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Teaching Bias in the Current Cultural Climate: Sample Exercises for a Legal Writing Class

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The American Bar Association now requires law schools to provide “education to law students on bias, cross-cultural competency, and racism.”¹ But how can a law professor navigate these challenges in the current cultural climate fraught with polarizing divisiveness? In this present-day charged atmosphere, law students may be particularly sensitive to statements they perceive as offensive and may seek accountability for such remarks. Implicit bias and micro-aggressions can reveal biases that are unconscious and unintentional. How then can a law professor make students feel comfortable discussing these important and relevant topics in class?

Having served on the Legal Writing Institute’s Diversity Committee, which in December of 2020 had sponsored the online conference “Getting Out of Our Comfort Zones: Addressing Issues of Race in the LRW Classroom,” I wanted to do my part and address the issue of bias in my legal writing classes. But I didn’t want to lecture the students on abstract concepts of social justice. I wanted the discussion to be relevant to the subjects taught in legal writing classes. I also didn’t want the

¹ ABA Standards and Rules of Procedure for Approval of Law Schools 2023-2024, Standard 303. Curriculum (requiring law schools to provide “education to law students on bias, cross-cultural competency, and racism”).

discussion to be negative, critical or confrontational, and I didn't want the students to feel uncomfortable with the topic. I wanted them to participate in the discussion and hopefully learn something in the process.

I thought the issue of bias was more relevant to a second semester persuasive writing class than a first semester legal research and writing class. Bias can have an adverse effect on an advocate's credibility and a judge or jury's empathy for an advocate's client. And damaged credibility or lack of empathy has a consequent detrimental effect on a lawyer's ability to persuade a judge or jury to decide in a client's favor. As a result, overcoming bias (whether it is directed at the lawyer or their client) is a critical skill for law students in a persuasive writing class.

To make the students more comfortable discussing the issue of bias, I decided to frame the conversation around the broad topic of affinity bias, rather than the specific example of racism. Affinity bias is our tendency to favor and develop relationships with people who are more like us or, stated in the converse, our tendency to disfavor people who are not like us. Race can be one of many reasons why people may have an affinity for people like them or a bias against people who are different. But there can be other reasons. For instance, people in one part of the country or world may sometimes tend to favor locals over people from other parts of the country or world (this is sometimes called "xenophobia"). As another example, people who are disadvantaged socio-economically may sometimes tend to disfavor the wealthy elites on the other end, and conversely, wealthy elites may tend to disfavor those who are socioeconomically disadvantaged (this can be referred to as "classicism").

I also thought it would be advantageous to have the students look at examples of attorneys dealing with the potential biases of judges and juries in litigation, rather than directly confront them with their own biases. I decided to give the students some case examples, and then ask them to consider how the attorney in the example might try to overcome biases directed at them or their client in a brief or at oral argument. I thought a discussion of strategies for overcoming bias in the context of litigation could lead to a more positive and productive discussion of racism.

The two examples I used were 1) the real case of Clarence Darrow defending Nathan Leopold and Richard Loeb in their famous murder trial,² and 2) the fictitious case of attorney Alan Shore defending Ezekiel Borns against the death penalty in the *Death be not Proud* episode of the television series *Boston Legal*.³ Leopold

² Koopmans, Andy, *Leopold and Loeb: Teen Killers 7* (Lucent Books 2004), <https://archive.org/details/leopoldloebteenk0000koop> (last visited July 4, 2023).

³ The Ezekiel Borns case is one of a few cases featured in *Boston Legal: Death be not Proud* (ABC television broadcast Mar. 20, 2005), <https://www.dailymotion.com/video/x5xb5u1>

and Loeb were the teenage children of two wealthy families in Chicago in the 1920's, both charged with the heinous murder of a fourteen-year-old boy, named Bobby Franks.⁴ To defend them, Darrow had to overcome the bias against his clients because of their social status.⁵ With respect to the *Boston Legal* episode, Ezekiel Borns' case was before a fictitious Texas appeals court, but his lawyer, Alan Shore, was a liberal Bostonian who opposed the death penalty on principle. The bias attorney Shore had to overcome was the bias against him personally as an outsider.⁶ Darrow succeeded; Leopold and Loeb were not executed, and instead were sentenced to life in prison.⁷ But Shore failed; Ezekiel Borns was executed by electrocution.⁸ I thought an initial discussion of what did or didn't work for each of those advocates could serve as a foundation for a further discussion of strategies for overcoming racism.

