



# 2023 Hospitality & Retail Practice Group Seminar

## January 25-27, 2023

### Who Can It Be Now?

*Deciphering the Mystery of Unconscious Bias in Your Jury*

Catherine Jackson

*Moderator*

GENTRY LOCKE

Roanoke, Virginia

[Huff@gentrylocke.com](mailto:Huff@gentrylocke.com)

Chris Page

YOUNG MOORE AND HENDERSON P.A.

Raleigh, North Carolina

[Chris.Page@youngmoorelaw.com](mailto:Chris.Page@youngmoorelaw.com)

Tim Peebles

DANIEL COKER HORTON & BELL, P.A.

Oxford, Mississippi

[tpeebles@danielcoker.com](mailto:tpeebles@danielcoker.com)

## Who Can It Be Now? Deciphering the Mystery of Unconscious Bias in Your Jury

### What is “implicit” or “unconscious” bias?

Implicit bias is a preference, whether positive or negative, for a group based upon a stereotype or attitude we hold that operates outside of human awareness. It can be understood as a lens through which someone view the world that automatically filters how a person takes in and responds to information.<sup>i</sup> In society, we all have attitudes toward people, things, and situations that stem from implicit bias without our realizing a bias exists. Unchecked implicit bias in a jury trial setting can have a negative impact in deliberations and ultimately result in a judgment against your client.

A 2020 survey conducted by scientists with New York University, University of Denver, and Harvard University interviewed men and women from 78 countries, as well as American boys and girls ages 9-10 to discover whether they had hidden biases.<sup>ii</sup> The study revealed that men are more likely than women to be seen as “brilliant.”<sup>iii</sup> Interestingly, however, these were automatic associations and contradicted what the study participants reported when asked directly how they felt.<sup>iv</sup>

Implicit bias is often difficult to study. As the above study found, people are reluctant to admit that they have implicit bias or that they are prone to stereotyping. Therefore, the researchers used a test to indirectly measure stereotyping by using the Implicit Association Test (IAT).<sup>v</sup> This test is a well-known speed sorting task where participants are asked to quickly sort items into categories using the E or I keys on their keyboard.<sup>vi</sup> For example, participants may be asked to press “E” if the word or photograph pictured was related to the category “male” or “brilliant.” Then, the categories would switch and participants would be asked to press “I” for words related to the category “female” or “brilliant.”<sup>vii</sup>

The researchers explain the logic like this: if “brilliant” is more associated with “male” than “female” in someone’s mind, they would be faster to sort those things together than if they were actively trying to sort “female” with “brilliant.”<sup>viii</sup> This study is but one example of research that shows how our implicit biases are truly unconscious.

### *Implicit Bias Myths - Busted*

The Kirwan Institute for the Study of Race and Ethnicity analyzed some of the most commonly believed myths about implicit bias and the results showed that perhaps there are even some biases or stereotypes about bias itself.<sup>ix</sup> Some of the myths “busted” included:

- Myth: implicit bias is nothing more than beliefs people choose not to tell others. Reality: implicit biases are activated involuntarily and not something that someone can intentionally control.<sup>x</sup>
- Myth: having an implicit bias makes someone a “bad person.” Reality: implicit bias is a naturally occurring phenomenon in the brain. However, with knowledge, awareness, and proper tools, its effect can be mitigated.<sup>xi</sup>
- Myth: Someone who believes they are fully aware of their thoughts and actions and are well-informed about diversity and inclusion is not affected by implicit bias. Reality: implicit associations can more accurately predict behavior than explicit beliefs and thoughts.<sup>xii</sup> Many people who believe that they are unbiased harbor implicit biases that may be surprising to them.
- Myth: Racial minorities do not have bias against racial minorities. Similarly, women do not have implicit bias about other women. Reality: implicit biases affect everyone – even someone in the same category.<sup>xiii</sup>

## Who Can It Be Now? Deciphering the Mystery of Unconscious Bias in Your Jury



- Myth: if a bias is implicit, there is nothing that can be done about it because it is part of the subconscious. Reality: research has demonstrated that various intervention strategies can help mitigate the effects of unconscious bias.<sup>xiv</sup>

### *Where do we get our own implicit biases?*

Implicit bias can be shaped at any age and can continue to be formed and reaffirmed throughout all stages of life. Our families, friends, peers, school, media (social media), experiences, positive/negative associations with interactions can all form both conscious and unconscious biases.

