



# WEST COAST RESOLUTION GROUP



## Managing Implicit Bias in Jury Trials: What You Can't See or Hear Can Hurt (or Help) You

With Doug Barker

March 18, 2021



**Doug Barker**

### **Overview**

Doug Barker was a very active and highly successful civil litigator from 1980 to 2014, both as a shareholder at San Diego's largest law firm, and, thereafter, as the managing partner of a full-service civil litigation firm. As a trial lawyer, he represented both plaintiffs and defendants in a wide variety of cases.

In addition to his litigation practice, Mr. Barker has been extremely active as an arbitrator and mediator for over 30 years. Beginning in 1984, he was a frequent arbitrator of cases referred by the court under the California Rules of Court. During the late 1990s, he trained to become a mediator and commenced his highly successful mediation practice. With time, that mediation practice grew until it became his exclusive professional area of practice.

In addition to his background as a lawyer, arbitrator, and mediator, Mr. Barker possesses broad academic achievements and life experiences that enable him to understand and empathize with the parties and issues in mediation. He was Editor-in-Chief of the San Diego Law Review, a holder of a number of advance degrees, an officer in the United State Army, and a college and high school teacher and coach. He presented more than 125 seminars on litigation and ADR skills.

To date, Mr. Barker has served as mediator in over 2,000 cases.

### **Rates**

Superior Court Ordered Civil Mediations:

- Civil Limited: \$150 per hour for each of the first two hours and \$450 per hour thereafter.
- Civil Unlimited: \$250 per hour for each of the first two hours and \$450 per hour thereafter.

HOA Mediations:

- \$800 flat rate for up to three hours
- \$450 per hour thereafter
- \$125 per party administrative fee

All Other:

- \$450 per hour
- \$195 non-refundable administrative fee

### **Legal Career & Prior Experience**

- Gray Cary Ware & Freidenrich (now DLA Piper), 1980 to 1994 -- Shareholder
- Barker Olmsted & Barnier, 1994 to 2014 -- Shareholder
- Mediator at NCRC and West Coast Resolution Group, 1999 to present
- Law School Professor, Thomas Jefferson School of Law

### **Education & Professional Affiliations**

- B.A., University of California, Santa Barbara, 1969 (History)
- M.A., University of Missouri, 1970 (History)
- M.A., California Lutheran University, 1975 (Education)
- J.D., University of San Diego, 1980 (Cum laude)

### **ADR Experience & Specialties**

Trained as a mediator at NCRC, Pepperdine University, and the American Bar Association.

Specialties:

- Commercial disputes (including contract, dissolutions, professional negligence, insurance, etc.)
- Construction (including defect, contract, and lien enforcement)
- Employment - all areas
- Personal injury (including wrongful death and medical/dental malpractice)
- Real estate (including purchase/sale, landlord/tenant, easements, environmental, etc.)

### **Achievements & Awards**

- Editor-in-Chief, San Diego Law Review, 1980
- "AV" rating, Martindale-Hubbell, since 1989
- "Top 10 Attorneys in San Diego," San Diego Magazine, 2005
- Master, American Inns of Court, Lopardo Chapter, 2011 to present

### **Hobbies & Interests**

- Former college football player and high school teacher/coach (football and baseball)
- Youth sports coach since 1993

## **Recent Articles**

- “When and How to Settle Pre-Filing Cases,” West Coast Resolution Group website and newsletter ([www.westcoastresolution.com](http://www.westcoastresolution.com)), February-March 2018
- “Homeowners Association Cases: Why Settlements of This Kind of Case Must Be Different,” West Coast Resolution Group website and newsletter ([www.westcoastresolution.com](http://www.westcoastresolution.com)), May 2018
- “What Can I Do to Keep My Employees from Suing Me?” West Coast Resolution Group website ([www.westcoastresolution.com](http://www.westcoastresolution.com)), February 2019
- “Mediating Pre-Litigation Real Estate Disputes,” West Coast Resolution Group website ([www.westcoastresolution.com](http://www.westcoastresolution.com)), December 2019
- “Implicit Bias in Jury Trials,” North County Bar Magazine, August 2020

## **Recent Press**

- Listed at “Top Lawyer,” San Diego Magazine, 2015 and 2017
- Organizer and presenter in well over 100 presentations on various subjects related to litigation skills, mediation, and negotiation techniques.

