



We Are Not All Viewed as Equals: Unconscious Bias in the Courtroom

Presented by
Sheryl L. Axelrod, Esq.

THE AXELROD FIRM, PC
A certified woman-owned law firm



Fairness is engrained in our species

- Even our ancestors, primates, understand it and demand it.¹

¹ See:

[http://www.ted.com/talks/frans de waal do animals have morals?language=en](http://www.ted.com/talks/frans_de_waal_do_animals_have_morals?language=en) from minutes 12:27-14:57.



Agenda

Part I: Delving into Unconscious Bias and Confirmation Bias

Defining our terms

Part II: Measuring Unconscious Bias

How we know we have unconscious bias and confirmation bias;

Part III: Diverse Teams Perform Better

Part IV: Unconscious Bias in the Courtroom

Examples of unconscious bias in court;

Part V: Minimizing Bias

PEP: Placing, echoing, and promoting women.



Part I: Delving into Unconscious Bias and Confirmation Bias

- Unconscious bias: Preconceived ideas / stereotypes
- Confirmation bias: Confirming your preconceived ideas



We're Socialized into Unconscious Bias

- Television
- Movies
- Commercials



We've been Socialized into Unconscious Bias by Who we've Seen in Power: Our Heads of State

○ **Across our government**

● United States Presidents

- **0 out of 43 Presidents who are women** – If we were thought of as equals, we would have had over 21 women Presidents
- **1 President of Color (0.2%)** – People of color make up about 30% of the U.S. population

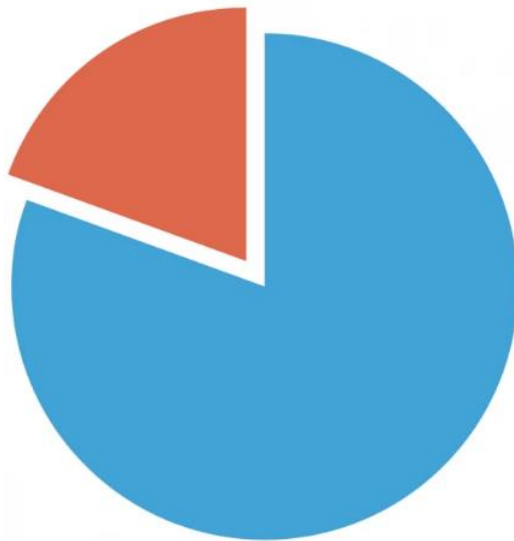
● President Obama's Cabinet

- **3 out of 16 Cabinet Positions** are held by women – We should have 8

We've been Socialized into Unconscious Bias by Who we've Seen in Power: Our Congress

Gender composition of the 114th Congress

■ Male ■ Female



House

Male: 80.6 percent
Female: 19.4



Senate

Male: 80 percent
Female: 20

THE AXELROD FIRM, PC
A certified woman-owned law firm



We've been Socialized into Unconscious Bias by who we've Seen in Power: Our Companies

- CEOs of the Fortune 500 Companies:
22 (**4.4%**) are women as of Nov. 2015
- Board of Directors of the Fortune
1000 Companies: **18.8%** are women

2020 Women on Boards' 2015 Gender Diversity
Index



We've been Socialized into Unconscious Bias by the Men who Heads our Companies

- We prefer not just men, but tall, white men
 - In the US, only about **14.5%** of men are 6' tall or taller, but **58%** of Fortune 500 CEOs are white, male, and 6' or taller.
 - In the US, only **3.9%** of adult men are 6'2" or taller whereas **30%** of Fortune 500 CEOs are.

Malcolm Gladwell, *Blink*



Part II: Measuring Unconscious Bias: How we Evaluate Potential and Decide Pay

○ The lab manager study

- The scientists (127 professors in biology, chemistry or physics) evaluating identical applications rated the male student: more competent, more likely to be hired, deserving of a better salary (from over \$3,000 to over \$4,300 per year), and worth spending more time mentoring.
- Female scientists were as likely as male scientists to evaluate the students this way.

Proceedings of the National Academy of Sciences

THE AXELROD FIRM, PC
A certified woman-owned law firm



Measuring Unconscious Bias: How we perceive talent

○ Orchestra Auditions

- Using a screen during preliminary auditions increased the likelihood a female musician would advance to the next round by **11%**.
- During the final round, “blind” auditions increased the likelihood of female musicians being selected by **30%**.
- The transition to blind auditions from 1970 to the 1990s accounts for **30%** of the increase in the number of women new hires.

“Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians” (Claudia Goldin Cecilia Rouse), Harvard Kennedy School, Women and Public Policy Program



Measuring Unconscious Bias: How we hear women in the workplace

- The ABC News Experiment, “Women Endure Surprising Bias in the Workplace” at:
<http://abcnews.go.com/WNT/video/women-endure-surprising-bias-workplace-21186867> from 0.49-2.28
- Either over confident or too meek



Measuring Unconscious Bias: The companies we finance

○ Venture capital

- About **38%** of U.S. businesses are owned by women, yet just **2%** of the money invested by venture capital firms goes to women-owned firms.

