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Unconscious Bias in Jurors Are We Doing Enough?

By Marisa Vinsky



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One of the most fundamental rights guaranteed by the United States Constitution is the due process of law.¹ This encompasses the basic requirement of having a fair trial in front of a fair tribunal.² With this requirement comes a longstanding history of procedural safeguards in order to ensure the fairest trial a person can possibly have, specifically when it comes to juries. The important case of *Batson v Kentucky*³ is just one example of the strides made by courts to uphold due process.

Even when jury selection falls in accordance with these safeguards, bias still permeates the criminal justice system, whether it is actual or implied. While it certainly should be addressed during voir dire, many individuals are reluctant to express their true feelings and admit actual bias. Where circumstances raise questions as to a juror's impartiality, "little stock need be placed in jurors' claims" that they will not be prejudiced.⁴ Jurors are not necessarily fully conscious of *what* will affect their attitude and *how* things will affect their attitude towards the accused.⁵

Further, there has been a significant amount of research done on unconscious bias. Studies on implicit social cognition show that the mental processes that affect social judgments can operate without conscious awareness or conscious control.⁶ Implicit bias testing measures, such as the Implicit Association Test, predict certain types of behavior—like anti-Black and intergroup discrimination—substantially better than explicit bias measures.⁷ Not only do jurors have implicit biases towards defendants, but this also spreads to the evaluation of witnesses and evidence.⁸ This implicit bias can cause jurors to misremember facts in racially biased ways, affect whether there really is a presumption of innocence, and even affect how the jury perceives an expert witness who is a person of color.⁹ Psychologists believe that a conscious effort to be unbiased may reduce a person's implicit bias.¹⁰

Unconscious bias is a concept that many people acknowledge but do not necessarily know how to address. A 2020 study revealed that a majority of judges do not notify jurors about implicit bias due to their own lack of awareness or understanding, but now believe it is important to alert jurors to this issue.¹¹ Federal courts are on the forefront of openly talking to and teaching jurors about this. Established in 2017, a committee of judges and attorneys for the United States District Court for the Western District of Washington created an instructional video to present to jurors "with the intent of highlighting and combating the problems presented by unconscious bias."¹² This 11-minute

video is shown in *every* case. Along with the video, the committee modified several Model Ninth Circuit Criminal Jury Instructions to include language on unconscious bias for the court to present to the jury throughout the course of the trial. Following in Washington's footsteps, the United States District Court for the Northern District of California now plays a video that includes a section on unconscious bias to potential jurors before the jury selection process.¹³

Compare that with what is happening in Michigan. The Committee on Model Criminal Jury Instructions amended Michigan Criminal Jury Instruction 2.26 to state the following:

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case.

You must not let bias, prejudice, or public opinion influence your decision. Each of us may have biases or perceptions about other people based on stereotypes. We may be aware of some of our biases, though we do not express them. We may not be fully aware of some of our other biases. Take the time you need to test what might be automatic or instinctive

judgments and to reflect carefully about the evidence. I caution you again to avoid reaching conclusions that may have been unintentionally influenced by stereotypes. You must reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.¹⁴

This became effective on June 1, 2020. While it does not outright call the issue unconscious bias, it attempts to address these concerns. The Sixth Circuit Pattern Criminal Jury Instructions, which are used by the federal courts in Michigan, do not have *any* jury instructions on unconscious bias.¹⁵

But is a jury instruction enough? Michigan is moving in the right direction by addressing the very persistent issue of unconscious bias. However, allowing jurors to watch a short video prepared specifically to discuss this hidden problem—one that is often easier to ignore—will further promote fairness in our trials. It provides a solution to combat an issue that is essential to tackle, but difficult to discuss. The hope is that eventually all courts will have a consistent standard when it comes

to allowing the viewing of this type of video. In the meantime, as attorneys, we need to consider whether we are doing our clients a disservice by not advocating for a video on unconscious bias to be played for the jury. In courts where a jury instruction does not even exist, we should be asking for a specific jury instruction on unconscious bias. What is not seen or heard may be the difference between a one-word verdict and a two-word verdict.

Endnotes

1. US Const, amend V.
2. *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955).
3. 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).
4. *Holbrook v Flynn*, 475 US 560, 570; 106 S Ct 1340; 89 L Ed 2d 525 (1986).
5. *Id.*
6. Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L Rev 1124, 1129 (2012).
7. *Id.* at 1131.
8. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn L Rev 827, 836 (2012).
9. *Id.* at 837.
10. *Id.* at 835.
11. See Jacqueline M. Kirshenbaum and Monica K. Miller, *Judges' experiences with mitigating jurors' implicit biases*, *Psychiatry, Psychology and Law* (2020).
12. <https://www.wawd.uscourts.gov/jury/unconscious-bias>
13. <https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/>
14. M Crim JI 2.26
15. <https://www.ca6.uscourts.gov/pattern-jury-instructions>