

Tools To Reduce Implicit Bias in Modern Juries

By **Bonnie Lau, Arturo Gonzalez and Morgan Mitruka** (April 25, 2023)

The U.S. is becoming increasingly diverse. In almost every jurisdiction, juries also are becoming increasingly diverse.

Does this mean that juries are now more fair, or free of bias?

This article examines implicit bias in jury selection and within juries. It concludes that all jurors — even jurors of color — may enter the courtroom with biases.

Judges and lawyers must be aware of these biases and address them either through jury instruction, challenges for cause, or — if a verdict has possibly been tainted with bias — a new trial.

Prosecutor's Activation of Jury's Implicit Bias Causes Washington Supreme Court to Vacate Conviction

In January, the Washington Supreme Court in *State v. Bagby* vacated a Black defendant's conviction based on its finding that the prosecutor had improperly appealed to jurors' racial bias by continuously referring to defendant Tyler Bagby's nationality, despite him being an American citizen, and evoking harmful racial tropes.[1]

The court concluded:

Here, when the prosecutor continuously referred to Bagby's nationality, ethnicity, and race, it primed the all-white jury to pay more attention to this racial difference, thereby activating any anti-Black implicit biases they may hold.[2]

The court held that this othering of the defendant denied him a fair trial.[3]

This was not the first time the Washington Supreme Court recognized and acted to combat the pervasive effects of implicit bias in the legal system. In 2018, it became the first in the nation to adopt an "objective observer" test to reduce racial bias in who is selected or rejected for jury duty.[4]

The test defines an objective observer as one who is aware "that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." [5] For example, the Bagby court asked

whether an objective observer could view the prosecutor's questions and comments as an appeal to jurors' potential prejudice, bias, or stereotypes in a manner that undermined the defendant's credibility or the presumption of innocence.

The court has since required the test be used to address bias at different stages of civil and criminal cases.[6]



Bonnie Lau



Arturo Gonzalez



Morgan Mitruka

These examples highlight the critical need to address how the subconscious may present one of the most significant barriers to achieving the impartial jury promised by the American justice system.

To make good on that promise, the legal industry must acknowledge the existence of implicit bias in jurors and implement ways to combat it.

Benefits of Diverse Juries

The United States population is more diverse than ever.[7] For the first time since 1790, the 2020 census reported that the nation's white population has declined.[8] Latinos have made the largest contributions to population growth, followed by Asian Americans and persons identifying as two or more races. [9]

The Pew Research Center has projected that Asians will become the largest immigrant group in the United States, surpassing Latinos, by 2055.[10]

As the number of people with different racial and ethnic backgrounds increase, the legal system is seeing a much-needed increase in diversity of attorneys, clients, judges, witnesses and jurors. Some clients are demanding diversity on their jury trial teams.

By now, the benefits of diversity and nonhomogeneity in the workplace, at school, on company boards and in political leadership are largely understood.[11] Diversity of individuals helps cultivate diversity of thoughts, ideas and solutions to problems.

The legal system, however, is still working to select jury pools that reflect their diverse communities and counties.[12]

The facts are undeniable: diverse juries matter. They review evidence from different perspectives and engage in a more detailed discussion of the evidence presented. One study found that on average,

members of diverse juries were nearly 10% less likely to presume the defendant's guilt than members of all-white juries [and] deliberated 11 minutes longer, discussed more facts about the case and made fewer factual errors than all-white juries.[13]

These differences are not solely attributed to the behavior of jurors from diverse backgrounds. When a jury is more diverse, white jurors act differently, too.[14]

The same study found that when working in a diverse group, white jurors evaluated evidence more carefully, exchanged more information and considered a broader range of facts before coming to a decision than when they were in an all-white group.[15]

On a wider scale, homogeneous or nonrepresentative juries weaken the perception of fairness and legitimacy of the legal system, particularly among members of minority racial and ethnic groups.