**If you would like a copy of Mr. Barker’s full CV, please contact Kathy Purcell at [KPurcell@westcoastresolution.com](mailto:KPurcell@westcoastresolution.com).**

**To schedule a mediation, please call Case Manager Kathy Purcell at 619-238-7282 or email Doug Barker at [dbarker@westcoastresolution.com](mailto:dbarker@westcoastresolution.com).**

IMPLICIT BIAS IN JURY TRIALS

WHAT YOU CAN'T SEE OR HEAR CAN HURT YOU

Presented by Doug Barker  
March 18, 2021

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THE TRADITION OF JURY SELECTION

Starts with 12 juror candidates selected at random from the community...  
...plus a number of "back ups" in case some of the first 12 aren't all suitable

Traditionally, the court allows *voir dire* questions clearly calculated to reveal any explicit biases a potential juror might have for or against one party

If a potential juror admits to a significant bias that would prevent him/her from being impartial, then that juror would be dismissed by the court for cause

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THE TRADITION OF JURY SELECTION

Beyond court-approved challenges for cause, parties may use peremptory challenges to dismiss jurors...  
...Up to six in civil cases, and usually more than six in criminal cases

Thus, in California, parties do not *choose* jurors; rather they *deselect* them

The goal during *voir dire* is to rid the panel of those jurors who seem most unlikely to be supportive of the party's case

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THE TRADITION OF JURY SELECTION

Traditionally, lawyers have been limited in the kinds of questions they are permitted to ask jurors in determining which jurors should be "deselected"

- Judges often limit questions to those which have some direct bearing or connection with the issues



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THE TRADITION OF JURY SELECTION

There have been at least two reasons why questions have been limited to matters related to the issues in the case:

1. Not to unnecessarily invade the privacy of the jurors, and, in the process, not to embarrass jurors with personal questions
2. To move the jury selection process along swiftly

NOTE: During the 1980s, selection of juries often took one full day, even with questions being limited to superficial inquiries



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DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

Every prospective juror reports for duty with biases

Some jurors are aware of their biases and are willing to admit them on *voir dire*

Some jurors are aware of their biases but do not reveal them on *voir dire*

ALL jurors have implicit biases; i.e., inherent, ingrained biases that the jurors **genuinely** do not know exist...so, on *voir dire*, jurors honestly deny having such biases



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DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

If you have not already done so, go to <https://www.implicitbias.org/implicit-bias-test> or <https://www.project ImplicitBias.com/> or some other site and take some of the short (and free) tests to determine whether you have implicit (i.e., unknown to you) biases

[Spoiler alert: You do]

Tests are offered on virtually all protected classifications and more



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DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

California Civil Jury Instructions (CCJI), Pre-Trial Instruction 100 reads, in part, "The parties have a right to a jury...that comes to the case without bias..."

But, beyond prospective jurors who know and confess their biases, if the lawyers are prohibited from scratching below the surface to hunt possible implicit biases, then are the parties truly getting a jury without bias?

At best, the parties will get a jury with biases KNOWN to the jurors; but, without probing questions about how each juror thinks, *implicit* biases will survive *voir dire*, and the parties end up with a jury WITH, rather than without, biases.



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MORE ABOUT IMPLICIT BIAS

From the Perception Institute [<https://perception.org/research/implicit-bias/>]:

- "Thoughts and feelings are "implicit" if we are unaware of them. .... We use the term "implicit bias" to describe when we have attitudes towards people or associate stereotypes with them **without our conscious knowledge**." [Emphasis added.]
- "[M]ost of our actions occur without our conscious thoughts, allowing us to function in our extraordinarily complex world...[O]ur implicit biases often predict how we'll behave more accurately than our conscious values."



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**MORE ABOUT IMPLICIT BIAS**

Implicit bias is “baggage” that every juror brings to every trial.  
 The jurors don’t even know they own that baggage, let alone that they brought it to trial  
 Thus, traditional *voir dire* questions are of little or no use in uncovering the existence of the baggage and what is inside it  
 “Okay, then, Doug, how do we learn of the implicit biases of jurors????!!!!”



