoritism Is Difficult to Change, Even When the Social Groups Are Meaningless*, SCI. AM. (June 7, 2019), https://blogs.scientificamerican.com/beautiful-minds/in-group-favoritism-is-difficult-to-change-even-when-the-social-groups-are-meaningless/ [https://perma.cc/U3TC-XMUD] (stating that "people more positively evaluate their in-group members" and noting such a preference across categories including "gender, race or ethnicity, language, nationality, and religion").

262. Morrison, *supra* note 171, at 82; Lind-Martinez, *supra* note 181, at 141.

263. Malouff & Thorsteinsson, *supra* note 114, at 253.

264. *See generally id.* ("Future research on bias might most profitably examine to what extent bias occurs in various circumstances with actual graders and to what extent use of rubrics or training reduces bias.").

265. DIMITRI ET AL., *supra* note 14, at 77; *e.g.*, Kritchevsky, *supra* note 9, at 50–51 (noting that inadequate judging can be caused by lack of experience in judging oral arguments).

266. Kritchevsky, *supra* note 9, at 66 ("Judges can only give effective critiques when they are students of the game and know the rules and the reasons they exist.").

267. *See* Morrison, *supra* note 171, at 83; Lind-Martinez, *supra* note 181, at 141.

268. DIMITRI ET AL., *supra* note 14, at 83–84.

269. DIMITRI ET AL., *supra* note 14, at 73.

270. *Id.* at 85.

These efforts in selecting and training judges would help reduce bias and help create a better experience for the students. One of the most common complaints about oral arguments in law school is with the inferior quality of the judging panel and the tendency for unprepared judges to "reward[ ] cleverness and poise over persuasiveness and sound legal argumentation."[271] Judges who are sufficiently prepared and trained are more likely to engage with the arguments in a meaningful, substantive way.[272] They are better able to analyze the student's substantive argument and evaluate it based on substance, rather than resorting to scripted comments or critiques on presentation style.[273]

Finally, a professor conducting oral argument as part of coursework may opt for a trial-level argument that requires only one judge and personally take on that judging role. A professor who created the assignment and already guided students through how to research and analyze it would be uniquely well-prepared to engage in substantive questioning that remains consistent throughout the sessions and ensure the evaluation criteria are evenly applied.[274] However, acting as both the judge and the evaluator raises a new potential problem: cognitive overload. The next section describes how anyone evaluating an oral argument—whether professor or moot court judge—can reduce their cognitive load.

6. Reduce Cognitive Load.

Psychologists have proposed that humans have two modes of processing information: the first mode is "unconscious, rapid, automatic, and high capacity," while the second mode is "conscious, slow, and deliberative."[275] This has become known as dual-process theory.[276] Many different terms for these two modes have been used. Jonathan Haidt used the metaphor of an elephant and a rider, with the elephant being the emotional, automatic, unconscious mode and

271. *See* Kritchevsky, *supra* note 9, at 48–49 (noting that moot court is often criticized for the "lack of competence of many of the individuals who judge the rounds and critique the students' performance").

272. *See* SOURCEBOOK, *supra* note 30, at 114 (noting that judges who lack "a sufficiently nuanced understanding of the assignment's legal or analytical foundation" are less able to engage with the substantive content of the argument).

273. *See id.*; *see also* Kritchevsky, *supra* note 9, at 67 ("Inexperienced judges tend to critique on technique because they can identify forensic problems more readily than substantive ones and because it is easier to tell advocates how to act than it is to explain how to argue and answer questions.").

274. SOURCEBOOK, *supra* note 30, at 113–14; *see also* DIMITRI ET AL., *supra* note 14, at 78 (describing faculty who teach the subject area of the argument as "unquestionably well suited to judge" the arguments).

275. Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCH. 255, 256 (2008).