Diverse juries, on the other hand, boost confidence in the impartiality of the legal system and jury verdicts.[16]

What Implicit Bias Is and Why It Matters in the Context of Juries

Achieving an impartial jury is not as simple as selecting more diverse jurors during voir dire.

Jurors of all backgrounds are affected by implicit bias, which, when left unaddressed, can reinforce existing harmful stereotypes. Accordingly, proactive mitigation efforts are needed.[17]

The National Institutes of Health defines implicit bias as "a form of bias that occurs automatically and unintentionally, that nevertheless affects judgments, decisions, and behaviors." [18]

Unlike conscious discrimination, people are often unaware of their implicit biases and how they affect their behavior.[19] One might express a sincerely held belief that all people should be treated equally regardless of race, but nonetheless exhibit an implicit preference for individuals of one race over another.[20]

Take, for example, the COVID-19 pandemic and the resulting increase in anti-Asian bias and mistreatment of Asian Americans in the U.S.

The 2022 STAATUS Index, which annually assesses attitudes and stereotypes about Asian Americans in the U.S., surveyed 5,113 respondents on race relations in the country and found that about 30% of Americans are unaware of increased attacks on Asian Americans or instead believe they have decreased, and only 56% of Americans believe that Asian Americans are being discriminated against.[21]

Yet anti-Asian hate crimes increased 339% in 2021 compared to 2020, and 1 in 6 Asian American adults experienced a hate crime or hate incident in 2021, up from 1 in 8 in 2020.[22]

This surge in anti-Asian bias during the pandemic has become so pronounced that another survey showed that Asian Americans "are more worried about the possibility of being a victim of pandemic-related racism than the virus itself." [23] In addition to increased violence, STAATUS also found an increase in bias: "Compared to 2021, Americans in 2022 are more likely to question the loyalty of Asian Americans" and blame them for COVID-19, exacerbating stereotype of Asian Americans as perpetual foreigners.[24]

Judges and jurors, while sworn to impartiality, are not immune to implicit biases. One 2009 survey found that 97% of a group of 36 judges believed they were in the top quartile in their ability to avoid racial prejudice when making decisions, which the researchers note suggests that judges "might be overconfident about their abilities to control their own biases." [25]

Other research indicates that bias exists outside of jurors' awareness. Because jurors may "want to promote the veneer of impartiality," they may be unable to admit how bias affects their legal judgments.[26] Crucially, "when people feel that they are objective, rational actors, they act on their group-based biases more rather than less," often believing that their thoughts and beliefs objectively reflect reality.[27]

One area of historical bias has involved large corporations. Many jurors have an implicit — or explicit — bias against big companies.[28]

Another area of bias involves law enforcement. Jurors historically tended to side with law enforcement when there is a factual dispute between a police officer and a suspect.[29] Due to more recent high-profile police shootings, this sentiment has started to shift: A substantial number of jurors are now suspicious of law enforcement.[30][31]

Regardless, judges and lawyers have to make their best efforts to identify and excuse jurors who have implicit or explicit biases to ensure a fair trial.

Combating Implicit Bias in Juries

To combat implicit bias, courts must first cultivate awareness of it.

Additionally, judicial intervention is necessary to signal to potential jurors and the public the judiciary's belief in the importance of addressing implicit bias. This can be done by using questionnaires during jury selection, evaluating implicit bias during voir dire and providing jury instructions on implicit bias.

Questionnaires

Because implicit biases are, by definition, subconscious, written questionnaires offer a private way to bring these biases to the conscious attention of the prospective juror. This can improve the ability of those who are selected to combat their own implicit biases in their deliberations.[32]

Questionnaires may also enable jurors to be more candid in their response, thus allowing attorneys and judges to exclude potential jurors whose biases might interfere with their ability to deliberate impartially.[33]

Examples questions include:

- Do you find people who do not speak English to be more or less credible than people who do speak English?
- Do you find people who speak with a foreign accent to be more or less credible than people who speak with an American accent?
- Do you have strong feelings, positive or negative, about people who do not speak English? (or alternatively, insert race or ethnicity as relevant to your case)
- In general, would you trust the testimony of a witness from China as much as the testimony of a witness from the United States?

