

Unconscious Bias

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I am delighted to be here to think along with you on this subject of unconscious bias. I must confess a little bit of surprise but also congratulate the law school that it has advanced to the stage of dealing with unconscious bias. Many law schools are still dealing with the conscious variety.

I bring you greetings from that Jesuit law school that anchors the north end of this peninsula and from San Francisco Mayor, a Santa Clara University class of '89 graduate. I mention Mayor Newsom not only to draw a local connection but also because his response to the sex scandal will figure into this talk about bias and the response to it.

I will also consider the actions of two Santa Clara University Law School alumni in making the points today. I speak of former Clinton administration chief of staff Leon Panetta, law school class of '63, whose son Christopher Panetta I met a few years ago on the left side of a lawsuit (That would be the plaintiff's side for those of you future litigators). And former Clinton administration cabinet member Mike Espy, Santa Clara University Law School class of '79, whose father was my father's business associates in Mississippi, where Mr. Espy and I grew up.

I mention those alumni because all have been involved in and responded to circumstances that inform the suggestions I will make today. In trying cases, I have learned that the more personal, immediate, or familiar you make the subject of the voir dire or closing argument, the more likely the jury to listen to and remember what you have to say. Alumni may not provide the closest analogy, but may help you remember the vignettes discussed.

I also tell you of my own background so that you may have context for evaluating what I say. Sometimes, in evaluating conduct or speech that has apparent or even patent bias, context affects the

evaluation. I know some but not all of how my background influences my thoughts today.

I was born in the rural-est of rural Mississippi, exactly mid-way through the last century. I am the eldest of four siblings, raised in a fundamentalist Baptist church. I have known what you would call abject poverty first hand. To Winston Churchill's offer of blood, sweat, toil, and tears to his countrymen, my parents added for us abundant love. I picked cotton under the 100-degree blaze of the mid-day sun. I was obliged to lower my head, avert my eyes, and cross to other side of the street whenever a white female approached from the other direction. I drank from "colored only" water fountains, said yes sir and no sir to white boys my own of age, as I listened to these same white kids call my then 60 year old grandparents "boy" and "auntie." As a child, I was taught to respect all adults under pain of corporal punishment by any adult in the community. Ironically, however, upon becoming an adult, I was expected to view men as superior women to in all matters outside of the home.

For 18 years, all the civil institutions in which I was a part were intentionally designed to teach me subservience and inferiority. I attended racially segregated, unequipped, ill-equipped, and surely unequal schools from 1st through 12th grade. I sat in a classroom with a white student for the first time in September 1968 at the University of Illinois. Judging from her reaction, it was the first time she had sat beside a black student. It was then the time for her and for me to begin our unlearning and re-learning. That was 38 years ago and I'm still unlearning.

What about you? Have you stopped unlearning those undesirable childhood influences and unconscious biases?

Have you arrested your socially ingrained presumption that women cannot compete with men on all intellectual levels?

Have you overcome the shame and denial you felt upon learning that your family member or best friend is gay or lesbian?

Have you unlearned the pity you feel for the disabled?

White students, have you conquered the presumption that every student of color at this law school was admitted under an affirmative action program and is therefore not your equal?

Black students, have you really challenged the unconscious thinking that leads you to believe that every ambiguous or even insensitive comment a white person makes reveals a racist mind?

February is Black History Month — a time when many of the still largely segregated schools (and others) around the country study African American writers, scientists, artists, athletes and luminaries. If this is the time you do so, I commend to you any of the works of James A. Baldwin. I began reading Baldwin in 1968 as part of my “unlearning.” That, in part, is why I told you earlier so much of my own background. Baldwin wrote:

“I am what time, circumstance, and history have made of me, certainly, but I am also much more than that. So are we all.”

Baldwin went on to say that any person who is not at home with the time and circumstance of his birth will never be comfortable anywhere. So I offer you the first lesson. Each of us must accept that we are the products of life’s circumstances. Those circumstances have affected us in both good and undesirable ways. They have affected us in ways that are embedded in our unconscious but often reveal themselves in what we believe and how we relate to one another.

The second lesson is this: each of us must also accept that the “other” person is likewise a product of his or her environment. Most often, we were virtually powerless to alter that environment when it had its most enduring affect — during our formative years.

I happen to believe, along with all of you — lest you would not be embarking upon this profession — that we can control our unconscious bias. And if not control, then at least control for it. That process, however, must begin with the recognition that we all have biases, both the good and the shameful, the conscious and unconscious. Only then can we hope to change. As Baldwin

observed: “not everything that is faced can be changed, but nothing can be changed until it is faced.”