276. *Id.*

the rider being the rational, controlled, conscious mode.[277] Malcolm Gladwell described how the brain uses two strategies: an adaptive unconscious that leaps to conclusions and a logical and definitive conscious that operates more slowly and requires more information.[278]

But perhaps most well-known is Nobel-Prize-winner Daniel Kahneman.[279] In his 2011 book *Thinking, Fast and Slow*, he uses the term "System 1" to describe the first and "System 2" to describe the second.[280] And in that book, Kahneman identified biases as characteristics of System 1—fast thinking.[281] This means people are more likely to allow their implicit biases to affect their decision-making when System 1 is in control.[282] Therefore, engaging in System 2 processing will help prevent implicit biases from affecting decision making.[283]

However, using System 2 requires mental effort, and its capacity to engage in that effort is limited.[284] As more effort is required of System 2, it prioritizes what it deems is the most important task and gives whatever capacity is leftover to the other tasks.[285] When that happens, System 2 becomes less effective and more prone to errors.[286] And that's when System 1 is more likely to influence behavior.[287]

However, a person can take numerous actions that will help keep System 2 processing in control. Kahneman suggests something as simple as frowning may help.[288] Another option is to reduce cognitive load.[289]

277. JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM 17 (2006).

278. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 10–11 (2005).

279. Deborah Smith, *Psychologist Wins Nobel Prize*, 33 MONITOR ON PSYCH. 22 (2002), http://www.apa.org/monitor/dec02/nobel.html [https://perma.cc/HS44-GRYQ].

280. KAHNEMAN, *supra* note 64, at 20–21.

281. *Id.* at 105.

282. *See, e.g.*, Godsil, *supra* note 217, at 8; Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. Rev. 145, 162–63 (2018); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 961 (2006) ("[I]mplicit attitudinal biases are especially important in influencing nondeliberate or spontaneous discriminatory behaviors.").

283. Godsil, *supra* note 217, at 8.

284. KAHNEMAN, *supra* note 64, at 35.

285. *Id.*

286. *Id.*

287. *Id.* at 41 ("People who are cognitively busy are . . . more likely to make selfish choices, use sexist language, and make superficial judgments in social situations.").

288. KAHNEMAN, *supra* note 64, at 152 ("Frowning . . . generally increases the vigilance of System 2 and reduces both overconfidence and the reliance on intuition.").

289. *See* Keith, *supra* note 2, at 358–59.

In a traditional oral argument setting, evaluators are faced with a significant number of tasks. First, they must take in and evaluate all aspects of the student's performance. This includes the substance of the student's argument—whether the student accurately described the facts and the law.[290] Just as the student must be able to think on their feet, so must the evaluator be able to engage with and respond to the students' arguments.[291] The evaluator must understand the questions being asked of the student and whether the student answered them directly and thoroughly.[292]

Not only must evaluators analyze the substance of the argument, but they must also analyze how it is presented. Even if the evaluators are not evaluating presentation style, they must still consider how the student organized the argument's substance.[293] They must determine whether the student made strategically wise decisions in ordering the supporting arguments.

Analyzing the student's presentation style adds yet another layer to the evaluation—the evaluators must watch carefully to gauge the student's eye contact, posture, and gesturing.[294] They must also listen to determine whether the student is using an appropriate pitch, avoiding verbal filler, and maintaining a proper tone.[295] The evaluator may also need to keep an eye on the student who is not arguing to provide feedback on their professionalism when the other advocate is arguing.[296]

Next, the evaluator may also act as a judge who interacts with the student on the content of the argument. As discussed above, a professor may be best positioned to fill this role as a judge.[297] Even if evaluators are not acting as judges, they may nonetheless choose to monitor the questions of other judges, stepping in if necessary to ensure accuracy and fairness.[298]

---

290. DIMITRI ET AL., *supra* note 14, at 71.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 72.
295. *Id.* at 71–72. This is another benefit to not evaluating demeanor, as suggested *supra* subsection IV.B.4. Because evaluating demeanor adds to cognitive load, removing it from consideration would lessen the cognitive load on the evaluator.
296. *See, e.g.*, MARY BETH BEAZLEY, TEACHER'S MANUAL: A PRACTICAL GUIDE TO APPELLATE ADVOCACY 50 (3d ed. 2010) (suggesting oral argument rubric that asks whether the student was respectful of opposing counsel both before and after the argument); Dworsky, *supra* note 31, at 34 ("Judges don't like to see lawyers behaving disrespectfully to each other. . . . If your opponent misstates the law or the facts, . . . [d]on't mime indignation from your chair[ ], . . . roll your eyes or shake your head, . . . [or] slam down your pen.").
297. *Supra* note 274.
298. *See* SOURCEBOOK, *supra* note 30, at 114 (A professor on a judging panel "has the opportunity to neutralize any unspoken agenda that guest judges might bring to