I. Clarence Darrow and the Defense of Leopold and Loeb

I started the Leopold and Loeb exercise by telling the students about the facts of the case. Nathan Leopold and Richard Loeb were wealthy, well-educated young men.⁹ They met at the University of Chicago and enrolled in postgraduate work to prepare for law school.¹⁰ They also led a secret life of crime, culminating in the kidnapping and murder of 14-year-old Bobby Franks in 1924.¹¹ Leopold and Loeb bludgeoned the boy to death with a chisel, poured acid on his face to disguise his identity, then stripped off his clothes and left him in a ditch.¹² They did not commit the crime for money or out of anger or hate; they did it for the thrill and experience of killing a human being.¹³

The community was outraged by what Leopold and Loeb did, and the prosecutor demanded both of them be hanged.¹⁴ Part of the reason for that was because of the nature of the crime they committed but the other part was because of bias.¹⁵ The parents of the two young men hired Clarence Darrow to represent them at the

(last visited August 17, 2024). To show just the Borns case to students, you must skip through the other cases in the episode.

⁴ Koopmans, *supra* note 2 at 38-42.

⁵ *Id.* at 78-79.

⁶ *Boston Legal: Death be not Proud*, *supra* note 3.

⁷ Koopmans, *supra* note 2 at 88.

⁸ *Boston Legal: Death be not Proud*, *supra* note 3.

⁹ *Id.* at 36.

¹⁰ *Id.* at 37 - 38.

¹¹ *Id.* at 38 - 42.

¹² *Id.* at 44.

¹³ *Id.* at 6.

¹⁴ *Id.* at 74.

¹⁵ *Id.* at 78 - 79.

sentencing hearing.¹⁶ Darrow believed that the community was prejudiced against his clients because they were children of privilege.¹⁷ He argued against the death penalty.¹⁸ And his argument was successful; the judge sentenced Leopold and Loeb to life imprisonment.¹⁹

After I briefly introduced the case, I asked the students a series of questions. Do you think classism might have affected the judge's sympathy for the plight of the two boys? Do you think classism might also affect the credibility of the arguments Darrow would make on their behalf? How would you handle the issue if you were representing the two young men at the hearing? For example, would you call out the issue or keep quiet about it? Would you confront the judge or the prosecutor? Or would it be better to deal with the issue indirectly by talking about the bias of the community or the prosecutor, not the judge himself? Assuming the judge was biased, what strategy might help you to connect with him despite that predisposition? How could you enhance your credibility as the attorney for Leopold and Loeb?

After discussing those questions, I had the students read excerpts from the transcript of Clarence Darrow's argument to the judge.²⁰ I posted the entire transcript on my course website but didn't ask them to read it all, as it is about 100 pages long, and deals with issues other than bias.²¹ I asked the students to pay particular attention to how Darrow approached bias issues and to be prepared to discuss that in class. What strategies did Darrow use to connect with the judge, enhance his own credibility and evoke sympathy for his two clients?

We started the next class by going over the students' responses. The first thing we discussed was the fact that Darrow confronted classism right at the beginning of the argument. This is the applicable passage in the transcript:

I insist, your honor, that had this been the case of two boys of this age unconnected with families who are supposed to have great

¹⁶ *Id.* at 76 - 77.

¹⁷ *Id.* at 78 - 79.

¹⁸ *Id.* at 76 - 77.

¹⁹ *Id.* at 88.

²⁰ *Voices of Democracy: the US Oratory Project, CLARENCE DARROW, "PLEA FOR LEOPOLD AND LOEB" (22, 23, AND 25 AUGUST 1924)*, <https://voicesofdemocracy.umd.edu/clarence-darrow-plea-for-leopold-and-loeb-22-23-and-25-august-1924-speech-text/> (last visited July 4, 2023) ("Transcript").

²¹ There is also a movie based on the Leopold and Loeb case called *Compulsion*, starring Orson Welles as Clarence Darrow (20th Century-Fox April 1, 1959). Another way to do this exercise is to show students video clips from the courtroom scenes in the movie instead of having them read the transcript. *E.g., Orson Welles as Clarence Darrow in Compulsion*, <https://www.youtube.com/watch?v=CrjbL4eedkQ> (last visited July 28, 2024).

wealth that there is not a state’s attorney in Illinois who would not at once have consented to a plea of guilty and a punishment in the penitentiary for life. Not one. No lawyer could have justified it. No prosecution could have justified it.

* * *

We are here with the lives of two boys imperiled, with the public aroused. For what? Because, unfortunately, their parents have money. Nothing else.²²

Then we discussed why Darrow did not confront the judge directly. Why did he instead confront the prosecuting attorney and the public? And why might that be a more effective way of dealing with the issue? The district attorney refused to consent to life imprisonment, not the judge. There was no basis for accusing the judge of bias. And even if there was, confronting him directly likely would have elicited a defensive response.

We next discussed how Darrow attempted to evoke sympathy for his clients and connect with the judge by appealing to the religious values of the community. Here are two examples:

Do I need to argue to your honor that cruelty only makes cruelty; that hatred only causes hatred; that if there is any way to destroy—which perhaps there is not—if there is any way to soften this human heart, which is hard enough at its best, if there is any way to kill evil and hatred and all that goes with it, it is not through evil and hatred and cruelty; it is through charity and love and understanding?

How often do people need to be told this? Look back at the world. There is not a man who is pointed to as an example to the world who has not taught it. There is not a philosopher, there is not a religious leader, there is not a creed that has not taught it. This is a Christian community, so-called, at least it boasts of it, and yet they would hang—a Christian community.

* * *

Let me ask this court, is there any doubt about whether these boys would be safe in the hands of the Founder of the Christian religion?

²² Transcript ¶¶ 10 and 12.

It would be blasphemy to say they would not. Nobody could imagine, nobody could even think of it. And yet there are men who want to hang them for a childish act, without the slightest malice toward the world.²³

Darrow's primary strategy for overcoming the bias was to appeal to the values he had in common with the judge and the community. He did not directly accuse anyone of hypocrisy. Instead, he talked about what Jesus would do with the two boys. And he compared that to what the district attorney and the public wanted the judge to do with his clients.

We also discussed several things Darrow did to bolster his credibility with the judge. For example, he made the following statement in his closing argument:

If to hang these two boys would bring him back to life, I would say let them go, and I believe their parents would say it, too. But, "the moving finger writes, and having writ moves on; nor all your piety nor wit can lure it back to cancel half a line or change one word of it."²⁴

I asked the students who Darrow was quoting at the end of that section. It was the Persian poet Omar Khayyam. Darrow quotes him three times during the argument, and he also ends with one of Khayyam's poems:

So I be written in the Book of Love,
I do not care about that Book above.
Erase my name or write it as you will,
So I be written in the Book of Love.²⁵

I asked the students why they thought Darrow was quoting a Persian poet and philosopher. We did some quick online research together and discovered that was there a substantial Muslim community in the area where the trial occurred.²⁶ I also asked the students to search for the word "love" in the transcript of Darrow's argument and count the number of times it appears in the document. It turns out

²³ Transcript ¶¶ 199 - 201.

²⁴ Transcript ¶ 49 (quoting OMAR KHAYYAM, THE RUBÁIYÁT OF OMAR KHAYYAM (1859)).

²⁵ Transcript ¶ 500 (quoting Omar Khayyam).

²⁶ Arab Muslims from Palestine had started settling in Chicago in the early 1900's. *The Electronic Encyclopedia of Chicago, Muslims* (May 11, 2005), <http://www.encyclopedia.chicagohistory.org/pages/865.html> (last visited, July 3, 2024). Mufti Muhammad Sadiq, the first missionary to the United States from the Ahmadiyya Movement in Islam, relocated to Chicago in 1920, and established in Chicago the first Ahmadi mosque in the nation. *Id.*

Darrow used the word “love” fourteen times in his argument. So, I then asked the students why they thought he mentioned the word so often. What effect did that have on the message he conveyed? I asked the students if he indirectly broached the issue of religion by appealing to Christian and Muslim teachings in his argument. What might be the persuasive impact of that?

There was another issue lurking beneath the surface in the Leopold and Loeb case. Both young men were Jewish, and both were also homosexuals. But Darrow didn’t touch on either of those facts in his argument to the judge. He didn’t argue that the men were victims of discrimination or homophobia. What might have been his motivations to not raise that argument? And we talked about whether the timing of the case, occurring in the 1920’s may have also had something to do with Darrow’s decision. But it is not clear what the rationale for Darrow’s strategy was.

