

**New York State Judicial Institute  
NYS Citywide Association of Law Assistants**

**Bias in the Courtroom**

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Presented by

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# Implicit Bias Sources

## Cases

*Batson v. Kentucky*, 476 U.S. 79 (1986)

*People v. Boone*, 30 N.Y.3d 521 (2017)

*People v. Bridgeforth*, 28 N.Y.3d 567, 571 (2016)

## Statutes

CPLR §4110. Trial jury: challenge for cause of an individual juror

## Other Legal Resources

NYPJI 1:9

NYPJI 1:36

U.S.D.C. Western, District of Washington Model Charge:

<https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf>

The Washington Court Video:

<https://www.wawd.uscourts.gov/jury/unconscious-bias>

## Articles & Studies

Marianne Bertrand Sendhil Mullainathan, ARE EMILY AND GREG MORE EMPLOYABLE THAN LAKISHA AND JAMAL?, Working Paper 9873 <http://www.nber.org/papers/w9873>, NATIONAL BUREAU OF ECONOMIC RESEARCH, 1050 Massachusetts Avenue, Cambridge, MA 02138, July 2003

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John Eligon, The ‘Some of My Best Friends Are Black’ Defense, The New York Times, February 16, 2019

Kirwan Institute For The Study Of Race And Ethnicity (The Ohio State University):

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*The Stanford Encyclopedia of Philosophy*

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Ronald Wright, Professor of Law at Wake Forest University, Yes, Jury Selection Is as Racist as You Think. Now We Have Proof, The New York Times, December 4, 2018

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## **Jurors and Implicit Bias**

by David Paul Horowitz and Lukas M. Horowitz

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## 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), "[w]e



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

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 \(https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html\)](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 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 asks 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.

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NEWS

# A Federal Court Asks Jurors to Confront Their Hidden Biases

But is a novel video tutorial the best way? The jury is still out.

By MARELLA GAYLA

There's something of a formula to the first morning of jury duty. It might involve a refresher on differences between civil and criminal cases, a little bit of shuffling between rooms, and a lot of waiting around in a generously named "Jury Lounge." But in one federal district, the customary civics lessons for jurors have been given a twist to alert them to the hidden biases they might bring into the courtroom.

The source is an [11-minute video](#) — believed to be the first of its kind — that since March has been shown to every prospective juror in the two federal courthouses, in Seattle and Tacoma, that serve the U.S. District Court for the Western District of Washington.

U.S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

The video — which cost the court \$15,000 to make — complements the customary voir dire process, during which judges and lawyers question potential jurors about conflicts of interest and obvious prejudices that could prevent them from deliberating fairly. It features three speakers: the district's U.S. Attorney Annette Hayes, Reagan-appointed Judge John Coughenour, and Jeffery Robinson, deputy legal director of the American Civil Liberties Union who started his career as a criminal defense lawyer.

“You might have a deep-seated belief that basketball is a better sport than football, and you may prefer strawberry to raspberry jam,” Robinson says in the video, describing examples of conscious — or explicit — bias. “Today, though,” he says, speaking slowly and looking directly into the camera, “I want to talk to you about unconscious bias: something we all have, simply because we're human.”

Robinson, who spearheaded the project, said that alerting jurors to their underlying prejudices was a “no-brainer,” citing decades of research on the role of unconscious racial biases in “every aspect of American society,” from hiring practices to policing. “You have two choices: either talk about it or don't talk about it, and haven't we seen what happens when we don't talk about it?” said Robinson. “If it goes unchecked, implicit bias will run rampant.”

Though no particular case in his decades-long career incited his passion for the issue, Robinson said he has seen many jurors who “trust police officers implicitly” and hopes that those who do may reconsider their assumptions.

“If you're a white person and the only time you see a police officer is when he helps you with a flat tire or responds when someone steals your stereo, you have one view of the police,” Robinson said. Jurors who are distrustful of the police, he said, might be dismissed for being unfair. “Why would trusting the police make you more fair in a criminal case?”

Seattle-area lawyers and judges have generally praised the video tutorial, but its use remains at the

discretion of trial judges, according to the court clerk, William McCool. And this week, for what is believed to be the first time since the video became part of the routine, it was barred by a judge in the case of Leonard Thomas, a black man who was shot and killed by a police SWAT team after a standoff at his home four years ago.

The judge, Barbara Rothstein, ruled on Tuesday that the video would be “simply too prejudicial,” especially because the plaintiffs intended to argue that the officers were affected by racial bias when they shot Thomas. Objections to the video had been raised by the officers’ legal team in the wrongful death civil lawsuit.