Most people will recognize their biases — some of which are neutral, if not true *i.e.*, SCU a is better school than USC, white wine can never be as complex as red; the Apostle Paul was not a greater theologian than St. Peter. I’m mindful that this is a Jesuit School.

Admitting unconscious bias takes work. You might observe it is “unconscious” after all. Failing to do this work will get your future clients a courtroom full of surprises. Studies of its presence are now too numerous to deny or ignore the effect of unconscious bias. Anyone who believes that neither he nor anyone else has this bias should go across the campus and enroll in a first year psychology course.

I also refer you to two books by Malcolm Gladwell, THE TIPPING POINT and BLINK, THE POWER OF THINKING WITHOUT THINKING. Both books will be valuable to any lawyer wanting to be effective in communicating his or her client’s position. Also, in a more academic vein, I suggest that you read the Harvard Civil Rights-Civil Liberties Law Review article UNCONSCIOUS BIAS THEORY IN EMPLOYMENT DISCRIMINATION LITIGATION. 40 Harv. C.R.-C.L. L. Rev 481 (2005). In it, the author recounts the social psychology research, clinical studies, and empirical test that show we all operate on stereotypes that often reside in our unconscious mind. These stereotypes, in turn, lead to automatic association responses for race, gender, and age, among other identity traits. The prevalence of unconscious bias then manifests itself in our admissions selection processes; in employment hiring and promotions; jury panel selection; tests; grading; and more.

For those of you who intend to be trial lawyers, understanding and tempering your and others unconscious bias will be critical to your success. You will find that it is not what you don’t know that hurts your case, rather is what you think you know for certain that turns out not to be true that upends your case.

Let’s consider some hypothetical questions:

1. What should you do when you utter an insensitive comment about race, gender or religion or commit some act you genuinely wish you had not?

Last Wednesday, in announcing his candidacy for president of the United States, Senator Joe Biden made the now familiar statement regarding his yet unannounced but presumed opponent Barack Obama:

“I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy,” he said. “I mean, that’s a storybook, man.”

Who knows what Senator Biden intended to say or what he meant by what he did say. Perhaps no offense was meant. They have much in common: Biden and Barack Obama are members of the world’s most exclusive club, serve together on the same committees, run in the same elite social circles, and have similar education and training. Perhaps Biden intended only to compare Obama and himself.

It seems, however, that Biden carries around a load of stereotypes about African Americans who are not Barack Obama. But let’s give Biden the benefit of the doubt and assume that he did not intend to offend, but offense was taken. If you had made such a statement — not that you have or would, of course — what would you do?

Let’s look at what Senator Biden did.

He volunteered that he had called Mr. Obama to express regret that his remarks had been taken “out of context,” and that Mr. Obama had assured him he had nothing to explain.

“Barack Obama is probably the most exciting candidate that the Democratic or Republican Party has produced at least since I’ve been around.” He added: “Call Senator Obama. He knew what I meant by it. The idea was very straightforward and simple. This guy is something brand new that nobody has seen before.”

I need not tell you that Senator Biden, to borrow a phrase, “misunderestimated” the firestorm. And has been “rearticulating” his mea culpa ever since.

That was how a person with an elite school law degree handled his problem.

Let’s seem how a well-trained Santa Clara Law graduate handled his fiasco.

Earlier this week SF mayor Gavin Newsom revealed that he had had sexual relations with his former assistant and wife of his campaign manager.

Newsom called a press conference and said:

“I want to make it clear that everything you've heard and read is true, and I am deeply sorry about that, I am deeply sorry, and I am accountable for what has occurred.”

An honest, undefensive acknowledgment and active voice apology is the first and best response when we offend. The apology will not change the facts but it will surely help us face facts and begin to change ourselves.

Let’s change the facts slightly. What if Senator Obama, instead of saying he took no offense, as reported by Biden, had said ‘I’m offended,’ as he later seemed to indicate? Would Biden have told Obama that he was being too sensitive — as many of us do when we retreat to stereotypes? That retreat only compounds the problem.

In my experience as an employment lawyer, I offer you this suggestion:

When a person of color or a woman in a white or male-dominated organization brings up race or gender as an issue, we should listen well. It takes tremendous courage to be the messenger of unwanted news. It is far easier to ‘go along to get along.’ Even if we have an explanation for our challenged statements. Remember that background can influence the perception of both parties to the

encounter. Try to see the other side. Remember also that it is good to have a healthy skepticism, not to say cynicism, about third-party reports. We all have our filters and agendas, conscious and unconscious.

2. What to do if you are the recipient of an insensitive comment that does offend you?

We could confront and respond in kind or, for me, recalling my religious background, I could follow the Gospels of Matthew 18:15-17 which talks of restoring relationships.

If your brother sins, go and show him his fault when the two of you are alone. If he listens to you, you have regained your brother.