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**BARRIERS TO DISCOVERING IMPLICIT BIASES**

1. The judge
  - a. Most judges have embraced and seek to preserve tradition
  - b. And they remain protective of jurors, their privacy, and their feelings  
 (On the other hand, many now welcome the chance to express their views)
2. Time constraints
  - a. To discover an individual’s implicit biases, questions must be directed to each juror, individually
3. Your willingness to profile jurors



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**PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT**

Ironically, many in this country have attempted to eliminate stereotyping or profiling; yet that is essentially what lawyers do on *voir dire*  
 Traditionally, young lawyers have been told that artists, teachers and caretakers (including nurses) tend to be pro-plaintiff in civil cases, while mathematicians, engineers and scientists tend to be pro-defense in those cases



12

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PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Hypothetical Juror A

- Watches Fox News and, in particular, Tucker Carlson
- Displays an "NRA" sticker on his/her car (or truck)
- Thinks the concept of "political correctness" is out of control
- Opposes social programs as steps toward socialism
- Thinks "Black Lives Matter" is absurd and disrespectful of the police
- Doubts that there is any such thing as "climate change"



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PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Hypothetical Juror B

- Watches MSNBC and CNN, but never Fox News
- Displays an "Coexist" sticker on his/her Prius
- Thinks "political correctness" is important and shows respect
- Supports social programs as a social responsibility
- Thinks "Black Lives Matter" is extremely important
- Considers climate change to be a vital issue



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PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Based upon what you now know about Jurors A and B, can you predict each's attitude toward the following issues:

1. During trial, the jurors are going to learn that one party is wealthy and the other exists below the poverty level
2. The trial issue relates to a mortgage lender seeking a judgment against someone who was not able to make payments
3. The trial issue is an allegation of police brutality
4. One of the parties has a history of drug addiction (and that will come out)



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PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Even if, during *voir dire*, each juror was alerted to the issues on the previous slide, and each confirmed that he/she could listen to the evidence objectively and render an unbiased verdict, might the jurors' positions on the issues on the Slides 13 and 14 allow a lawyer to predict how each juror is going to feel and act on the issues on Slide 15?



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PREDICTING IMPLICIT BIASES

Broad inquiries

- If you have bumper stickers on your car, what do they say?
- What newspapers and magazines do you read?
- During election times, do you display signs on your property?
- Where do you get your news?
- What's your opinion of the concept of "political correctness"?
- Have you ever marched for a cause; and, if so, what cause(s)?
- Have you ever signed a petition? If so, for what?



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Attitudes toward people who are members of groups which have been frequently discriminated against (i.e., "protected classifications")
  - "Everyone should be responsible to take care of themselves" vs. "Society should provide special support to the less fortunate"
  - "In the U.S., everyone is given an equal opportunity and should succeed without any special assistance" vs. "Those in certain groups face significant challenges to success and therefore should be given help by the government"
  - "Certain assumptions can be made about people in particular groups" vs. "Every person should be judged as an individual and not based on being part of a group"



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Attitudes toward authority
  - “The rules are the rules, and they should be followed” vs. “Rules are merely guidelines which can be broken whenever necessary or justified”
  - “Always respect authority” vs. “Resist authority whenever appropriate”



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Attitudes toward institutions
  - “Large corporations are generally trustworthy” vs. “Large corporations are generally untrustworthy”
  - “The government is generally trustworthy” vs. “The government is generally untrustworthy”



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Reactions to behaviors of others and making moral judgments
  - “I am angered by those who don't follow the rules” vs. “It's not worth getting upset about if it doesn't affect me”
  - “I confront those who behave inappropriately” vs. “I walk away when I see people behaving inappropriately”
  - “I dwell on the behaviors of others, even when those other people are not around” vs. “I'm not going to think about the bad behaviors of others because being upset and angry only brings me down and does nothing to affect or change the other person”
  - “I live by the values and beliefs with which I was raised” vs. “I am willing to reevaluate and deviate from traditional values”



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Responding to the problems of others
  - "I analyze surrounding issues which resulted in a given outcome" vs. "I empathize with those affected by a bad outcome"
  - "I look first at myself for personal accountability" vs. "I look first for the fault of others"
  - "I think it's appropriate to judge the people and things around me" vs. "I resist judging because it is neither appropriate nor beneficial to anyone"