Brian Augenthaler, a lawyer for the officers, argued that watching the video could lead jurors to believe that his clients shot Thomas because of an unconscious bias against black people. This was especially so, he asserted, because Robinson is a well-known civil rights attorney who had once served on the ACLU’s board of directors with one of the plaintiffs’ lawyers.

Although the video has been well-received, its effectiveness has yet to be evaluated. The body of research on implicit bias has expanded greatly in the last three decades, but there seems to be little consensus about ways to curb discriminatory behavior.

Patricia Devine, a social psychologist at the University of Wisconsin-Madison, is an expert in the study of racial bias and the unconscious effect of stereotypes. She said the court’s method of “tuning jurors into their biases” is a generally sound approach, though it’s hard to predict how well it will work without some experimental testing. “They’re giving them generally good advice,” Devine said. “But they’re not doing research.”

Although few scholars reject the concept of implicit bias, some are less confident about controlling discriminatory behavior. Calvin Lai, a postdoctoral fellow at Harvard’s Project Implicit lab, has studied hundreds of bias-reduction techniques and has found that most of them were unlikely to cause lasting shifts in behavior. Getting people to “self-regulate” their prejudices, he said, is difficult.

“Simply understanding that your biases exist doesn’t necessarily mean you’re going to stop yourself from acting on them in the moment,” Lai said. “I might know in some abstract way that eating cheeseburgers is bad for my health, but in the moment, I’m not thinking about that. I just

want to eat my cheeseburger.”

The Washington federal court’s project is part of a broader effort to minimize the expression of unconscious bias in the courtroom. The American Bar Association, for example, posted guidelines for creating an impartial jury [on its website](#), complete with recommended orientation materials and examples of jury instructions that directly address the issue of implicit bias.

In the UCLA Law Review, Jerry Kang, a law professor who is the school’s vice chancellor for equity, diversity and inclusion, and some of his colleagues wrote that implicit bias education was likely to do more good than harm, and that such strategies are worth a try, even if there is little scholarship on their effectiveness in practice.

Robinson, who helped initiate the Washington program, says he’s confident that it’s a step in the right direction. “When people ask if it works, I can say without question that it works better than saying nothing.”

*Correction: An earlier version of this article incorrectly spelled the first name of Jeffery Robinson. |||*

The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.

One tool the committee developed was a set of jury instructions that address the issue of unconscious bias. Research regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good.<sup>1</sup> However, the body of research supports that, as a general matter, awareness and mindfulness about one's own unconscious associations are important and thus a decision-maker's ability to avoid these associations, however that is achieved, will likely result in fairer decisions.<sup>2</sup>

Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The committee has incorporated unconscious bias language into a preliminary instruction, into the witness credibility instruction, and into a closing instruction.<sup>3</sup> In addition, the committee has developed an instruction that can be given before jury selection if the parties are going to ask questions during *voir dire* regarding bias, including unconscious bias.

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<sup>1</sup> See, e.g., Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Jennifer K. Elek & Paula Hannaford-Agor, First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 CT. REV. 190, 193-195, 198 (2013), available at <http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf>; Jennifer A. Richeson & J. Nicole Shelton, Negotiating Interracial Interactions: Costs, Consequences, and Possibilities, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction, NAT'L CENTER FOR STATE CTS. (Apr. 2014), available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273> (finding "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention.").

<sup>2</sup> See Adam Benforado & John Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311, 325-26 (2007).

<sup>3</sup> The committee suggests introducing the topic as part of the preliminary instructions as there is research that suggests priming jurors may be more effective than waiting until the end of a case. See, e.g., Lisa Kern Griffin, Narrative, Truth, and Trial, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

**PRELIMINARY INSTRUCTION TO BE GIVEN  
TO THE ENTIRE PANEL BEFORE JURY SELECTION**

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

**PRELIMINARY INSTRUCTIONS TO BE GIVEN  
BEFORE OPENING STATEMENTS**

**DUTY OF JURY**

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.<sup>1</sup> Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.<sup>2</sup>

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

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<sup>1</sup> Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

<sup>2</sup> <http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf>

## **CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

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 weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

**INSTRUCTION TO BE GIVEN  
DURING CLOSING INSTRUCTIONS  
(perhaps before 7.5 – Verdict Form)**

**DUTY OF JURY**

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.<sup>1</sup> Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.<sup>2</sup>

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<sup>2</sup> <http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf>