

Click to print or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.law.com/newyorklawjournal/2019/01/25/jurors-and-implicit-bias/>

## Jurors and Implicit Bias

In their Burden of Proof column David Paul Horowitz and Lukas M. Horowitz write: The judicial system recognizes and addresses attorney bias in jury selection, bias of eyewitnesses when identifying people of other races in criminal trials, and the impact of implicit bias on attorneys and judges. However, one stakeholder in our judicial system does not receive guidance in implicit bias: jurors. Whether they should, or not, is this month's topic.

By **David Paul Horowitz and Lukas M. Horowitz** | January 25, 2019

Bias, of all kinds, is all over the news today, and as our broader society struggles to address bias, the judicial system has too. Steps have been taken to address, and attempt to eliminate, bias at different stages of litigation, by different participants, in both civil and criminal litigation.

The practice of some prosecutors to exclude jurors based on race led the

U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), to bar race-based peremptory jury challenges. The late Judge Sheila Abdus-Salaam noted in the New York Court of Appeals' decision in *People v. Bridgeforth*, 28 N.Y.3d 567, 571 (2016),



**David Paul Horowitz and Lukas M. Horowitz**

“[w]e recognize the existence of discrimination on the basis of one’s skin color, and acknowledge that under this State’s Constitution and Civil Rights Law, color is a classification upon which a *Batson* challenge may be lodged.” *Batson’s* holding has been expanded to bar exclusion based on “the basis of race, gender or any other status that implicates equal protection concerns.” *Id.*

*Batson* was decided 33 years ago, yet on Dec. 4, 2018, the New York Times carried an article (<https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html>) titled “Yes, Jury Selection Is as Racist as You Think. Now We Have Proof.” We have a long way to go, baby.

Just over a year ago the New York State Court of Appeals, in *People v. Boone*, 30 N.Y.3d 521 (2017), concluded there was “near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race,” increasing the risk of wrongful convictions. The solution? “[W]hen identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification.”

The existence of implicit bias and its potential impact on both attorneys and judges was deemed so important that New York state made instruction on implicit bias one of only two mandatory topics in continuing education training (the other being ethics).

So, the judicial system recognizes and addresses attorney bias in jury selection, bias of eyewitnesses when identifying people of other races in criminal trials, and the impact of implicit bias on attorneys and judges. However, one stakeholder in our judicial system does not receive guidance in implicit bias: jurors. Whether they should, or not, is this month’s topic.

## **What Is Implicit Bias?**

The concept of implicit bias has emerged as a topic of current mainstream discussion, leading to training throughout both public and private sectors targeting this bias and formulating methods to recognize and avoid the effects of this bias. Every day, our brains process tremendous amounts of information, and much of of this processing is done subconsciously. This system of processing is automatic. When we see a green light, we automatically know that green means go. Within this automatic processing system lies our implicit bias. Implicit bias consists of the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Operating outside of our conscious awareness, implicit biases are pervasive, challenging even the most well-intentioned and egalitarian-minded individuals, resulting in actions and outcomes that do not necessarily align with explicit intentions. Situations that invoke our subconscious processing system include those that involve ambiguous or incomplete information, the presence of time constraints, and circumstances which may compromise cognitive control such as fatigue. Situations in which implicit bias can influence actions and decisions are now all too well known.

We would like to believe we are immune from the effect of implicit bias. Various tests exist to demonstrate whether, and to what extent, a person is susceptible to the impact of implicit bias. The best known is an [online evaluation](https://implicit.harvard.edu/implicit/takeatest.html) (<https://implicit.harvard.edu/implicit/takeatest.html>) from Harvard's Project Implicit, that takes approximately 10 minutes to complete. We each took the test. More on Project Implicit later.

## **Current Protections Against Juror Bias**

In New York, the qualifications to serve as a juror are set forth in Judiciary Law §510, "Qualifications":

In order to qualify as a juror a person must:

1. Be a citizen of the United States, and a resident of the county.

2. Be not less than eighteen years of age.
3. Not have been convicted of a felony.
4. Be able to understand and communicate in the English language.

CPLR §4110, “Challenges for cause,” provides two grounds for disqualifying jurors: “Challenges to the favor” and “Disqualification of juror for relationship.” CPL 270.20(1), “Trial jury: challenge for cause of an individual juror,” provides, in part:

1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that:
  - (a) He does not have the qualifications required by the judiciary law; or
  - (b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial ...

PJI 1:9 instructs jurors to consider bias, just not their own: “There is no magical formula by which you evaluate testimony ... The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any ...” The same criteria appear in PJI 1:21 and 1:41, and PJI 1:27, “Exclude Sympathy,” delivers just that instruction.

Guidance for jurors regarding their own beliefs vis-à-vis reaching a verdict is limited to a general instruction in PJI 1:36:

A lawsuit is a civilized method of determining differences between people. It is basic to the administration of any system of justice that the decision on both the law and the facts be made fairly and honestly. You as the jurors and I as the court have a heavy responsibility—to assure that a just result is reached in deciding the differences between the plaintiff(s) and the defendant(s) in this case.

The most critical task of an attorney during jury selection is to identify and exclude those potential jurors who have a bias potentially harmful to the client's interests. Yet this is no simple task, and any attorney who has picked a jury knows that the least illuminating question that can be asked of a potential juror is along the lines of, "sir/ma'am, can you be a fair and impartial juror?" The most biased person in the world, asked this question in front of a panel of prospective jurors, is likely to affirm their impartiality. Subtle questioning can often elicit answers suggesting bias, and follow-up questioning outside the presence of the panel can sometimes lead to the juror talking themselves off the jury. However, this is, at best, an imperfect system for ferreting out juror bias.

## **A Proposed Model Charge**

The U.S. District Court for the Western District of Washington created "[a bench-bar-academic committee](#)

(<https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf>) to explore the issue [of implicit bias] in the context of the jury system and to develop and offer tools to address it."

One tool created by the Committee is a [video](#)

(<https://www.wawd.uscourts.gov/jury/unconscious-bias>) shown to prospective jurors discussing unconscious bias. The second tool are model charges for use in criminal actions. The court website explains that "[t]he video and jury instructions on this page were created by a committee of judges and attorneys and will be presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias."

The charges formulated by the Committee incorporate unconscious bias language into preliminary, witness credibility, and closing instructions, as well as an instruction to be given prior to jury selection if voir dire will include questions about bias, including unconscious bias.

The charge before openings, "DUTY OF JURY," instructs jurors, in part:

You must decide the case solely on the evidence and law before you and must not be influenced by any personal likes or dislikes, opinions, prejudice, sympathy, or bias, including unconscious bias. Unconscious bias are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

The charge for evaluating witness credibility admonishes jurors: “You must avoid bias, conscious or unconscious, based on the witness’s race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.” The closing instruction repeats the language in the charge given before openings.

## **Conclusion**

The problem is real, a tool to help ameliorate the problem is available, and as one person involved in the Washington study explained, “[w]hen people ask if it works, I can say without question that it works better than saying nothing.” Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, American Educator, Vol. 39, pp 29-33, at 29-30, (2016).

None of us wants to admit we possess implicit bias, or that implicit bias may influence our decision making. But they exist, and based upon our experience with Project Implicit, if called to serve as jurors, at least one of us could benefit from a charge on implicit bias.

**David Paul Horowitz** *is a member of McNamara & Horowitz in New York City, Lecturer at Law at Columbia Law School, and serves as a legal malpractice expert, private arbitrator, mediator, and discovery referee. He can be reached at david@newyorkpractice.org.* **Lukas M. Horowitz** *is a member of the Albany Law School Class of 2019.*