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Social issues and perspectives
  - "Life's unfair and there will be casualties" vs. "Society exists to protect those who need help"
  - "I don't care what other people think of me" vs. "I care very much what others think of me"
  - "I am outspoken in my beliefs, even if expressing them causes people not liking me" vs. "If my beliefs are not popular, I tend to keep them to myself"
  - "I don't hesitate to express my opinion to others" vs. "I like to hear the opinion of others before I voice my own"
  - "Being in control of a social situation is important to me" vs. "I don't need to be in control to be happy"
  - "My greatest pride and satisfaction come from my personal accomplishments" vs. "My greatest pride and satisfaction come from helping others"



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EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Trust
  - "If I am going to trust a new acquaintance, that person is going to have to earn my trust" vs. "I assume people to be trustworthy until they show themselves to be otherwise"
  - "Financially successful people are generally more trustworthy than people who are not very financially successful" vs. "Blue collar people are generally more trustworthy than white collar people"
  - "Educated people are generally more trustworthy than those who are under educated" vs. "Educated people are generally less trustworthy than under educated people"



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**CONCLUSION**

Traditional *voir dire* places a premium on essentially superficial questions that meaningfully connect to the issues in the case

Judges are often unwilling to allow *voir dire* to extend to inquiries designed to uncover biases the jurors themselves don't even know exist

Numerous respected studies have confirmed that all humans are products of their past, and that they, therefore, have implicit biases

Hasn't the time come for lawyers to appreciate the existence and influence of implicit biases, and be permitted to search for those biases during *voir dire*?



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**THANK YOU!**

Questions for Doug?  
[dbarker@westcoastresolution.com](mailto:dbarker@westcoastresolution.com)  
(858) 663-2701 (direct)  
(619) 238-7282 (scheduling)



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# IMPLICIT BIAS IN JURY TRIALS

WHAT YOU CAN'T SEE OR HEAR CAN HURT YOU

Presented by Doug Barker

March 18, 2021



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# THE TRADITION OF JURY SELECTION

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...plus a number of “back ups” in case some of the first 12 aren’t all suitable

Traditionally, the court allows *voir dire* questions clearly calculated to reveal any explicit biases a potential juror might have for or against one party

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There have been at least two reasons why questions have been limited to matters related to the issues in the case:

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NOTE: During the 1980s, selection of juries often took one full day, even with questions being limited to superficial inquiries



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# DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

**Every** prospective juror reports for duty with biases

Some jurors are aware of their biases and are willing to admit them on *voir dire*

Some jurors are aware of their biases but do not reveal them on *voir dire*

ALL jurors have implicit biases; i.e., inherent, ingrained biases that the jurors ***genuinely*** do not know exist...so, on *voir dire*, jurors honestly deny having such biases



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# DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

If you have not already done so, go to [implicit.harvard.edu/implicit/research](https://implicit.harvard.edu/implicit/research) or <https://perception.org/research/implicit-bias/> or some other site and take some of the short (and free) tests to determine whether you have implicit (i.e., unknown to you) biases

[Spoiler alert: You do]

Tests are offered on virtually all protected classifications and more



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# DO TRADITIONAL *VOIR DIRE* LIMITATIONS ACHIEVE THE GOAL OF SELECTING A JURY WITHOUT BIASES?

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At best, the parties will get a jury with biases KNOWN to the jurors; but, without probing questions about how each juror thinks, *implicit* biases will survive *voir dire*, and the parties end up with a jury WITH, rather than without, biases.



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# MORE ABOUT IMPLICIT BIAS

From the Perception Institute [<https://perception.org/research/implicit-bias/>]:

- “Thoughts and feelings are “implicit” if we are unaware of them. .... We use the term “implicit bias” to describe when we have attitudes towards people or associate stereotypes with them **without our conscious knowledge.**” [Emphasis added.]
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# MORE ABOUT IMPLICIT BIAS

Implicit bias is “baggage” that every juror brings to every trial.