Questionnaires can also be more open-ended, such as asking whether the juror strongly agrees, agrees, neither agrees nor disagrees, disagrees, or strongly disagrees with a statement, or asking the juror to rank the credibility of a witness who does not speak English on a scale of 1-10.[34] Jurors may reveal more about their implicit biases when allowed to answer on a sliding scale rather than providing a simplistic yes or no response.

Voir Dire

Voir dire provides a unique opportunity for judges and attorneys to question potential jurors about their implicit biases.[35] During voir dire, attorneys and judges should follow up with jurors individually about their questionnaire or oral responses and, per the American Bar Association,

discover, with the prospective juror, what life experiences and attitudes, if any, may implicitly affect how that juror might view the evidence and the law in the case.[36]

Questions that are overtly directed at detecting prejudice may sometimes fail to pick up on a juror's implicit biases, so it may be more helpful to ask questions targeted at a juror's personality, attitude and behaviors.[37] Questions assessing a juror's openness to experience, agreeableness and social tendencies, for example, may provide additional context to a juror's background and potential biases.[38]

While revealing explicit bias during voir dire can, of course, be challenging, given the social pressure potential jurors face when being questioned in a courtroom surrounded by their peers, asking open-ended questions and being mindful of nonverbal as well as verbal responses can help uncover hidden biases in jurors.[39]

Many judges also bring prospective jurors to sidebar or the court's chambers to follow up on certain voir dire responses and encourage candor. The American Bar Association has a list of recommended questions with this very goal, which includes suggestions like:

- "Where did you grow up? What was it like growing up there?"
- "What (other) experience have you had with persons of different races/ethnicities, with disabilities (mental or physical) or other groups (as may be appropriate to the case)?"
- "What, if anything, do you know about implicit or unconscious bias?"[40]

Jury Instructions

Jury instructions provide a further opportunity for the court to address implicit bias in the jury deliberation process. Fairness or implicit bias instructions are now proposed in some states' model jury instructions and codes of civil procedure.[41]

As the American Bar Association notes, jury instructions should "make jurors aware of the possible influence of implicit, unconscious associations," and caution them to decide a case on the evidence presented, not on biases.[42]

Jury instructions, such as the following drafted and used by retired Judge Mark Bennett of the U.S. District Court for the Northern District of Iowa, provide helpful guidance:

Do not decide the case based on "implicit biases." As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of... . Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases.[43]

An Imperative Need to Combat Implicit Bias in the Legal System

Implicit bias in jurors can be significantly harder to detect than overt or explicit biases. But because the "ability of the decision maker to de-categorize and steer clear of group

stereotypes and associations, however it is achieved, will likely make for a more fair decision," it is imperative for the judicial system to address and find ways to combat the influence of implicit bias in jury decisions.[44]

The first step is to acknowledge that it exists.

Bonnie Lau is a partner and co-head of the San Francisco litigation department at Morrison Foerster LLP.

Arturo Gonzalez is a partner and co-head of the commercial litigation and trial practice at the firm.

Morgan O'Neill Mitruka is an associate at the firm.

JuryScope president Johanna Hillard and MoFo associate Camila Tapernoux contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Prosecutors asked about a Black man's 'nationality.' WA Supreme Court says it showed racial bias | The Seattle Times.

[2] State v. Bagby, 522 P.3d 982, 993 (Wash. 2023).

[3] Prosecutors asked about a Black man's 'nationality.' WA Supreme Court says it showed racial bias | The Seattle Times.

[4] See Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection | American Civil Liberties Union (aclu.org); see also Wash. Gen. R. 37(e); State v. Jefferson, 192 Wash.2d 225, 249-50, 429 P.3d 467 (2018) (plurality opinion) ("In order to meet the goals of Batson, we must modify the current test. ... [T]he relevant question is whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.' If so, then the peremptory strike shall be denied.").

[5] State v. Berhe, 193 Wash.2d 647, 665, 444 P.3d 1172 (2022).