2. Paul Shore and the Defense of Ezekiel Borns

After we discussed the Loeb & Leopold case, I told the students the story behind the fictitious murder trial in the *Death be Not Proud* episode of *Boston Legal*.²⁷ That episode portrayed the criminal trial of Ezekiel Borns, a Black man born with severe alcohol fetal syndrome. He had an IQ of 80.²⁸ The police had arrested him for shooting a gas station attendant to death. He had been “doped up” and had no memory of the event.²⁹ But the police interrogated him for 16 hours, and he confessed.³⁰ The prosecutor brought the charges before an all-White grand jury.³¹ His lawyer at trial had been abusing alcohol and cocaine, had failed to raise several issues on Borns’ behalf, and later admitted that he had provided ineffective counsel to his client.³² The trial jury was also all White and convicted Borns of the crime of murder.³³ The judge then sentenced him to death by lethal injection.³⁴

A Boston law firm agreed to assist Borns’ local attorney and represent Borns on appeal.³⁵ The firm sent hot shot trial lawyer Alan Shore to argue the case before a fictitious appeals court in Texas.³⁶ A DNA test had determined someone other than Borns was at the scene of the murder, and Borns’ defense team sought a stay

²⁷ *Boston Legal: Death be not Proud*, *supra* note 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

of the execution.³⁷ The problem Shore had to overcome was the judges' bias against outsiders. It was apparent from the judges' questions and remarks that they were biased against Shore because he came from the state of Massachusetts; and he called them out on that bias when he concluded his argument. He was a liberal Yankee who opposed the death penalty, arguing a case in front of the court that executes more inmates than any other state in the country. Because of that bias, Shore was not likely to have much credibility in a Texas court. So, what could he have done to overcome the likely bias of the judges against him?

We started the exercise by preparing for the argument and discussing what the students thought they would do at the hearing if they represented Borns. First, who should conduct the argument before the court: Shore or the local attorney? Second, assuming the decision to have Shore do the argument was a good one, how could Shore try to overcome any bias the judges may have had against him? Applying what the students learned from Darrow's argument, what could he do to get the judges to empathize with his client or enhance his credibility? Would it make sense to concede his personal opposition to the death penalty but argue his personal opinions are irrelevant; the issue is his client's possible innocence? Would it also make sense to characterize the case as a case about due process not the death penalty? Is due process a value both the judges and Shore have in common? Those are examples of the questions we considered first, then we watched the video of the *Death be Not Proud* episode.³⁸

In the video, Shore first met with Borns in prison.³⁹ Shore initially wanted Borns to recant his confession.⁴⁰ Borns said he could not remember what happened when the incident occurred.⁴¹ But he confessed when the police interrogated him.⁴² Borns told Shore, "I was all doped up."⁴³ I remember being at the gas station, but"⁴⁴ Then he said he confessed because the police "kept telling [him he] did it."⁴⁵ They told him "they had witnesses" and he concluded "I probably did it."⁴⁶ It was

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

apparent Borns was a religious man.⁴⁷ Shore tried to reach him, saying God “favors the side of truth.”⁴⁸ But Borns refused to recant.⁴⁹ And that is how the meeting ended.⁵⁰

At the hearing, Shore did nothing to call out the judges’ bias against him.⁵¹ Instead, he listed the numerous legal arguments supporting his motion.⁵² There were no Black jurors.⁵³ The grand jury was all White.⁵⁴ Borns’ trial lawyer provided ineffective counsel, having failed at the very least to raise several critical defenses and arguments.⁵⁵ DNA evidence showed someone else was at the scene of the crime.⁵⁶ And the confession was likely coerced.⁵⁷

The court shot down each of those arguments, primarily because the trial attorney waived them by not raising them at trial.⁵⁸ And it was clear the court intended to deny the motion to stay the execution.⁵⁹ At that point, one judge accused Shore of his own bias against the death penalty:

Mr. Shore you came down here from Massachusetts? . . . I’d like to propose that you got a problem with the death penalty in general. Now is that why you came here, sir?⁶⁰