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Thus, traditional *voir dire* questions are of little or no use in uncovering the existence of the baggage and what is inside it

“Okay, then, Doug, how do we learn of the implicit biases of jurors????!!!!”



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# BARRIERS TO DISCOVERING IMPLICIT BIASES

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  - a. Most judges have embraced and seek to preserve tradition
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(On the other hand, many now welcome the chance to express their views)
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# PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Ironically, many in this country have attempted to eliminate stereotyping or profiling; yet that is essentially what lawyers do on *voir dire*

Traditionally, young lawyers have been told that artists, teachers and caretakers (including nurses) tend to be pro-plaintiff in civil cases, while mathematicians, engineers and scientists tend to be pro-defense in those cases



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# PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

## Hypothetical Juror A

Watches Fox News and, in particular, Tucker Carlson

Displays an “NRA” sticker on his/her car (or truck)

Thinks the concept of “political correctness” is out of control

Opposes social programs as steps toward socialism

Thinks “Black Lives Matter” is absurd and disrespectful of the police

Doubts that there is any such thing as “climate change”



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# PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

## Hypothetical Juror B

Watches MSNBC and CNN, but never Fox News

Displays an “Coexist” sticker on his/her Prius

Thinks “political correctness” is important and shows respect

Supports social programs as a social responsibility

Thinks “Black Lives Matter” is extremely important

Considers climate change to be a vital issue



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# PREDICTING BIASES, WHETHER EXPLICIT OR IMPLICIT

Based upon what you now know about Jurors A and B, can you predict each's attitude toward the following issues:

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Even if, during *voir dire*, each juror was alerted to the issues on the previous slide, and each confirmed that he/she could listen to the evidence objectively and render an unbiased verdict, might the jurors' positions on the issues on the Slides 13 and 14 allow a lawyer to predict how each juror is going to feel and act on the issues on Slide 15?



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# PREDICTING IMPLICIT BIASES

## Broad inquiries

- If you have bumper stickers on your car, what do they say?
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# EXAMPLES OF CASE-SPECIFIC ISSUES AT TRIAL

- Attitudes toward people who are members of groups which have been frequently discriminated against (i.e., “protected classifications”)
  - “Everyone should be responsible to take care of themselves” vs. “Society should provide special support to the less fortunate”
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- Attitudes toward institutions
  - “Large corporations are generally trustworthy” vs. “Large corporations are generally untrustworthy”
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- Responding to the problems of others
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  - “My greatest pride and satisfaction come from my personal accomplishments” vs. “My greatest pride and satisfaction come from helping others”



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- Trust
  - “If I am going to trust a new acquaintance, that person is going to have to earn my trust” vs. “I assume people to be trustworthy until they show themselves to be otherwise”
  - “Financially successful people are generally more trustworthy than people who are not very financially successful” vs. “Blue collar people are generally more trustworthy than white collar people”
  - “Educated people are generally more trustworthy than those who are under educated” vs. “Educated people are generally less trustworthy than under educated people”



# CONCLUSION

Traditional *voir dire* places a premium on essentially superficial questions that meaningfully connect to the issues in the case

Judges are often unwilling to allow *voir dire* to extend to inquiries designed to uncover biases the jurors themselves don't even know exist

Numerous respected studies have confirmed that all humans are products of their past, and that they, therefore, have implicit biases

Hasn't the time come for lawyers to appreciate the existence and influence of implicit biases, and be permitted to search for those biases during *voir dire*?



**WEST COAST  
RESOLUTION  
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# THANK YOU!

Questions for Doug?

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**WEST COAST  
RESOLUTION  
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# HAS THE TIME ARRIVED TO EXPAND THE BOUNDS OF TRADITIONAL *VOIR DIRE*?

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**True or false:** “In 90% of trials, jurors will have decided the outcome by the end of opening statements.” **True or false:** “Each juror decides who he/she likes, then embraces the facts (evidence) and law (instructions from the court) that support that side.”

If there is any merit to the perceptions above, a “deep dive” into the pre-disposition of each juror needs to be effective during *voir dire*. This concept is not new, but the scope and kinds of questions permitted in *voir dire* might be.