The people, places, and experiences that shape our lives do not always result in *negative* implicit biases. Favorable biases exist as well. For example, as a child someone may have had a babysitter with red hair and have happy memories about the babysitter. As an adult, the person may be more inclined to feel favorably about someone with red hair – whether in the workplace, socially, or in conducting business. This is not a negative implicit bias. Rather, this is a predisposition to feel favorably about a trait as a result of positive experiences in one’s life.

These experiences and interactions lead individuals to make immediate assessments when they see someone for the first time, right or wrong.

### Implicit Bias in Jury Selection

Litigators begin each jury trial with the task of having to quickly and efficiently determine which individuals in a group of people they have never met are best suited to deciding the fate of their client. The Sixth Amendment to the United States Constitution states, in pertinent part, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”<sup>xv</sup> The U.S. Supreme Court has held that the right to a jury trial provides a defendant “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>xvi</sup> Additionally, in *Taylor v. Louisiana*, the Supreme Court held that the right to an impartial jury requires a jury that is selected from a jury pool that represents a fair cross-section of the community.<sup>xvii</sup> Furthermore, the Sixth Amendment requires that courts allow defendants to exercise unlimited “for cause” challenges to biased prospective jurors, including racist prospective jurors, to safeguard the right to an impartial jury.<sup>xviii</sup> While the Sixth Amendment deals with bias in *criminal* cases, the principles and protections are important in civil trials as well.

For example, in the recent California case of *People v. Silas*, the prosecutor and lower court judge believed that the Black Lives Matter movement was violent and “lawless” and struck a juror who was associated with the movement.<sup>xix</sup> There, the prosecutor claimed that she moved to strike the potential juror because she was “openly hostile” when questioned about Black Lives Matter, and refused to admit that certain people in the movement destroyed property or had a negative view of law enforcement.<sup>xx</sup> The appellate court, however, disagreed and found that the juror should not have been removed on the basis that she supported the Black Lives Matter movement, stating that the reasons for striking the juror were “plainly tied to race.”<sup>xxi</sup> California modified its jury selection framework in 2020, though the legislation applied to trials beginning after January 1, 2022.<sup>xxii</sup> The new rules specify that judges should consider implicit and institutional biases in jury selection and include an explicit legal presumption that certain explanations for challenges are invalid, i.e. expressing distrust of law enforcement or having a negative experience with the legal system.<sup>xxiii</sup>

### Implicit vs. Explicit Bias in Jury Selection

As Dr. Melissa Loberg of Courtroom Sciences, Inc. wrote, “[e]xplicit bias in jury selection is helpful because the trial attorney can easily identify jurors who hold explicit bias against her client and can make a challenge for cause

## Who Can It Be Now? Deciphering the Mystery of Unconscious Bias in Your Jury

which would most likely be successful.”<sup>xxiv</sup> Identifying implicit bias in jurors can be more difficult but is imperative in determining whether jurors can be fair to your client.

Juror demographics including age, gender, socio-economic status and educational background can be helpful to an attorney who has limited time to conduct *voir dire*.<sup>xxv</sup> Studies have shown that certain demographic correlations indicate that individuals may hold racial bias – older jurors, those of lower education, and republicans/political conservatives often fall within this category.<sup>xxvi</sup> However, these categories do not *always* show racial bias and it is important to vet jurors individually to determine their leanings.

The best approach to do this is to use multiple methods to identify implicit bias among jurors (questionnaires, verbal questions, background and social media searching).<sup>xxvii</sup> Dr. Loberg’s article is attached hereto and provides additional insight into types of juror personality and behavior that may reveal implicit bias or the willingness of a juror to stereotype.

### Combatting Anti-Corporate Bias by Jurors

Bias is often discussed in the realm of race, gender, age, etc. But what happens when your client is a “faceless” corporation? The public often sees corporations as associated with greed and makes them want to root for an underdog – even when the facts and law are on the company’s side.<sup>xxviii</sup> Despite a legal basis for treating a corporation as a “person,” research shows that jurors hold people and companies to different standards.<sup>xxix</sup>

Jurors enter the courtroom with unconscious bias and look for information that will confirm their belief – i.e. a “confirmation bias.” A juror’s first impression is important as it can be the single factor that causes a juror to decide for or against a party, regardless of the facts or law of the case. In front of a jury, the key to humanizing a corporation is showing a jury that the company shares the same values that they do.<sup>xxx</sup> The company must show that they take the matter seriously, which often starts with being a corporation that people desire to do business with, like and trust, and who shows authenticity and reliability.<sup>xxxi</sup> During trial, selection of a corporate representative that embodies these values and is likeable to a jury is a must. These witnesses allow jurors to connect with them and the company they represent, which can affect a juror’s otherwise biased opinion.<sup>xxxii</sup>