National Foundation for Women
Business Owners and Wells Fargo &
Co. study



Measuring Unconscious Bias: How we review what we read

○ A Study on Writing

- A legal memorandum written that intentionally included mistakes in grammar, logic, application of the law, etc.
 - Said to be written by John Thomas, a third-year associate at a third-year associate with a degree from NYU Law School.
 - Sent to 60 partners at law firms, who were asked to judge the potential of John Thomas and to offer feedback.
 - John Thomas was identified as white to half of the partners and as black to the others.
 - The white John Thomas was rated much higher, given more positive feedback and was seen as having much more potential than the black John Thomas, whose (identical) memo was not only scored worse, but the partners found additional errors in his work, and gave him very negative feedback.
- “Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills,” summarizing an eye-opening study by Dr. Arin N. Reeves



Testing your own bias

- We all have unconscious bias
- Despite our biases, most of us want to treat people equally, without favoritism
- How we can test our biases – Harvard's Project Implicit at <https://implicit.harvard.edu/implicit/>



Part III: Diverse Teams Perform Better

○ Having Women at the Top Pays

- The Fortune 500 companies with the most women on their boards outperformed those with the least by:
 - **66%** in return on invested capital (ROI),
 - **42%** in return on sales, and
 - **53%** in return on equity.

Catalyst press release, “Companies With More Women Board Directors Experience Higher Financial Performance, According to Latest Catalyst Bottom Line Report”



Equality Multiplies Organizations' Success

- More women in leadership equates with greater financial success.
 - Of the most successful U.S. companies, the top Fortune 100 companies, women represent **18%** (nearly 1 in 5) board members.
 - As you move to Fortune 200, the number of women on the board decreases to **16.7%**.
 - Fortune 300 have **14.9%**, and so on down to Fortune 500 companies.

“The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004–2008),” *Catalyst, Inc.*, Nancy M. Carter and Harvey M. Wagner (2011)

THE AXELROD FIRM, PC
A certified woman-owned law firm



Equality Multiplies Organizations' Success

- The most racially diverse companies bring in nearly 15 times more revenue than the least racially diverse.
- Racial diversity is a better determinant of sales revenue and customer numbers than company size, age, or number of employees at a worksite.

“Does Diversity Pay?: Race, Gender, and the Business Case for Diversity,” Cedric Herring, *American Sociological Review* (2009)



What We Know About Diverse Teams

- Diverse teams, and diverse companies, **perform better**: they avoid groupthink and have a wider perspective – explaining the functioning of a more diverse board
- Diverse groups outperform even groups chosen for their intelligence (Cedric Herring)
- Diversity actually creates a **synergistic** positive impact
- These two things mean that **diversity positively impacts non-profit organizations** as well



Diversity Positively Impacts Entire Societies' Quality of Living

- Diversity benefits everyone, women *and men*:
“[H]aving women participate at the top of the corporate food chain appears to be a byproduct of cultures that meaningfully value equality and diversity. [C]ountries with more female directors [also] tend [not only] to be the wealthiest [and] most prosperous, [but also the] best educated, least corrupt, and *happiest*.” (Emphasis supplied).

Quoting from “Female Corporate Directors Pay Dividends for Corporations and their Countries,” John Okray



Part IV: Unconscious Bias in the Courtroom

Commil USA, LLC v. Cisco Systems, 720 F.3d 1361 (U.S. App. 2013):

Court of Appeals for the Federal Circuit upheld grant of partial new trial that led to Cisco being held liable to Commil for \$63M for induced patent infringement. In first trial, the jury found for Cisco on the claim.

Commil is based in Israel and the inventors of the '395 patent are Israeli. Throughout the trial, according to the district court, Cisco's trial counsel attempted to play upon religious prejudices and ethnic stereotypes.

For instance, **during the cross-examination of Jonathan David, a co-owner of Commil who is Jewish, Cisco's counsel attempted to perpetuate the stereotype of Jewish people as greedy opportunists by asking Mr. David if his cousin was a "bottom-feeder who swim[s] around on the bottom buying people's houses that they got kicked out of for next to nothing."** J.A. 5823 (139:19-140:1). Later, **when Mr. David mentioned dining at a local barbeque restaurant, Cisco's counsel quipped, "I bet not pork."** J.A. 5825 (146:4-24).



Unconscious Bias in the Courtroom: Commil v. Cisco (continued)

Counsel for Cisco began his closing argument with a reference to the trial of Jesus Christ, stating:

Ladies and Gentlemen of the jury, you are, in this case, truth-seekers. You are charged with the most important job in this courtroom, and that's determining the truth. . . . And when you figure out what the truth is, you'll know how to answer that verdict form. You remember the most important trial in history, which we all read about as kids, in the Bible had that very question from the judge. What is truth?