## BACKGROUND

Every juror brings biases (positive as well as negative) to jury duty. Some of those biases are known to the juror (explicit biases), and the juror is willing to reveal those biases in *voir dire*. As to that same juror, certain other biases are known to him/her, but, notwithstanding the juror’s oath, the juror chooses not to acknowledge the existence of those explicit biases. Yet a third category encompasses biases that are deeply engrained in the juror, but genuinely unknown to the juror (“implicit biases”)<sup>1</sup>, so denial of their existence during *voir dire* is honest insofar as that juror knows.

For centuries, courts have permitted questions designed to elicit revelation of explicit biases which a juror is willing to acknowledge. Further, questioning latitude has been routinely granted by the court so that each lawyer can test whether a juror is being untruthful in denying the existence of biases actually known to that juror. However, overwhelmingly most courts have been unwilling to allow lawyers to make abstract inquiries into a juror’s political, social, and economic perspectives, or into reactions to moral dilemmas and behavioral judgments. Such inquiries have been deemed irrelevant to the issues in the case, and an impermissible invasion of the prospective juror’s privacy. Yet, these are the kinds of inquiries designed to uncover a juror’s implicit (i.e., genuinely unknown to the juror him/herself) biases.

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<sup>1</sup> “These biases, which encompass both ***favorable and unfavorable*** assessments, are activated ***involuntarily and without an individual’s awareness or intentional control***. Residing deep in the subconscious, these biases are ***different from known biases*** that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, ***implicit biases are not accessible through introspection*** [by the person who possesses them].” *Ohio State University Kirwan Institute* (Bolded emphasis added.)

## THE POLARIZATION OF AMERICA AND ITS JURORS

Throughout the twentieth century, most people wanted to believe that America and Americans were homogenized. Not that it was; but most Americans wanted to believe it was. McCarthyism—using the powers of the federal government to make sure certain Americans were *really* Americans—dominated the middle of the century. During the last half of that century, “wholesome” all-American values, morals, and behaviors were reflected in every kind of television show, from situation comedies to dramas to westerns to variety shows to news programming to all else. The Equal Rights Amendment could not muster adequate states support to achieve ratification (thereby reaffirming the “traditional” status of women in America). Most “outliers” were grudgingly tolerated as annoyances who could become a threat to those all-American values: war protesters, civil rights advocates, farm worker advocates, people of color, hippies, that “new music,” and others who differed from prevailing perceptions and values. However, general control and comfort was maintained.

Then, in 2008, an African-American was elected President, and, over the ensuing eight years of that presidency, voices grew louder among many who had not previously been heard or acknowledged. In 2016, a new President was elected—a President who was not shy about expressing his views, unfiltered, and who was inclined to insult those who opposed him and/or his policies. His opponents were vocal in their criticisms of him. The result has been polarization to such a degree and with such passion that the United States has not experienced since the Civil War and Reconstruction. Many people will faithfully support President Trump no matter what he says or does. Many other people will faithfully oppose (loathe) President Trump no matter what he says or does. Over the past few years, prospective jurors have been challenged by political and social developments to embrace perceptions about what constitutes proper behavior, trust, morals, civility, truthfulness, compliance (or not) with authority, judging others, the meaning of “justice,” and other abstract concepts. Those perceptions become a part of every prospective juror, and those perceptions influence that juror’s judgment of a case.

## THE POWER OF IMPLICIT BIAS

While many Americans acknowledge their biases and are now emboldened to express their views regardless of popularity, others would prefer to believe that their views are well-reasoned and not at all influenced by any biases. However, implicit biases are engrained in every person, and, because implicit biases are unknown to the possessor, they cannot be confronted.

In recent years, implicit bias has become the subject of many exhaustive university research projects. Among the most prominent of those projects is an on-going one at Harvard University.<sup>2</sup> The Harvard project has developed an entire library of 10- to 15-

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<sup>2</sup> See [implicit.harvard.edu/implicit/research](http://implicit.harvard.edu/implicit/research).

minute tests on many areas of implicit bias. The tests are online and free...and very revealing (and, most often, disappointing) to all who take them.