Finally, the evaluator must do all this while keeping an eye on the argument timer. This is necessary to analyze the student's time management, determining whether the student is spending too much time on less important topics or moving too quickly through the important ones.[299] If resources do not allow an additional timekeeper or bailiff, some evaluators may also need to fill that role, maintaining a vigilant eye on the timer to provide corresponding time cues to the student at set intervals during the argument.[300]

This is a lot—perhaps too much—for any one mind to keep up with.[301] Moreover, all this is done under a time constraint—usually ten to fifteen minutes.[302] This added time pressure is yet "another driver of effort" that increases the load on working memory.[303]

One way to reduce cognitive load would be to record the oral argument and evaluate the student based on the recording.[304] Recording the argument removes the time constraint on the evaluative process, and decreases the burdens on the evaluator's cognitive load.[305] However, when the argument is recorded, evaluators are no longer time pressured; they may review the oral argument as many times as necessary to arrive at a fair evaluation.[306] Recording the argument also allows the evaluator to review the argument for one trait at a time, rather than trying to evaluate everything at once, which will help mitigate the halo effect.[307]

Evaluating a recording of the oral argument comes with additional benefits beyond just the evaluation process. In particular, it will re-

---

the exercise, and to provide some degree of uniformity to the students' experiences.").

299. *See* DIMITRI ET AL., *supra* note 14, at 72.

300. *Id.* at 101.

301. *See* KAHNEMAN, *supra* note 64, at 23 ("The often-used phrase 'pay attention' is apt: you dispose of a limited budget of attention that you can allocate to activities, and if you try to go beyond your budget, you will fail. . . . You can do several things at once, but only if they are easy and undemanding."); *see also* SOURCEBOOK, *supra* note 30, at 114 ("[T]he professor may find it challenging to serve as both judge and evaluator simultaneously.").

302. Although data regarding the amount of time students are given for oral argument during their legal writing course is scant, ten to fifteen minutes is common in moot court oral arguments. DIMITRI ET AL., *supra* note 14, at 53.

303. KAHNEMAN, *supra* note 64, at 37 ("The most effortful forms of slow thinking are those that require you to think fast.").

304. This may be more feasible for professors grading oral argument as a course component rather than for judges of a moot court competition, given that many such competitions take place over a condensed time period that does not allow the additional time needed for this approach. *See* DIMITRI ET AL., *supra* note 14, at 92, 101 (recommending that judges be limited to 15–30 minutes to fill out score sheets and provide feedback, and suggesting that judges' score sheets be collected at the end of each round while the judges are giving the advocates feedback).

305. *Supra* note 303.

306. *See* SOURCEBOOK, *supra* note 30, at 115.

307. *See supra* notes 236, 238.

duce the cognitive load during the live oral argument itself. This leaves the evaluator free to focus their attention, during the live oral argument time, on their other tasks. For an evaluator who is acting as a judge on the panel, they can better devote attention to questioning and engaging in a conversation with the student. Even if the evaluator is not acting a judge, they will be able to devote more attention to monitoring questioning and ensuring it remains fair and consistent among the students, regardless of race or gender.[308] Additionally, recording the oral argument can allow for richer feedback to students. The professor can watch the recording with the student and provide live commentary,[309] or the professor can use software that allows them to add comments to the recording.[310]

Along with the benefits, there are drawbacks to recording oral argument and using the recording to evaluate the student. The first obvious drawback is that it is an additional time burden on the professor. If the average legal writing professor has between thirty-one and forty students[311] and allows each student ten minutes of oral argument,[312] re-watching those arguments just once will take five to seven hours of additional time, on top of the time already taken by the live arguments themselves. And if the professor watches the argument more than once—to evaluate each trait separately—this will exponentially add to the time required. That said, the professor may be able to reduce this time by watching the recording at a higher speed, such as 1.5 times the normal speed.

---

308. *See supra* note 271.

309. SOURCEBOOK, *supra* note 30, at 115.

310. For example, Canvas allows users to add time-cued comments to videos posted through Canvas Studio. *See How Do I Add Comments or Replies to Canvas Studio Media in a Course?*, INSTRUCTURE, https://community.canvaslms.com/t5/Studio/How-do-I-add-annotations-to-my-media-in-Canvas-Studio/ta-p/456910 [https://perma.cc/4BYB-DKP2] (last visited Feb. 11, 2022). Other popular video software such as Loom and Panopto offer this capability. *See How to React to Videos with Emojis and In-Video Comments*, LOOM, https://support.loom.com/hc/en-us/articles/360017464517-How-to-react-to-videos-with-emojis-and-in-video-comments [https://perma.cc/9BFW-P89E] (last visited Feb. 11, 2022); *How to Use Discussions in Videos*, PANOPTO, https://support.panopto.com/s/article/How-to-Use-Discussions-in-Videos [https://perma.cc/P5KW-RENR] (last visited Feb. 11, 2022).

311. The most recent ALWD/LWI survey indicated that most common student load range was thirty-one to forty students; the next most common student load range was twenty-one to thirty students, followed closely by forty-one to fifty students. TED BAKER ET. AL, ALWD/LWI LEGAL WRITING SURVEY, 2019–2020: REPORT OF THE INSTITUTIONAL SURVEY 99 (2020), https://www.alwd.org/images/resources/ALWDLWI2019-20InstitutionalSurveyReport.pdf [https://perma.cc/5YCR-4ELW] (Question 10.18).

312. *See supra* note 302.

Another drawback to recording oral argument is that it may increase some students' apprehension about the argument.[313] The professor should assure students that the recording will not be made available to anyone but the professor—and possibly the student to view their own performance.[314] The professor can also suggest additional techniques to help students with public speaking anxiety.[315]

7. Reduce Mental Fatigue.

When the human mind engages in long periods of cognitive activity, fatigue sets in.[316] This fatigue causes a decline in cognitive performance.[317] While mental fatigue has some similarities with cognitive overload, mental fatigue is more about the length of time cognitive activity goes on rather than the amount of cognitive load at any moment.[318] The effects of mental fatigue include difficulty concentrating and greater susceptibility to distraction.[319] A person with mental fatigue is more likely to make errors and less able to correct those errors.[320] And this decline in cognitive performance can begin after just thirty minutes of cognitive activity.[321]

As with cognitive overload, steps can be taken to help prevent mental fatigue. First, an evaluator who creates the oral argument schedule should do so with care, being mindful of earlier demands on mental resources. Arguments should not be scheduled right after any

313. SOURCEBOOK, *supra* note 30, at 113 ("[S]tudents with performance anxiety . . . may find it more stressful to have their arguments recorded.").
314. *See* SOURCEBOOK, *supra* note 30, at 113 (suggesting the professor and student review the recording together while the professor provides feedback); Sirico, *supra* note 54, at 19 (discussing benefits of providing the students with a recording of their oral argument).
315. *See generally* Brown, *supra* note 39; Larry Cunningham, *Using Principles from Cognitive Behavioral Therapy to Reduce Nervousness in Oral Argument or Moot Court*, 15 NEV. L.J. 586 (2015).
316. *See, e.g.*, Michael Inzlicht & Elliot Berkman, *Six Questions for the Resource Model of Control (and Some Answers)*, 9 SOC. & PERSONALITY PSYCH. COMPASS 511, 514 (2015); Monicque M. Lorist et al., *Impaired Cognitive Control and Reduced Cingulate Activity During Mental Fatigue*, 24 COGNITIVE BRAIN RSCH. 199, 199 (2004). Mental fatigue does not require the person to be engaged in the same task; it can set in when a person engages in different tasks that all require mental effort. Dimitri van der Linden et al., *Mental Fatigue and the Control of Cognitive Processes: Effects on Perseveration and Planning*, 113 ACTA PSYCHOLOGICA 45, 46 (2003).
317. Lorist et al, *supra* note 316, at 199; van der Linden et al, *supra* note 316, at 46.
318. *See* Inzlicht & Berkman, *supra* note 316, at 514 ("[M]ental fatigue is typically evoked after protracted bouts of cognitive labor.").
319. Maarten A.S. Boksem et al., *Effects of Mental Fatigue on Attention: An ERP Study*, 25 COGNITIVE BRAIN RSCH. 107, 112 (2005).
320. Lorist et al., *supra* note 316, at 203–04.
321. *See* Gerhard Blasche et al., *Comparison of Rest-Break Interventions During a Mentally Demanding Task*, 34 STRESS & HEALTH 629, 633 (2018) (finding that students' fatigue increased after thirty minutes of class participation).

