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History's Calling: Today's Racism and the Elevation of Lawyers and Legal Practice

Emile Loza de Siles

History teaches. It allows us to see people and events through the lens of time; compare and contrast them with those of our current world; and, most importantly, think deeply and honestly about what kinds of people we are and should be. Particularly, as attorneys sworn to law and justice, history illuminates for us what kind of society we must foster and build. For these and other reasons we look forward to *The Advocate* issues sponsored by the Idaho Legal History Society. Our recent reward was the Society's sponsored issue in November/December 2016.

What history can teach us about ourselves

There, our colleague Richard Eppink's article, *Let Us Now Praise Famous Men: Why Are Nearly All of Idaho's Most Lauded Lawyers White Men?*,¹ pains us with shocking stories of racial and ethnic atrocities from Idaho's past, ones that went unpunished by the law and ones that were so heinous as to be blotted from past historical accounts. That history teaches us about those days' profound xenophobia and blatant personal and institutional prejudice against people not of European descent.²

After the shock, however, Mr. Eppink's article allows us to compare the view of "the other" today in our law, our profession, and ourselves. With introspection and courage, our study of history calls us to reaffirm integrity, honesty, and justice as our guiding principles. These are great and real rewards of the histories shone upon by Mr. Eppink.

We best exist as people and serve as attorneys when we build upon these insights to ferret out prejudice, racism, bigotry, hate, and a bias-springing refusal to extend common decency and empathy to the "other."

History's call to action

The thing about learning from people and events long dead to us is that, beyond the self-circumscribed joy of learning, the relevance and power of that learning only come to light through our introspection followed by action. Without action, learning means nothing.

Here, we have the opportunity and duty to inform, empower, and elevate ourselves and our practice by considering, integrating, and then acting upon the lessons from Mr. Eppink's article. It is especially important that we do so in view of current manifestations of prejudice, discrimination, and hate against the "other."³

Whether in public service or private work as employment attorneys, litigators, or corporate counsel, we best promote justice and the rule of law when we educate ourselves, especially about our own selves, and inform our practice about aversive racism. Aversive racism and other forms of unjust bias⁴ are real and deeply corrosive to our society and legal system and, most of all, destructive to those against whom we are biased.⁵ We best exist as people and serve as attorneys when we build

upon these insights to ferret out prejudice, racism, bigotry, hate, and a bias-springing refusal to extend common decency and empathy to the "other."

In the end, our actions are all that speak for us and for our profession. Our actions on behalf of humanity, our commitment to justice and ethical integrity, and our enlightened practice of law are the enduring legacies. Notable examples that belong to history include Judge Sergio Gutierrez, Dick Fields, Ernesto Sanchez, Dean and former Justice Cathy Silak, and so many other of our esteemed colleagues. . . Let us learn from them and others because all lives matter and all lives can elevate us, especially our own.

Aversive racism: Pretending not to hate

To support this journey of contemplation into professional responsibility and legal practice, I offer a brief introduction to aversive racism, the "dominant model of prejudice" in the legal literature.⁶ I cite to exemplar references in which the U.S. Supreme Court⁷ and other tribunals⁸ and the judiciary,⁹ academy,¹⁰ and

bar¹¹ have applied the theory of aversive racism and related species of implicit, but still destructive and often deadly prejudice.

The theory of aversive racism, also called symbolic or contemporary racism, was introduced more than 30 years ago in 1986 by John F. Dovidio, now of Yale University, and Samuel L. Gaertner, now distinguished professor emeritus of the University of Delaware.¹² Since then, they¹³ and others have been examining and developing our understanding of such covert prejudice and how such prejudiced people and systems perceive and behave toward the “other,”¹⁴ as compared to the blatant perceptions and overt actions are motivated by so-called “traditional” prejudice.¹⁵ Professor Jody David Armour of the University of Southern California’s Gould School of Law explains:

The theory of aversive racism begins with the proposition that most Americans are highly committed to egalitarian values. Therefore, they desire to maintain an egalitarian, non-prejudiced self-image. This desire causes them to express non-prejudiced personal beliefs. Such professed nonprejudiced beliefs are not to be confused with genuine - *i.e.*, well-internalized - nonprejudiced beliefs, for deep down ‘aversive racists believe in white superiority’ and ‘do not want to associate with blacks.’ Desperately clinging to their egalitarian, non-prejudiced values and self-image, aversive racists repress their negative feelings and beliefs about blacks. Lawrence refers to these repressed anti-black beliefs as ‘hidden prejudice,’²¹ and offers a Freudian theory of unconscious motivation to

explain how ‘we all harbor prejudiced attitudes that are kept from our consciousness.’ Moreover, since aversive racists do not recognize their anti-black attitudes, the prospects for prejudice reduction are particularly dim. Here the pessimism of the aversive racism model asserts itself. Writing from this perspective, Professor Peggy Davis observes, “it is difficult to change an attitude that is unacknowledged. Thus, ‘like a virus that mutates into new

Lawrence refers to these repressed anti-black beliefs as ‘hidden prejudice,’ and offers a Freudian theory of unconscious motivation to explain how ‘we all harbor prejudiced attitudes that are kept from our consciousness.’²¹

forms, old-fashioned prejudice seems to have evolved into a new type that is, at least temporarily, resistant to traditional . . . remedies.”¹⁶

In a civil rights and employment context, aversive racism:

is characterized by subtle, often unintentional, forms of bias on the part of whites. They often believe that they are acting free from prejudice, and may be unaware that their decision making is to the detriment of black workers. Aversive racism

appears to be prevalent in the modern workplace. Because of its subconscious and implicit nature, it is especially difficult for the existing Title VII structure to handle. This type of racism can offer advantages for members of the dominant group, boosting their self-esteem and promoting feelings of authority and superiority. In a more tangible sense, aversive racial discrimination offers economic advantages to whites and allows them to maintain dominance in the workplace.¹⁷

Aversive racism is subtle and nearly subliminal. It is indirectly expressed and often camouflaged in prejudice-neutral trappings or even symbolic conduct.¹⁸ Nevertheless, its corrosive consequences are as significant and grave as those of traditional racism.¹⁹ Just as traditional racism never seems to die, research overwhelmingly shows that the aversive forms of prejudice are deeply persistent.²⁰

Our higher selves, our higher service

Although most often examined in terms of racial or ethnic distinctions between people of European descent and so-called people of color, the concepts underlying aversive racism apply to other forms of bias and prejudices we may have against women and others. The unifying theme is that we may be unaware of our unjust prejudices and even be emphatically adamant that we are not prejudiced. Despite this, our beliefs, perceptions, and behavior toward “the other” may reveal the true parameters of our darkness²¹ and put the lie to our feigned protestations of justice and equality.²²

The truth can be hard to accept and none more difficult than la-

mented ones about ourselves. If we have courage, however, and are committed to our integrity and competency²³ as people and attorneys, the pursuit of truth in our self-examination²⁴ and in examining the facts and circumstances of the cases before us will lead us, always, to the highest callings of our lives, our profession, and our service to our clients. Let us be worthy of history.

Endnotes

1. See 59 ADVOCATE 43 (Nov./Dec. 2016).

2. Persons of European descent have suffered prejudice within the American legal system in the past. See, e.g., *Berger v. United States*, 255 U.S. 22, 36 (U.S. 1921) (certified from Court of Appeals for Seventh Circuit) (holding, in relevant part, that affidavit of prejudice sufficed to invoke applicable law under which defendants sought to disqualify judge and challenged judge “had no lawful right or power to preside as judge on the trial of defendants”). In that oft-cited case, the affidavit averred this traditionally prejudiced diatribe by the challenged judge:

One must have a very judicial mind, indeed, *not* be prejudiced against the German Americans in this country. *Their hearts are reeking with disloyalty*. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the *same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people*. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and *now when this country is at war with Germany you seek to undermine the country*

During her Senate confirmation for appointment to the Court of Appeals for the Eleventh Circuit, then-Florida Chief Justice Rosemary Barkett was lauded for her recognition of aversive racism and its taint in judicial proceedings in a capital case.

which gave you protection. You are of the same mind that *practically all the German-Americans* are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and *as between him and this defendant, I prefer the safeblower*.

Berger v. United States, 255 U.S. 22, 28-29 (U.S. 1921) (emphasis supplied).

3. See EDDIE S. GLAUDE, JR., *DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL* (2016); *Eddie Glaude, Democracy in Black*, Interview of Professor Glaude by Derek McGinty, The Diane Rehm Show (WAMU, Washington, D.C., Jan. 13, 2016), <https://thedianerehmshow.org/shows/2016-01-13/eddie-glaude-democracy-in-black>.

4. See Molly O’Leary, *What Do You Mean I’m Biased*, 55 ADVOCATE 10 (2012) (President’s message).

5. See, e.g., *Jun Yu v. Idaho State University*, Memorandum in Support of Motion for Leave to Amend Complaint, 4, 11-12 & 25-28 & First Amended Complaint and Demand for Jury Trial, ¶¶ 157 & 352. Case No. 4:15-cv-00430-REB (D. Idaho, filed with motion on Apr. 8, 2016). The author serves as co-counsel with Mr. Ronaldo A. Coulter representing Mr. Yu in this ongoing litigation.

6. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 CALIF. L. REV. 733,

746 & n.58 (1995) (Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1564-65 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335-36 (1987); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1649 (1985)).

7. See *Fisher v. University of Texas at Austin*, United States Supreme Court Amicus Brief of the American Psychological Association, 2014 U.S. Briefs **28-**41 (Nov. 2, 2015).

8. See, e.g., *Salami v. Von Maur, Inc.*, 838 N.W. 2d 680 (Iowa Ct. Appeals, July 24, 2013); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 14-15 (2004) (citations omitted). During her Senate confirmation for appointment to the Court of Appeals for the Eleventh Circuit, then-Florida Chief Justice Rosemary Barkett was lauded for her recognition of aversive racism and its taint in judicial proceedings in a capital case. There, she wrote:

The Court found that a prosecutor’s use of peremptory challenges is subject to the constraints of the Equal Protection Clause when there is some basis for believing that the challenges are used in a racially discriminatory manner.

The U.S. Supreme Court in *Batson* recognized the invidious nature of discrimination. [See *Batson v. Kentucky*, 476 U.S. 79, 93-96, 106 S. Ct. 1712, 1721-23, 90 L. Ed. 2d 69 (1986).] Justice Marshall, in a concurring opinion, noted that discrimination is not often blatantly expressed, and in many cases it is subliminal:

"A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported." *Id.* at 106, 106 S. Ct. at 1728 (Marshall, J. concurring). Studies of unconscious racism have shown that the perpetrator does not feel particularly punitive toward minorities, rather, he or she wants to remain distant and is less likely to feel empathy because of the distance. . . . While society has largely rejected blatant stereotypes and overt discrimination, more subtle forms of racism are increasing: "A burgeoning literature documents the rise of the 'aversive' racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously." [].

Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the state is not imposing the ultimate penalty of death in a racially discriminatory manner.

Chief Justice Rosemary Barkett, concurring in part and dissenting in part in *Foster v. Florida*, Supreme Court of Florida, No. 76639 (Oct. 22, 1992), *rehearing denied* (Apr. 1, 1993) (citation omitted), in Ex. 1, 103rd Cong., 2d Sess., 140 Cong. Rec. S. 1834 (Feb. 24, 1994) (Nomination of Rosemary Barkett to Court of Appeals for the 11th Circuit) (Senator Bob Graham); see also 103rd Cong., 2d Sess., 140 Cong. Rec. S. 1935 (Feb. 25, 1994) (Statement on Nomination of Rosemary Barkett to Court of Appeals for the 11th Circuit) (Senator Graham adding inadvertently omitted page to Chief Justice Barkett's concurrence & dissent).