Implicit bias is imported to trial by every juror in the box; and, if jurors do decide cases by the end of opening statement and/or if jurors find in favor of the party they like, then the implicit bias—unknown to the juror as he/she responds to *voir dire* questions—is the reason. Implicit bias guides each juror to relate to the issues and arguments of one side over the other, and it is the basis for why one side/party/lawyer is more appealing to the juror than the other. If implicit biases are not hunted and detected by a lawyer in *voir dire*, then that lawyer is simply accepting the “luck of the draw” with regard to pre-disposed leanings (biases) of each juror.

### **SEARCHING FOR IMPLICIT BIASES IN JURORS**

Questions designed to ferret out undisclosed explicit biases or unknown implicit biases may be divided into two categories. The first category includes broad questions that are not necessarily case-issue specific. Rather they are designed to reveal whether the prospective juror is ultra-conservative (“Maintain status quo!!”), conservative, liberal, or ultra-liberal/progressive (“Promote significant change immediately!!”), and whether he/she tends to be outspoken about views. The second category consists of questions that, in roundabout ways, test the prospective juror’s predispositions toward issues and perspectives related to the case.

#### **Examples of broad inquiries; not case-specific issues**

- If you have bumper stickers on your car, what do they say?
- What newspapers and magazines do you read?
- During election times, do you display signs on your property?
- Where do you get your news?
- What’s your opinion of the concept of “political correctness”?
- Have you ever marched for a cause; and, if so, what cause(s)?
- Have you ever signed a petition? If so, for what?

#### **Examples of inquiries bearing on case-specific issues**

In this hypothetical case, the lawyer is concerned that jurors will be offended by the fact that the client has visible body art. This snippet might be reflective of a traditional *voir dire* on the subject:

Q: As you can see, Mr. Smith, my client has visible tattoos and a few visible metal body piercings. Will that visible body art cause you to disfavor or dislike my client?

A: No.

Q: Do you think less of people with body art?

A: No, of course not. It’s a free country.

Q: Do you think that you will be able to judge my client's testimony and his case without being influenced by his body art?

A: Yes.

What do we learn from this exchange? (1) The prospective juror does not have an explicit bias which he is willing to acknowledge to the court; or (2) The juror may have an explicit bias that he/she is unwilling to acknowledge; or (3) The juror genuinely believes that he/she is completely oblivious to the body art, and, subconsciously, the body art will cause the juror to disfavor (or favor) that party; or (4) the juror is truly oblivious to the body art and there is no implicit bias lurking below the surface.

Traditional "textbook" *voir dire* questions are not going to lend insight to whether the prospective juror possesses an undisclosed explicit bias or an implicit bias in favor of or against the body art. The path to unveiling an undisclosed (and, perhaps, genuinely unknown) bias is by straying from straightforward questions and, instead, asking the juror about matters of conformity in his/her personal life. For example, where does the juror shop for clothes? What does the juror wear to work each day? If the juror has school-age children, what do they wear to school each day? Do the juror's children have tattoos and/or piercings? Has the juror ever taken "a fashion risk;" and, if so, what was worn? The lawyer wants to know, "Will you be biased against my client because he has body art?" However, the best way to find out how the juror thinks and feels is to find out about the actual actions taken by the juror in his/her own life. If, for example, the answers to questions such as these signal a conservative/traditional dress and appearance orientation, an inference can be drawn that the juror would feel uncomfortable with and about the body art.

## IDENTIFYING THE JUROR YOU WANT...OR, MORE IMPORTANTLY, THE JUROR YOU DON'T WANT

Quality time should be spent by every trial lawyer in determining both (1) what juror profiles would be best for the case and (2) which would likely be adverse to the lawyer's case.<sup>3</sup> Of course, *voir dire* should feature straightforward questions generally expected to uncover bases for excusing jurors *for cause*. However, lawyers should also determine what kinds of engrained values and perspectives should be identified for peremptory exclusion or, in the alternative, keeping that juror. Depending upon the issues and parties in a given case, below is a sampling of the sorts of distinctions that might be deemed to be favorable to the issues and parties in the case, and the reverse:

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<sup>3</sup> In the California Superior court civil cases, each party is limited to six peremptory challenges. Thus, choosing a jury is much less a process of **selecting** a jury as it is **deselecting** up to six jurors whose experiences, perspectives, and biases would be expected to be least favorable to a lawyer's case. While much attention is given to juror profiles that might be most favorable to a case, most or all of those jurors will likely be excused by the other side, leaving a mix of neutral jurors and jurors who would disfavor the

lawyer's case and/or client. The trial lawyer should tactfully search for the implicit biases of the neutral jurors and accurately identify those jurors whose explicit and/or implicit biases will be unfavorable to the case.