mentally taxing activity. This could be accomplished by scheduling the arguments to occur in the morning, before any mentally fatiguing activity occurs.[322] If morning sessions are not possible, afternoon sessions should be scheduled as soon as possible after lunch.[323] This lunch break can provide a mental break for judges' cognitive resources to recharge.[324]

Additionally, shorter breaks should be scheduled liberally between rounds.[325] Even breaks of just a few minutes can improve cognitive performance.[326] Being strategic and intentional about how time is spent during those breaks can help reduce fatigue even more.[327] A break that involves engaging in physical activity or following a guided relaxation exercise can be particularly beneficial.[328] Additionally, "spending time in natural settings" is also effective.[329] Therefore, during breaks from oral argument, evaluators should be allowed or even encouraged to stand up, stretch, relax, or step outside if possible. Importantly, they should prioritize actually taking that break.[330] As tempting as it may be to power through the rounds and go home early, this early ending should not come at the expense of mental fatigue that may unfairly affect students arguing at the end of the session.[331]

Even evaluators who do not control the oral argument schedule, such as a moot court judge who volunteers for a session, can still take their own steps to reduce mental fatigue. These evaluators can manage their own schedule by signing up for a judging session at a time that comes after a break from cognitive activity. They can resist any

322. *See, e.g.*, Hans Henrick Sieversten, et al., *Cognitive Fatigue Influences Students' Performance on Standardized Tests*, 113 PROC. NAT'L ACAD. SCI. 2621, 2623 (2016) (finding that students' performance on standardized tests decreased for every hour later in the day the test was taken).

323. *See id.* at 2623–24 (finding that students who took standardized tests after a twenty to thirty minute break performed better than students who did not receive a break before testing and recommending that schools "plan tests as closely after breaks as possible").

324. *See id.*

325. *See* Stacey Colino, *Secision fatigue: Why it's so hard to make up your mind these days, and how to make it easier*, WASH. POST ONLINE (Sept. 22, 2021, 8:00 AM), https://www.washingtonpost.com/lifestyle/wellness/too-many-choices-decision-fatigue/2021/09/21/2dffce74-1b22-11ec-bcb8-0cb135811007_story.html [https://perma.cc/VXX3-UPC3] (noting that consistently taking breaks to rest and recover will help replenish cognitive resources).

326. Kirsten Weir, *Give Me a Break: Psychologists Explore the Type and Frequency of Breaks We Need to Refuel Our Energy and Enhance Our Well-Being*, 50 MONITOR ON PSYCH. 40, 40, 43 (2019).

327. Blasche et al., *supra* note 321, at 634–35.

328. *Id.*

329. Weir, *supra* note 326, at 46.

330. *Id.* ("However you choose to spend your breaks, the most important thing is to make them a priority.").

331. *See, e.g.*, *id.* at 42 ("Powering through without a pause can do more harm than good.").

calls to forge ahead, rather insisting on taking short breaks between sessions. And they can be intentional to engage in physical activity or relaxation exercise to further restore cognitive ability before the next set of oral arguments.

In short, while mental fatigue may be inevitable to an extent, it can be managed to minimize its effect on evaluators' cognitive performance and their ensuing evaluation of the oral argument.