### Combatting Implicit Bias in Jurors - Takeaways

The science of identifying and combatting implicit bias is ever evolving. However, Dr. Loberg offers some helpful takeaways to address juror implicit bias:

- Jury selection is challenging, but extremely important and attorneys should not wait until the last minute to plan.
- Learn about your judge’s process for jury selection ahead of time so you can prepare your strategy accordingly. Will he/she provide an implicit bias instruction to jurors? Are you allowed to administer juror questionnaires? How long will you have for *voir dire*?
- Use science rather than intuition to increase your accuracy in jury selection.
- Do not focus on one data point.<sup>xxxiii</sup>

The key is to know that implicit bias exists in everyone – jurors, lawyers, judges and courtroom staff. Awareness can go a long way in successfully identifying jurors who will favor a particular party to your advantage.

---

<sup>i</sup> Lauren N. Nile, *Developing Diversity Training for the Workplace: A Guide for Trainers 5-17*, NMCI Publications (9th ed. 2008),

quoted in American Bar Association, Criminal Justice Section et al., Building Community Trust: Improving Cross-cultural Communication in the Criminal Justice System [hereinafter “Building Trust”], Unit 2, <https://www.sbnm.org/Portals/NMBAR/docs/Committees/Diversity/ABABuildingCommunityTrust.pdf?ver=EWkfcsUGK00fcc eFWoq39w%3D%3D>.

<sup>ii</sup> New York University. (2020, July 2). Implicit bias against women: Men more likely than women to be seen as brilliant: New global study finds an unconscious stereotype linked to gender. *ScienceDaily*. [www.sciencedaily.com/releases/2020/07/200702100533.htm](http://www.sciencedaily.com/releases/2020/07/200702100533.htm).

<sup>iii</sup> *Id.*

<sup>iv</sup> *Id.*

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.*

<sup>viii</sup> *Id.*

<sup>ix</sup> The Kirwan Institute at Ohio State University, Mythbusters implicit bias edition: clearing up the confusion surrounding implicit bias. <http://kirwaninstitute.osu.edu/implicit-bias-training/resources/mythbusters.pdf>

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.*

<sup>xii</sup> *Id.*

<sup>xiii</sup> *Id.*

<sup>xiv</sup> *Id.*

<sup>xv</sup> U.S. CONST. amend. VI.

<sup>xvi</sup> Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 Am. Crim. L. Rev. 349, 354 (2022), citing *Duncan v. Louisiana*, 319 U.S. 145, 156 (1968).

<sup>xvii</sup> *Id.*, citing *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

<sup>xviii</sup> *Id.* See, e.g., *State v. Urrea*, 421 P.3d 153, 155 (Ariz. 2018) (interpreting *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000)) (noting that “for cause” challenges, unlike peremptory challenges, have a “constitutional dimension”).

<sup>xix</sup> Hassan Kanu, Court recognizes implicit bias in nixing juror for supporting Black Lives Matter, September 22, 2021; [reuters.com](http://reuters.com).

<sup>xx</sup> *Id.*

<sup>xxi</sup> *Id.*

<sup>xxii</sup> *Id.*

<sup>xxiii</sup> *Id.*

<sup>xxiv</sup> Melissa Loberg, Ph.D. Jury Selection Post 9-11: Uncovering Bias against Arabs and Muslims. Spring 2018. Voir Dire: A Publication of the American Board of Trial Advocates.” The authors of this paper would like to sincerely thank Melissa Loberg, Ph.D. a Litigation Consultant at Courtroom Sciences, Inc. Dr. Loberg has conducted extensive research, taught, and published articles regarding psychology and the law. Dr. Loberg provided significant resources for the creation of this paper and presentation.

<sup>xxv</sup> *Id.*

<sup>xxvi</sup> *Id.*

<sup>xxvii</sup> *Id.*

<sup>xxviii</sup> Destiney J. Johnson. How to Avoid Anti-Corporate Bias by Jurors. August 23, 2022. Last Accessed on 1/12/2023 at <https://talglaw.com/anti-corporate-bias-jurors/>.

<sup>xxix</sup> *Id.*

<sup>xxx</sup> *Id.*

<sup>xxxi</sup> *Id.*

<sup>xxxii</sup> *Id.*

<sup>xxxiii</sup> Loberg, Melissa. Uncovering *Hidden* Bias: Jury Selection in a Country with Changing Demographics. PowerPoint Presentation.