Mexico-born of Syrian immigrants, Justice Barkett, now a Judge on the Iran-United States Claims Tribunal, undoubtedly knew directly of what she spoke, and her recognition of and certain experience with racism illustrate the inestimable value of diversity on the bench and at the bar. See *Advocate* 43 (Nov./Dec., 2016) at 44-45.

9. See Hon. Jerome P. Vanora, *Judicial Disqualification for Personal Bias in New York State*, 8 J. NAT'L ASS'N ADMIN. L. JUDGES (1988) (discussing judges' personal bias, i.e., bias stemming from an extrajudicial source, as bases for disqualification under 28 U.S.C. § 144), <http://digitalcommons.pepperdine.edu/naalj/vol8/iss2/3>.

10. See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 14-15 & 38-39 (2004) (citations omitted).

11. See generally, e.g., Sarah Q. Simmons, *Litigators Beware: Implicit Bias*, 59 *ADVOCATE* 35 (Mar./Apr. 2016); Deborah A. Ferguson, *ABA Delegates to Examine Courtroom Bias*, 58 *ADVOCATE* 40 (2015).

12. See, e.g., John F. Dovidio & Samuel L. Gaertner, *The Aversive Form of Racism*, in *PREJUDICE, DISCRIMINATION, AND RACISM* (Dovidio & Gaertner, eds., 1986); see also <http://psychology.yale.edu/people/john-dovidio> and <https://www.psych.udel.edu/people/full-list-searchable/gaertner> (curricula vitae).

13. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1 (2004).

14. See, e.g., *Spurlock v. Fox*, 2010 U.S. Dist. LEXIS 100366 at *52-*58 (examining expert testimony of Professor Leslie Wade Zorwick on stereotyping, prejudice, identity, "white flight," "code words," "at risk communities," and concepts of "moral credentials" and aversive racism) (rejecting *motion in limine* as to same), Case No. 3:09-CV-0756 (M.D. Tenn., filed Sept. 23, 2010).

15. Traditional or "dominative racists," persons who express bigotry and hatred openly, are less common than they were twenty-five years ago, they have been replaced, in substantial measure, by closet or 'aversive' racists, persons who continue to hold negative stereotypes

of minorities and wish to avoid them." *Fisher v. University of Texas at Austin*, Amicus Brief of the American Psychological Association, 2014 U.S. Briefs **34 (Nov. 2, 2015) (quoting Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 *WM. & MARY L. REV.* 21, 75 (1993)); see also Leslie Wade Zorwick, Henricks College, *Old Fashioned and Contemporary Prejudice*, <https://quizlet.com/10345722/old-fashioned-and-contemporary-prejudice-zorwick-1-flash-cards/> (Professor Zorwick's online flashcard study tool for distinguishing aversive and traditional prejudice).

16. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 *CALIF. L. REV.* 733, 746-747 (1995) (citations omitted); see also Omar Ha-Redeye, *Media Narratives in Times of Turmoil: Depictions of Minorities in Canada Post 9/11*, Annual Meeting of the World Institute for Research and Publication - Law (presented June 4, 2010), <http://ssrn.com/abstract=1526867>.

17. Damon Ritenhouse, *A Primer on Title VII: Part Two*, American Bar Ass'n, GP SOLO EREPORT (Jim Schwartz, ed., Feb. 2013) (citations omitted), http://www.americanbar.org/publications/gpsolo_ereport/2013/february_2013/primer_title_vii_part_two.html.

