

# Voir Dire and Implicit Bias in the Federal Courts

by Joanna Fox



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Today, most lawyers and judges recognize the concept of implicit bias. In simple terms, implicit bias can be described as the idea that people have thoughts and feelings outside of their conscious awareness and control that impact the way they make decisions. The term encompasses innocuous thoughts and feelings as well as more insidious stereotypes, where a person may assign characteristics to all members of a group or all classes of a certain thing.

Organizations like Project Implicit (a nonprofit organization and international collaboration of researchers who are interested in implicit social cognition) have spent years studying implicit bias and developing tests to measure attitudes and beliefs that people may be unwilling or unable to self-report.<sup>1</sup> And while we may realize how important it is to battle implicit biases—our own, those of our clients, and those of judges and juries—finding ways to recognize them and confront them, sometimes publicly, can be difficult.

This can be especially true for a prospective juror in the confines of a courtroom, in front of a judge, or while subject to voir dire in front of a room full of people from her community. For lawyers and judges, however, this is possibly the most important time to discover someone's implicit biases—when everything is on the line for both the integrity of the judicial system and for an individual client. Unfortunately, Federal Rule of Civil Procedure 47, which governs jury selection, doesn't give much guidance for lawyers or judges in this respect, providing only that "the court may permit the parties or their attorneys to examine prospective jurors or it may itself do so." The rule does nothing to delineate the limits of voir dire or guide a lawyer or judge on how best to feel out prospective jury biases.

But not all hope is lost. I recently listened to two podcast discussions given by renowned trial lawyers on battling implicit bias in jury selection. Each had different, highly effective approaches to tackling this challenge.

First was Michael Cowen's interview of Lisa Blue<sup>2</sup> on his "Trial Lawyer Nation" podcast.<sup>3</sup> Blue explained that to battle implicit bias in selecting her juries, she takes a therapy- and law-based approach to voir dire,

which fits well with her background (including her Ph.D. in psychology). For example, she begins voir dire the same way she begins any therapy session: Explaining in a straight-forward manner that this is a safe place for each prospective juror to share his or her thoughts about any topic, that there is no judgment or shame here, and that the lawyers and the judge do not care how or why he or she answers a question the way he or she did.

When Blue suspects a prospective juror may have some bias against her case based on initial questioning, she puts them in the "Cortez coffin," her reference to Texas' leading case on voir dire and juror rehabilitation.<sup>4</sup> To do so, Blue does not end her questioning of the prospective juror when the juror admits that she might have some bias in the case. Rather, she continues in a manner that pre-emptively and gently allows the juror to admit that even if the judge later asks her if she can be fair, she most likely cannot be because of deep-seated feelings about the case. Blue not only closes the door on the prospective juror, but she also makes sure to deadbolt it on her way out. The lesson here is to know the law of voir dire in your particular jurisdiction and to use it to your advantage.

Second was Brian Panish's interview of Keith Mitnik.<sup>5</sup> Mitnik does not have the same "safe space" approach as Blue, but nonetheless effectively opens prospective jurors up to the idea of implicit biases through use of simple, everyday scenarios. For example, he often explains to a prospective jury pool that if he was asked to judge a pie baking contest, he'd feel compelled to let the contestants know that, although he likes pie in general and would try to be a fair judge, he really does not like cherry pie—it is simply not his preference—and he would choose an apple pie over a cherry pie any day. He then explains to the prospective jurors that they might have similar feelings about aspects of the case before them. But because they are just-minded people they—like him—should let those involved in the case know they don't care for cherry pie. By informing the lawyers and the court, the juror will ensure that the parties to the case get "pie judges"

*continued on page 25*

who—all things being equal—will not have leanings one way or the other about the case at hand.

Both of these approaches, as well as the myriad other ways to pull out and combat implicit bias through voir dire, take creative thinking from lawyers, as well as time and patience from judges on the bench. As the research around implicit bias becomes more readily known, lawyers and judges will hopefully take (and be given) creative license in voir dire to ensure fairness to all participants in a trial. ☉

### Endnotes

<sup>1</sup>To take a test to learn more about your own implicit biases, visit PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html>

(last visited Apr. 8, 2019).

<sup>2</sup>Lisa Blue has recovered \$350 million in jury verdicts (and hundreds of millions more in settlements) and is a leading expert on jury selection—something she credits to her background, which includes two master’s degrees and a Ph.D. in psychology.