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Like the Leopold and Loeb case, there is more than one way to present the Borns case to students. You can show the relevant sections from the video of the entire episode, *Boston Legal: Death be not Proud*, *supra* note 3, or you can tell the students what happens in the jailhouse scenes and just show them courtroom scenes. If you take the latter approach, there you could just use excerpts of the oral argument on YouTube. *Boston Legal -- The Death Penalty in Texas (Part 1 of 2)*, <https://www.youtube.com/watch?v=b9BIrzuNJgA> (last visited July 28, 2024), *Boston Legal -- The Death Penalty in Texas (Part 2 of 2)*, <https://www.youtube.com/watch?v=kNwqLbEC8UQ> (last visited July 28, 2024).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

Shore had no persuasive response to the judge's accusation.⁶¹ Instead, he accused the judges of being indifferent.⁶² He argued against the death penalty.⁶³ And he suggested there was "something wrong in the state of Texas" because the state executed a disproportionate number of criminals compared to every other state.⁶⁴ That strategy backfired.⁶⁵ The judges did not appreciate being lectured to by a Yankee.⁶⁶ One of them admonished him saying this:

I would urge you to confine your remarks to your client and not the good state of Texas.⁶⁷

Shore finished with a passionate argument supporting his position, but it fell on deaf ears.⁶⁸ It was obvious he was going to lose.⁶⁹ At the end, Shore meekly warned the court not to let their obvious bias affect the decision.⁷⁰

I would sincerely, sincerely, sincerely hope you don't penalize my client simply because his lawyers happen to be from Massachusetts.⁷¹

In the next scene, Shore met with Borns again in prison.⁷² He told Borns to "show people what it really feels like to be executed."⁷³ Borns responded, "that's because you are against the death penalty, right?"⁷⁴ And Shore said, "whether a person is for or against the death penalty, he or she should just know what it is."⁷⁵ And that was apparently enough to convince Borns to follow Shore's advice.⁷⁶ The final execution scene was graphic and disturbing to watch;⁷⁷ rather than show it, I just told the students what happened.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Boston Legal: Death be not Proud*, *supra* note 3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

After the video, I discussed with the class what they thought Shore did wrong and what he could have done differently. We started the discussion with the client conference at the prison. Shore seemed to have a good strategy. Recanting was consistent with Borns’ religious beliefs. But couldn’t Shore have pushed the issue further? Why did he not confront Borns with the fact that the confession was not true? Borns was “doped up” and could not remember what happened. His statement should have said that, not what the police told him.

In addition, was it a mistake to choose a Boston lawyer to represent Borns at the hearing? Would Borns have been better represented by a local attorney? Should Shore have called attention to the likely bias against him instead of ignoring it at the beginning? Should he have tried to find some common ground with the judges instead of attacking them? How could he have better responded to the judge’s accusation that he was only there because he had a problem with the death penalty? Is there any way he could have conceded his bias and still been able to persuade the judges to hold off on the execution?

Finally, should he have been so critical of the judicial system of the state of Texas? And how should he have ended his argument? Did he stop when he should have or did he keep talking when he should have sat down? Was his last statement about not penalizing his client because he was from Boston likely to be effective?

There was another issue lurking beneath the surface in the Borns case too: racism. Shore touched on the issue by indicating that, although his client was black, there wasn’t a single black person on the grand jury that indicted him. The trial jury that convicted him was all White. And the students could see in the video all the judges on the appellate panel were White. But Shore did not argue that Borns was a victim of racism. So, we talked about that issue as well.

For example, Shore quoted several statistics about the number of inmates put to death in Texas. A disproportionate number of those inmates were Black. Why didn’t he make that argument? From what the students could see in the video, was there any basis for alleging the justices were racist? What would such evidence even look like? Was there any evidence suggesting the lower court was biased against Borns because he was black? How would the judges likely have reacted if Shore claimed either they or the trial court judge were biased against Borns because of his race? What other tactics, direct or indirect, could Shore have used to raise the issue of race to the court?

The student response to these classes was enthusiastic. They enjoyed reading the transcript of Darrow’s argument, and the Boston legal episode was entertaining to watch. I think using those examples and starting with the broader topic of

affinity bias helped to frame the discussion so that the students would be comfortable participating in it. The discussion of bias in these classes, including racism in the criminal justice system, and litigation strategies for dealing with bias directed at lawyers or their clients, was positive and productive. I think those are important topics to include in a class on Persuasive Writing; and the idea of approaching those topics in this way proved to be a success.