[6] See, e.g., Henderson v. Thompson, 200 Wash.2d 417, 446, 518 P.3d 1011 (2022) ("When a new trial is sought on the ground that racial bias affected the verdict, the facts must be viewed through the lens of an objective observer who is aware 'that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State.'") (quoting State v. Berhe, 193 Wash.2d 647, 665, 444 P.3d 1172 (2022)). See also State v. Sum, 199 Wash.2d 627, 631, 647, 650, 511 P.3d 92 (2022) (holding that because "law enforcement officers are [not] immune from ... unexpressed racial and ethnic biases" and "it is well known that BIPOC are wrongfully subject to excessive police scrutiny," "a person is seized for the purposes of article I, section 7 if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement's display of authority or use of physical force"); State v.

Berhe, 193 Wash.2d 647, 664, 444 P3d 1172 (2019) ("The ultimate question for the court [when it is alleged that implicit racial bias was a factor in the jury's verdict] is whether an objective observer ... could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.").

[7] See 2020 U.S. Population More Racially, Ethnically Diverse Than in 2010 (census.gov).

[8] New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations (brookings.edu).

[9] Id.

[10] Key facts about Asian Americans | Pew Research Center.

[11] Why Diverse Teams Are Smarter (hbr.org).

[12] California lawmakers recently made efforts to ensure that an increasingly diverse population is reflected in state and federal jury pools. See Juror Pay Could Go Way up In California (sfstandard.com); Federal Jury Pools to Be Expanded, Made More Diverse under Legislation Introduced at CA Capitol | Davis Vanguard.

[13] Diverse Juries Make Better Decisions | SPARQ (stanford.edu); see also Why Diverse Teams Are Smarter (hbr.org).

[14] Effects Racial Makeup (cornell.edu); When diversity adds fairness - Los Angeles Times (latimes.com).

[15] Diverse Juries Make Better Decisions | SPARQ (stanford.edu).

[16] See Will Spotlight On Racial Justice Force More Diverse Juries? - Law360.

[17] Implicit Bias | SWD at NIH.

[18] Id.

[19] Implicit Bias: Definition, Examples, and Unconscious Bias Training (insider.com).

[20] Cynthia Lee, A New Approach to Voir Dire on Racial Bias, 5 U.C. Irvine L. Rev. 843, 860 (2015), <https://www.law.uci.edu/lawreview/vol5/no4/Lee.pdf>; see, e.g., The Bias Beneath: Two Decades of Measuring Implicit Associations | Association for Psychological Science – APS (discussing the widely used Implicit Association Test (IAT) which helps users discover potential prejudices and noting that "data from Project Implicit" reveal[ed] that 75% of people who have taken the IAT have correlated men more strongly with work roles and women more strongly with family positions").

[21] Leading Asian Americans to Unite for Change (LAAUNCH), STAATUS Index Report 2022, at 16, 18, available at <https://staatus-index.s3.amazonaws.com/STAATUS%20Index%202022%20Report.pdf>.

[22] Id. at 18.

[23] Survey highlights bias facing Asian Americans | Harvard Gazette.

[24] Leading Asian Americans to Unite for Change (LAAUNCH), STAATUS Index Report 2022, at 4, 32-33 (finding that 21% of Americans agreed that Asian Americans are at least partly responsible for COVID-19), available at <https://staatus-index.s3.amazonaws.com/STAATUS%20Index%202022%20Report.pdf>; see also Survey: More than 30 percent of Americans have witnessed COVID-19 bias against Asians | Center for Public Integrity (indicating that an April 2020 survey found that more than 30% of all Americans have witnessed someone blaming Asian people for the pandemic, whereas 60% of Asian Americans had witnessed the same).

[25] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. Rev.* 1124, 1172 (2012), <https://www.uclalawreview.org/pdf/59-5-1.pdf>; Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195, 1225 (2009), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1214&context=ndlr>.