Matthew 18:16 continues:

but if he does not listen, take one or two others with you, so that at the testimony of two or three witnesses every matter may be established. If he refuses to listen to them, tell it to the church. [Then] If he refuses to listen to the church, treat him like . . . [the Racist or Sexist he is].

Well that ending is slightly different from what the New Testament says, but it fits our purpose, nonetheless.

Public confrontation and humiliation rarely change a person's heart; rather, as my favorite blues singer B.B.King says, it'll just make them "smarter and harder to catch the next time." We have come to the university to learn from one another, to help one another see through different eyes, to form alliances across racial, gender, sexual orientation, and generation chasms. We can form those alliances by constructive criticism and open-minded engagement but not by condemnation, rejection, and negation of the individuality of "the other."

3. What should you do when in a private moment you find yourself thinking that a classmate or colleague is less capable because of

race or gender? First, let me advise that thinking and believing are two different things. You should work hard not to believe everything you think. I told you earlier that I grew in a society that stressed males were superior to females. Some thirty years ago, I was in graduate school, taking a very difficult operations management course. I had been a poli-sci major in college and did not have the math and calculus preparatory courses to handle the statistics in the class. I tried to make up in hard work what I lacked in prerequisites. Two days before a mid-term exam, I was very frustrated at not being able to master a particular analysis, although I understood the concept. I knew that examination would be graded on a curve. I thought to myself, this course requires at least an understanding of this manufacturing process. There are several women in this class. No way do they understand the concept, even if they can do the math. I called two male classmates and we studied together, although one of the women had offered to be my study partner, as she lived not far away. “No way,” I thought to myself. The women will set a low curve.

I barely passed. The professor’s practice was to return the exams from lowest ranking to highest scores. Two women got the last two papers handed back. I’ve been ashamed of my bias since that day. This is the first time I’ve revealed that story to anyone. I immediately found myself in a new study group. And I’ve tried to keep diverse company ever since, in every thing that I do. So the lesson I offer you is just that. If you find yourself thinking less of someone then you should — join them, get to know them. You’ll help yourself and them.

4. What to do if a colleague or classmate or moot court partner, or law partner repeatedly speaks or acts in manner that shows unconscious bias? Your first thought might to mind your own business. Now much of the time, minding your own business is a good thing; the world would have far fewer problems. But there are times when it’s appropriate and even necessary to speak. How you speak should be commensurate with the circumstances. Often, these peccadilloes come within the category of “all too human” and any of us can have the empathy to say “but for the grace of some deity go I.” At other times, the conduct or statement will call out for strong sanction, lest the organization be damaged.

I call to your attention an alleged series of ethical breaches that played out on the national stage early in the last decade and brought the remaining two alumni together — or more accurately split them apart.

In 1994, two former congressmen, Leon Pannetta and Mike Espy, Santa Clara Law classes of '63 and '79, respectively, had been catapulted to national prominence in the Clinton White House. Espy became the target of overzealous prosecution following accusations that he had received improper gifts, sports tickets and travel from Tyson Food, a company subject to Agriculture Department Regulations. Though both Tyson and Espy denied it, the appearance of impropriety led Panetta to ask for Espy's resignation, lest the organization be compromised. Espy briefly protested but days later offered his resignation. Messrs. Espy and Panetta are doing well today by the way.

I point out this incident to show that sometimes we must look beyond ourselves and be willing to do the unpopular and the personally unpleasant to achieve a larger good. Sometimes, the options are all undesirable. But the consequences for the institution are potentially too significant to ignore.

That is why I am happy that the Santa Clara Law School is taking step to deal with the problem of unconscious bias. I am aware of the tension here as a result of a recent incident; no doubt, many of you think the recent incident is just one of many. Others think, there has been no problem or one only of misunderstanding or misunderstood intent. I believe that well-intentioned people can make progress toward a solution if they have empathy for one another and are willing to work on themselves as hard as they believe it necessary to work on the "other." Both you and I would be unrealistic if we thought that anyone could prescribe a quick remedy for what is a centuries-old problem. I hope merely that I have offered some different and less judgmental suggestions for thinking about the problem from a different perspective. As has been observed in another context, we cannot rely on the same kind of thinking that got us into the problem to get us out. We cannot be passive bystanders to racism, sexism, ageism, homophobia, religious bigotry, and invidious treatment of others regardless whether is the unthinking kind or the *Washington v.*

Davis, specific intent kind. Yet addressing those “isms” does require us to recognize a difference between the two. We must hold ourselves responsible. We cannot leave it to or blame someone else. Finally, each of us individually must have the courage to examine our bias, honestly recognize it, and dare to challenge ourselves to change.