8. Consider Using Anonymous Grading.

A final, and admittedly radical, step to ensure fair oral argument evaluations would be to incorporate anonymous grading into oral argument evaluation. The authors of a meta-analysis of research about bias in grading have suggested that "when feasible, it may be worthwhile for graders of student work to keep themselves unaware of potentially biasing information about students."[332] However, this suggestion is more easily implemented with written work, where anonymous grading is common.[333]

While using anonymous grading is a commonly accepted way to mitigate bias in grading written work, using it to grade oral argument appears novel.[334] This is likely because oral argument grading has traditionally required the evaluation of traits that must be observed visually, such as eye contact, body movement and posture, and dress.[335]

One approach to reducing the effects of bias on the evaluation is holding anonymous oral arguments where the evaluator does not see

332. Malouff & Thorsteinsson, *supra* note 114, at 253. *But see* Lind-Martinez, *supra* note 181, at 130–31 (criticizing anonymous grading as "strip[ping] us of important markers of our identity and perpetuat[ing] a color-blind approach to the law and law school" and arguing for a "color conscious approach").

333. In the 2019–2020 ALWD/LWI Survey, 116 respondents (72.5%) out of 160 indicated using some form of anonymous grading for written assignments in objective legal writing courses; the number was 116 respondents (74.4%) out of 156 for persuasive legal writing courses. BAKER ET. AL, *supra* note 311, at 33 (Question 6.11); *see also* SOURCEBOOK, *supra* note 30, at 230 (recommending "robust anonymous grading policies for written assignments to reduce the effects of implicit bias"). Anonymous brief grading is also common in moot court competitions. *See, e.g.*, AM. BAR ASS'N L. STUDENT DIV., NATIONAL APPELLATE ADVOCACY COMPETITION: COMPETITION RULES 3 (2020), https://abaforlawstudents.com/wp-content/uploads/2020/11/2020-2021-ABA-NAAC-Rules.pdf [https://perma.cc/7WM9-WH3J] (requiring anonymous grading); N.Y.C. BAR, SEVENTY-FIRST ANNUAL NATIONAL MOOT COURT COMPETITION RULES, COMMENTS, AND FORMS 4 (2020–2021), https://www2.nycbar.org/Committees/Moot_Court/OfficialRulesCommentsForms71stAnnualNationalMootCourt.pdf [https://perma.cc/EL9J-G6KF] (same); *see also* DIMITRI ET AL., *supra* note 14, at 86 ("If your competition uses outside brief judges, you should require anonymous brief submissions to prevent any bias that may arise should a brief judge learn a competitor's identity.").

334. *Cf.* Burman, *supra* note 33, at 134.

335. DIMITRI ET AL., *supra* note 14, at 72; *see supra* notes 36–37.

the student during the argument. This could involve conducting arguments over the telephone or another audio-only medium,[336] or even having the arguments in person with the students behind a screen or other visual block. Just like in written work, the students could identify themselves using an anonymous number or another identifier, rather than a name, further helping to mitigate bias.[337]

Indeed, some scholars have already advocated for a physical screening approach in courtrooms. Chet K.W. Pager proposed "placing a screen between the jury and the witness, permitting jurors to view only a silhouette."[338] Jeremy Blumenthal similarly proposed using a screen to hide the witness not only from the jury but also from the defendant.[339] Stanley P. Williams has proposed a "double-blind system" where the judge and jury cannot see the defendant unless the defendant is testifying.[340]

Other scholars have proposed broader solutions. Daphne O'Regan recently argued in favor of "[s]creening or blinding decision makers so they cannot see any participants, including attorneys," arguing that such a physical barrier would be more effective in mitigating bias than using demeanor experts or jury instructions.[341] Adam Benforado advocated using an entirely virtual courtroom experience where all participants—lawyers, judges, juries, and parties— interact as neutral avatars designed to avoid bias based on appearance, mannerisms, and voice inflections.[342]

While it "may seem an extreme remedy," blinding participants is already a common tactic in other disciplines, including medical research.[343] It is also not unprecedented in the legal world. People who

336. The U.S. Supreme Court held audio-only arguments over telephone in 2020, during the Covid-19 pandemic. Adam Liptak, *Virus Pushes a Staid Supreme Court into Revolutionary Changes*, N.Y. TIMES, May 4, 2020, at A1, https://www.nytimes.com/2020/05/03/us/politics/supreme-court-coronavirus.html [https://perma.cc/RE9L-9KUE].