[26] *Is justice blind if we say it is?* (apa.org) (indicating that research on "schemas and stereotypes ... routinely finds that jurors view defendants who are more consistent (versus inconsistent) with stereotypical expectations as more likely to be guilty," and that "jurors may be unwilling or unable to admit that their biases have seeped into their legal judgments").

[27] Eric Luis Uhlmann and Geoffrey L. Cohen, "I think it, therefore it's true": Effects of self-perceived objectivity on hiring discrimination, 104 *Org. Behav. and Human Decision Processes* 207, 215, 221 (2007), available at <https://doi.org/10.1016/j.obhdp.2007.07.001>.

[28] See *Understand Anti-Corporate Bias: The Extent of the Bias and the Effect of Familiarity* | Holland & Hart - Persuasion Strategies | JDSupra ("It is well known that some people have it in for corporations ... research has shown that a negative attitude is very common, with close to eight in ten individuals believing that large corporations tend to be dishonest and should bear a greater share of responsibility than individuals.").

[29] See generally Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, *DePaul J. for Soc. Just.*, Vol. 11, Issue 2, 2018 (discussing and explaining the issue of "unearned, implicit credibility given to police officer testimony by juries"), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1167&context=jsj>.

[30] See *Awakening the American Jury: Did the Killing of George Floyd Alter Juror Deliberations Forever?* | *Houston Law Review*.

[31] See *id.*

[32] See *Uncovering Bias against Arabs and Muslims in Jury Selection - Part 2 of 2 | Courtroom Sciences; Potential George Floyd Trial Jurors Asked About BLM, Police* (insider.com).

[33] *Uncovering Bias against Arabs and Muslims in Jury Selection - Part 2 of 2 | Courtroom Sciences* ("Given there is a large number of people in the room during voir dire, it is likely that many jurors will hide their prejudice, particularly when the questions have strong social implications. To obtain more candid responses, a juror supplemental questionnaire is highly recommended.").

[34] For example, prior to the criminal trial of Derek Chauvin for the murder of George Floyd, potential jurors were given a questionnaire to fill out that asked many open-ended

(as well as direct questions) aimed at identifying "jurors that will be able to decide the case based on the evidence presented in court and without bias." See Potential George Floyd Trial Jurors Asked About BLM, Police (insider.com).

[35] Uncovering Bias against Arabs and Muslims in Jury Selection - Part 2 of 2 | Courtroom Sciences.

[36] Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox, at 22, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_to_olchest.pdf (last visited Apr. 12, 2023).

[37] Uncovering Bias against Arabs and Muslims in Jury Selection - Part 2 of 2 | Courtroom Sciences.

[38] See id.

[39] Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox, at 26, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_to_olchest.pdf (last visited Apr. 12, 2023).

[40] Id. at 25-26.

[41] See, e.g., Cal. Code Civ. Pro. § 231.7(d)(2)(A), (C) ("For purposes of this section, an objectively reasonable person is aware that unconscious bias. ... For purposes of this section, 'unconscious bias' includes implicit and institutional biases."); Illinois Courts, Illinois Pattern Jury Instructions Civil, Rule 1.08 ("You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision."), <https://www.illinoiscourts.gov/resources/d28c859b-ce8c-4ff2-81bb-00bb0934e6d2/file>; Massachusetts Supreme Judicial Court, SJC Model Jury Instructions on Implicit Bias (2021), at 1 ("One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them and even if we believe we do not have them."), <https://www.mass.gov/doc/sjc-model-jury-instructions-on-implicit-bias-preliminary-charge-pdf-sept-29-2021>; New York State Unified Court System, Implicit Bias Instructions, at 2 ("A fair juror is a person who will keep the promise to be fair and impartial and will not base the decision upon a bias or prejudice ... [and] must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision."), https://www.nycourts.gov/judges/cji/1-General/CJI2d.Implicit_Bias.pdf.

[42] Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox, at 15, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_to_olchest.pdf (last visited Apr. 12, 2023).

[43] Id. at 20-21.

[44] Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox, at 16, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_to_olchest.pdf (last visited Apr. 12, 2023).