- Attitudes toward people who are members of groups which have been frequently discriminated against (i.e., "protected classifications")
  - "Everyone should be responsible to take care of themselves" **vs.** "Society should provide special support to the less fortunate"
  - "In the U.S., everyone is given an equal opportunity and should succeed without any special assistance" **vs.** "Those in certain groups face significant challenges to success and therefore should be given help by the government"
  - "Certain assumptions can be made about people in particular groups" **vs.** "Every person should be judged as an individual and not based on being part of a group"
- Social issues and perspectives
  - "Life's unfair and there will be casualties" **vs.** "Society exists to protect those who need help"
  - "I don't care what other people think of me" **vs.** "I care very much what others think of me"
  - "I am outspoken in my beliefs, even if expressing them causes people not to like me" **vs.** "If my beliefs are not popular, I tend to keep them to myself"
  - "I don't hesitate to express my opinion to others" **vs.** "I like to hear the opinion of others before I voice my own"
  - "Being in control of a social situation is important to me" **vs.** "I don't need to be in control to be happy"
  - "My greatest pride and satisfaction come from my personal accomplishments" **vs.** "My greatest pride and satisfaction come from helping others"
- Trust
  - "If I am going to trust a new acquaintance, that person is going to have to earn my trust" **vs.** "I assume people to be trustworthy until they show themselves to be otherwise"
  - "Financially successful people are generally more trustworthy than people who are not very financially successful" **vs.** "Blue collar people are generally more trustworthy than white collar people"
  - "Educated people are generally more trustworthy than those who are under educated" **vs.** "Educated people are generally less trustworthy than under educated people"
- Attitudes toward authority
  - "The rules are the rules, and they should be followed" **vs.** "Rules are merely guidelines which can be broken whenever necessary or justified"
  - "Always respect authority" **vs.** "Resist authority whenever appropriate"
- Attitudes toward institutions
  - "Large corporations are generally trustworthy" **vs.** "Large corporations are generally untrustworthy"
  - "The government is generally trustworthy" **vs.** "The government is generally untrustworthy"

- Reactions to behaviors of others and making moral judgments
  - “I am angered by those who don’t follow the rules” **vs.** “It’s not worth getting upset about if it doesn’t affect me”
  - “I confront those who behave inappropriately” **vs.** “I walk away when I see people behaving inappropriately”
  - “I dwell on the behaviors of others, even when those other people are not around” **vs.** “I’m not going to think about the bad behaviors of others because being upset and angry only brings me down and does nothing to affect or change the other person”
  - “I live by the values and beliefs with which I was raised” **vs.** “I am willing to reevaluate and deviate from traditional values”
- Responding to the problems of others
  - “I analyze surrounding issues which resulted in a given outcome” **vs.** I empathize with those affected by a bad outcome”
  - “I look first at myself for personal accountability” **vs.** “I look first for the fault of others”
  - “I think it’s appropriate to judge the people and things around me” **vs.** “I resist judging because it is neither appropriate nor beneficial to anyone”

### **Conclusion**

Traditional *voir dire* has been limited to the experiences of prospective jurors, and their attitudes and feelings about issues and facts expected to come out during trial. Questions about where jurors get their information and about their reactions to abstract hypothetical questions have been generally deemed “out of bounds.” However, if litigants are entitled “...to a jury...that comes to the case without bias,”<sup>4</sup> and, if implicit bias significantly influences a juror’s judgments, then, consistent with the purpose of *voir dire*, lawyers should be allowed to search for implicit biases during the jury selection process. Whether the courts are willing to acknowledge a scope of inquiry broader than what has been the standard in the past is yet to be seen. However, lawyers who appreciate the outcome impact of implicit bias should seek leave of the court to broaden the traditional boundaries of *voir dire*.

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<sup>4</sup> California Civil Jury Instructions, Pre-Trial Instruction 100: “The parties have a right to a jury...that comes to the case without bias....”