337. First, a name alone can promote bias. *See* O'Regan, *supra* note 57, at 449 & n.311. Moreover, using numbers benefits professors who have already graded the students' earlier work. Using a number that is different from the number used for written work would help keep the professor from associating that student with the earlier work, which could invoke the halo effect. *See supra* subsection III.A.1.a.

338. Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 429 (2005).

339. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1202 (1993).

340. Stanley P. Williams, *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUITY 48, 69 (2018).

341. O'Regan, *supra* note 57, at 448, 451.

342. BENFORADO, *supra* note 242, at 266–70.

343. O'Regan, *supra* note 57, at 451; *see also* Williams, *supra* note 340, at 89. Orchestra selection committees have also used screens to anonymize the selection pro-

are blind can serve on juries because "excluding them would be discriminatory given their other ways to assess testimony."[344] Additionally, several judges who are blind have served on both state and federal courts, as trial judges and appellate judges.[345] These judges are just as highly respected as their colleagues—if not more so.[346] Even lady justice herself is often depicted as blindfolded.[347]

One benefit of using an anonymous grading approach for oral argument is that it mitigates the effects of bias based on visual observations of the student's appearance—it keeps the evaluator unaware of those potentially biasing characteristics.[348] However, there is still some potential for bias even if the evaluator cannot see those characteristics. The evaluator will still be able to listen to the student's voice. Normal listeners can determine a speaker's dialect after hearing very little speech—often just a single word—with notable accuracy.[349] The phrase "linguistic profiling" has been coined to refer to the process of a listener using "auditory cues . . . to identify an individual or individuals as belonging to a linguistic subgroup within a given speech community."[350] This includes identifying an individual as belonging to a

---

cess, resulting in more diverse orchestras. Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 25 (2019). Anonymous evaluation even exists in pop culture, with the television show "The Voice" using an audition phase where the coaches remain in chairs facing away from the singers. *See* Bill Carter, *NBC Rides 'The Voice' From Worst to First Place*, N.Y. TIMES, Dec. 10, 2012, at B4, https://www.nytimes.com/2012/12/10/business/media/nbc-rides-the-voice-to-first-place.html [https://perma.cc/F47L-ZLVD].

344. O'Regan, *supra* note 57, at 448.

345. *See* Doron Dorfman, *The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor*, 5 CAMBRIDGE J. INT'L & COMPAR. L. 272, 289–92 (2016) (identifying blind judges on state courts in Florida, Illinois, Alabama, New York, and Missouri; as well as blind judges in federal courts including the Southern District of New York and the D.C. Circuit Court of Appeals). Additionally, the U.S. Supreme Court has hosted two blind judicial clerks. *See* Jenna Greene, *How Blind Lawyer Laura Wolk Went from SCOTUS Clerkship to Kirkland*, REUTERS LEGAL (Sept. 10, 2020, 9:36 PM), https://today.westlaw.com/Document/I566e0a60f3af11ea8e48d387532371a6/View/FullText.html?transitionType=default&contextData=(sc.Default)&firstPage=true&bhcp=1 [https://perma.cc/T6PU-YL4F].

346. *See, e.g.*, Dorfman, *supra* note 345, at 289–92; *see also* Ann E. Marimow, *Judge David Tatel's Lack of Eyesight Never Defined Him, but His Blindness is Woven into the Culture of the Influential Appeals court in D.C.*, WASH. POST (July 8, 2021 6:00 AM), https://www.washingtonpost.com/local/legal-issues/dc-judge-david-tatel-career/2021/07/07/bf48778e-c486-11eb-8c18-fd53a628b992_story.html [https://perma.cc/5U7L-YEX7].

347. Dorfman, *supra* note 345, at 277.

348. *Supra* note 332.