<sup>3</sup>06 – Lisa Blue – A Psychologist’s View on Jury Selection, TRIAL LAW. NATION (2018), <https://triallawyernation.com/episode/06-lisa-blue> (last visited Apr. 8, 2019).

<sup>4</sup>Cortez v. HCCI-San Antonio Inc., 159 S.W.3d 87 (Tex. 2005).

<sup>5</sup>Jury Analyst, Get in the Game Podcast - Bruises Matter in Court with Keith Mitnik - Trial Lawyer and Educator, YOUTUBE (Sept. 6, 2018), <https://www.youtube.com/watch?v=B7B5ts-8ewg>.

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### At the Local Level continued from page 9

18SAO15842AD, Re: Closed Investigation (Feb. 8, 2019), <https://www.jacksonville.com/assets/pdf/staugustine/LK2010212.PDF>.

<sup>22</sup>Fla. AGO 71-191.

<sup>23</sup>Inf. Op. to Markham, Sep. 10, 1996; Inf. Op. to Green, Dec. 11, 1998; *Roscow v. Abreu*, No. 2003 CA 01833 (Fla. 2d Cir. Ct. Aug. 6, 2004); cf. *Brown v. Denton*, 152 So.3d 8 (Fla. 1st Dist. 2014) (finding that certain collective bargaining negotiations were not subject to the Sunshine Laws).

<sup>24</sup>Since 1995, 269 exemptions to the Sunshine Law have been approved. Gray Rohrer, *Florida’s Renowned Sunshine Laws Took Another 12 Hits from the Legislature This Year*, MIAMI HERALD (Apr. 10, 2018, 6:06 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article208393214.html> (updated Apr. 11, 2018, 6:43 AM).

<sup>25</sup>Inf. Op. to Nelson, May 19, 1980.

<sup>26</sup>*Freeman v. Times Publ’g Co.*, 696 So.2d 427 (Fla. 2d Ct. App. 1997).

<sup>27</sup>Fla. AGO 2009-19.

<sup>28</sup>*Canney v. Board of Pub. Instruction of Alachua Cty.*, 278 So.2d 260, 264 (Fla. 1973).

<sup>29</sup>Fla. AGO 05-03.

<sup>30</sup>Matt Vautour, *Robert Kraft Prostitution Charges: Potential Release of “Extremely Graphic” Video Tied Up After Motion*, MASS LIVE (Feb. 26, 2019), <https://www.masslive.com/patriots/2019/02/robert-kraft-prostitution-charges-potential-release-of-extremely-graphic-video-blocked-after-motion-from-defense-attorney.html>; *John Doe, Jane Doe v. The City of Jupiter Police Dep’t et al.*, Filing No. 85425813 (Fla. 15th Cir. Ct. Feb. 25, 2019) (Complaint for an Emergency Declaratory Judgment) (case number pending as of submission).

<sup>31</sup>The response to the Parkland massacre was codified by CS/CS/CS/ HB 165 (Ch. 2018-128) and the relevant subsections appear in Fla. Stat. §§ 16.555, 20.15, 30.15, 121.091, 394.463, 394.495, 397.6760, 790.065, 790.0655, 790.335, 794.056, 836.10, 921.0022, 938.085, 1002.32, 1006.04, 1006.07, 1005.12, 1006.13, 1011.62, 1013.64.

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### Moran Profile continued from page 20

<sup>1</sup>National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34).

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### Green Profile continued from page 22

Baby Evelyn was 15 weeks old when she was sexually assaulted by her father. She died in the process. This, recalls Judge Green, was probably the most emotionally and factually difficult case he prosecuted. He remembers presenting the case to the grand jury leaving most of them sobbing. The same thing was true at trial. Baby Evelyn’s mother was only 22 years old when she had to testify. She was brave, and Judge Green maintains great respect for her. Throughout the course of the investigation, they learned of other victims. Baby Evelyn’s father is where he belongs, in prison, serving a life sentence without the possibility of parole.

The words of wisdom Judge McMillan spoke to his naïve clerk all those years ago are woven into the fabric of the robe Judge Green wears today. He is a man of great faith. He is a devoted husband, father of five, and he is a judge. Every time Magistrate Judge Phillip J. Green leaves his chambers, he looks at baby Evelyn’s picture and a poem written for her, which hang next to the door that leads to his courtroom. She reminds him that his call to serve means he has to think about the people, consider what they go through, and have true compassion for all. ☉