18. See AMERICAN BAR ASSOCIATION, *Division for Public Education*, <http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html> ("Hate speech is speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits."); THE FEDERAL BUREAU OF INVESTIGATION, *Hate Crimes Add an Element of Bias to Traditional Crimes - And the Mixture is Toxic to our Communities* <http://www.fbi.gov/about-us/investigate/civil-rights/hate_crimes>; *R.A.V. v. St. Paul, Minnesota*, United States Supreme Court Amicus Brief of the Asian American Legal Defense and Education Fund, et al., 1991 WL 11003964 at *19 (filed Aug. 23, 1991) (discussing special meanings of symbolic conduct in hate crimes) ("These symbols carry messages replete

with animosity that is rooted in the past and extends into the present; they trigger collective memories that are both painful and frightening.”).

19. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 3 (2004) (citations omitted).

20. See *Fisher v. University of Texas at Austin*, Amicus Brief of the American Psychological Association, 2014 U.S. Briefs **29 (Nov. 2, 2015) (citing *Texas Dep’t of Housing & Comm. Affairs v. Inclusive Comms. Proj., Inc.*, 135 S. Ct. 2507, 2522 (2015) (regarding value of disparate impact analysis in exposing and countering “unconscious prejudices”).

21. See Margo Louise Foster, *There Was a High Court that Swatted a Fly . . . But Why? Mental Disability in the Negligent Infliction of Psychiatric Injury and the Decisions in Mustapha v. Culligan*, 14 *APPEAL* 37, 63-65 (2009) (discussing “claimant as other”).

22. See Nadya A. Fouad & Patricia Arredondo, *BECOMING CULTURALLY ORIENTED: PRACTICAL ADVICE FOR PSYCHOLOGISTS AND EDUCATORS*

15 (2007) (color-blind paradigm as fallacy), cited in Adele, *supra* note [#], at 106.

23. See Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, *American Bar Ass’n, 30 PROBATE & PROPERTY MAGAZINE* 29 (Mar./Apr. 2016) (discussing cultural competency under ABA Model of Professional Conduct Rules 1.1 & 1.3), [http://www.americanbar.org/publications/probate_property_magazine_2012/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_com-](http://www.americanbar.org/publications/probate_property_magazine_2012/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.html)


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24. See Andrea A. Curcio, *Addressing Barriers to Culture Sensibility Learning: Lessons from Social Cognition Theory*, 15 *NEVADA L. JOURNAL* 537, 545-56 (2015), <http://www.ssrn.com/abstract=2670820>.

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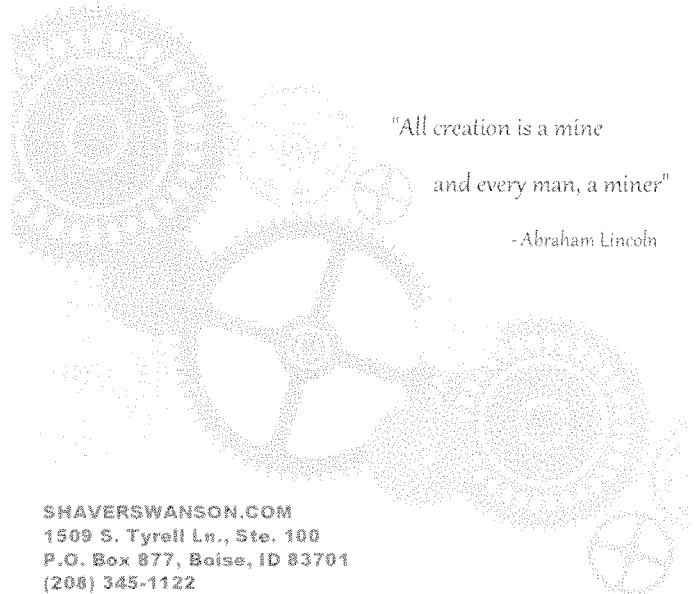


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- Abraham Lincoln

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