349. Thomas Purnell et al., *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCH. 10, 28 (1999) (reporting a study where respondents correctly identified dialects based on the single word "hello" more than seventy percent of the time).

350. John Baugh, *Racial Identification by Speech,* 75 AM. SPEECH 362, 363 (2000). According to Baugh, "linguistic profiling is . . . the auditory equivalent of visual

particular racial or ethnic group,[351] as well as linguistic profiling "based on sex, age, region, religion, and sexual orientation."[352]

Additionally, for evaluators, such as professors, who have taught the student all semester, anonymous grading may not prevent them from recognizing the student's voice.[353] This would enable them to identify the student, along with the student's physical characteristics, from having previously interacted with the student in person. Thus, biases based on the student's appearance would nonetheless be possible for the professor—regardless of the visual screen.

On balance, even though it may not eliminate bias entirely, using anonymous grading for oral argument can still help decrease it.[354] The tradeoff, of course, in using anonymous grading for oral argument is that the evaluators cannot evaluate the students' presentation style; however, as discussed above, evaluating presentation style may be worth giving up in the effort to ensure fair, unbiased evaluations.[355]

'racial profiling.'" John Baugh, *Linguistic Profiling*, *in* BLACK LINGUISTICS: LANGUAGE, SOCIETY, & POLITICS IN AFRICA & THE AMERICAS 155 (Sinfree Makoni et al., eds., 2005).

351. Chin, *supra* note 119, at 358 ("Listeners may use these auditory cues to identify an individual as belonging to a racial subgroup and to draw racial inferences."); Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. REV. L. & SOC. CHANGE 309, 320–21 ("Courts recognize the ability of laypeople to identify a person's race or national origin through voice."); Dawn L. Smalls, Note, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV. 579, 580 (2004) ("[L]inguistic profiling often most acutely affects linguistic communities of color.").

352. Baugh, *Racial Identification by Speech*, *supra* note 350, at 364. In fact, one study even showed that listeners were able to accurately discern a speaker's height 62% of the time simply by hearing them speak. *See* Washington University in St. Louis, *Listeners can distinguish voices of tall versus short people, study finds*, THE SOURCE (Dec. 3, 2013) https://source.wustl.edu/2013/12/listeners-can-distinguish-voices-of-tall-versus-short-people-study-finds/ [https://perma.cc/4M7H-92US]; John Morton et al., *Acoustic Features Mediating Height Estimation from Human Speech*, 134 J. ACOUSTICAL SOC'Y AM. 4072, 4072 (2013) (meeting abstract) ("Findings indicate that listeners are able to discriminate and rank speakers heights better than chance.").

353. *See generally* Robert E. Remez et al., *Talker Identification Based on Phonetic Information*, 23 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 651, 651 (1997) ("When a familiar voice speaks familiar words, a listener identifies both talker and message."); Stanley J. Wenndt, *Human Recognition of Familiar Voices*, 140 J. ACOUSTICAL SOC'Y AM. 1172, 1182–83 (2016) ("[T]he more familiar a listener is with a speaker, the more likely the listener will recognize the speaker.").

354. Pager, *supra* note 338, at 431 ("Let us be clear: if Martha Stewart were to give testimony, no screen in the world would prevent jurors' awareness of a broad range of nonprobative information about her, including (but not limited to) her race. However, the effect of a screen will still be beneficial, and it should be a mandatory courtroom feature absent compelling reasons to the contrary.").

355. *Supra* subsection IV.B.4.

V. CONCLUSION

Evaluating an oral argument poses a unique set of challenges. The live nature of the performance, the inconsistent preparation and engagement of judges, and the non-anonymous nature of the evaluation make it an environment with significant potential for inequities in evaluation. And it is not the evaluator who suffers from the consequences of the inequity, but the student. Relative to the evaluator, all students are in a position of less power, and women and students of color even more so. Therefore, it is incumbent on us, the evaluators, to understand the problems that can make oral argument an inequitable experience for students. With that understanding, we can—and should—work towards ameliorating those inequities and ensuring that all students stand on equal footing when they rise to deliver their oral argument.