J.A. 6038 (16:1-16) (footnote omitted).



Unconscious Bias in the Courtroom: Commil v. Cisco (continued)

After the jury awarded a \$3.7 million award against Cisco, Commil moved for a new trial. In granting Commil's motion for a new trial, the court found that Cisco's counsel's comments regarding the trial of Jesus, viewed in context with his other comments regarding Mr. David and the inventors Jewish heritage:

[Made it] clear that counsel was attempting to align his "religious preference with that of the jurors and employs an 'us v. them' mentality -- i.e., 'we are Christian and they are Jewish.'" Commil USA, LLC v. Cisco Sys., Inc., No. 2:07-CV-341, 2010 U.S. Dist. LEXIS 144014, *7 (E.D. Tex. Dec. 29, 2010).

Commil, 720 F.3d 1361, *5. In the new trial, Commil was awarded \$63 million against Cisco. The Court of Appeals for the Federal Circuit found no abuse of discretion in the grant of the new trial.



Unconscious Bias in the Courtroom: Tokenism

- Bringing in a woman or minority attorney to appear at counsel table



Unconscious Bias in the Courtroom: Racism

- From an African American attorney: “When I was a prosecutor, opposing counsel often tried to portray me as a sellout [because] African-American jurors are not too fond of the criminal justice system. Sadly, they didn't realize that black jurors don't appreciate crime either -- so they would relate to me the same way they would to the often black male defendants. I did have to make a conscious effort to let the jury know that I was from the community I was trying to protect -- and once that was established, it often worked to the detriment of the lawyer who tried to paint me as an ‘Uncle Tom.’”



Unconscious Bias in the Courtroom: Racism and Sexism

- From a female African-American attorney:
 - Other attorneys in her practice repeatedly mistook her for another female African-American attorney in her field, although the two did not look alike and were not handling any cases together.
 - A security guard told the judge in a case she was handling, “Your Honor, the attorney on the other side is African-American.” Multiple lawyers were involved in the action, and all heard the comment and when it was made, turned and stared at her.



Unconscious Bias in the Courtroom: Sexism

- From female trial attorneys:
- An older male constantly referred to her as “that young lady.” She told him at sidebar that if he kept it up, she’d refer to him as “that older gentleman.”
- Many reported being taken by the court and/or court staff as the court reporter, despite not carrying any court reporter equipment.



Unconscious Bias in the Courtroom: Sexism (From female attorneys continued)

- “[I]n one case that I had a few years ago where I represented a young black man charged with drugs and firearms offenses in federal court, ... the older white men on the jury told me that the fact my client had selected a white female lawyer made a very positive impression on them because it led them to conclude he had respect for his mother [and was open minded].”

“[M]y client had an extensive criminal record and was buried alive in evidence in the case but ended up getting acquitted of practically all of the charges, including the main charges.”

Biography



Sheryl L. Axelrod provides strategic, results-driven advice and representation to companies concerning their employment, bodily injury, and commercial, and appellate litigation matters. While only 5% of lawyers are recognized by their peers as Super Lawyers, Ms. Axelrod was recognized as a Super Lawyer and rated one of the Top 50 Women Super Lawyers in Pennsylvania for the past four years in a row and in 2015, was also recognized as one of the Top 100 Super Lawyers in Philadelphia. She is rated AV Preeminent by Martindale-Hubbell, the highest rating a lawyer can achieve. One of her trials, a David versus Goliath commercial litigation victory for her client-defendant, was published in “Pennsylvania Jury Verdict Review & Analysis” which catalogs the

most significant state verdicts. She is a member of the Litigation Counsel of America (LCA), a peer-selected honorary society of top trial lawyers. Vigorously vetted for skills, expertise, and service, less than one-half of one percent of American lawyers are accepted into LCA's by-invitation-only membership.

In addition to her trial work, Ms. Axelrod has won many cases on her briefs. Two of her briefs have been published. On a Superior Court of Pennsylvania television program, she explained Pennsylvania appellate practice to the public prior to televised oral arguments before the Court.

Prior to founding [The Axelrod Firm](#), a four-attorney Philadelphia law firm, Ms. Axelrod worked at Blank Rome LLP, one of the largest and most prestigious law firms in the country handling some of the biggest and most complex real estate litigation matters. Ms. Axelrod received her law degree from Temple University in 1993 after having won the 1992 Samuel J. Polsky Moot Court Competition. Upon graduation from Temple Law School, she clerked for the Honorable Sandra Mazer Moss, a distinguished and award winning (now retired) jurist. Ms. Axelrod is the Immediate Past President of the Temple Law Alumni Association (TLAA), the fourth female to hold the post in TLAA's nearly hundred year history. During her Presidency of TLAA (the 2002 and 2013 term), Ms. Axelrod founded the TLAA Women's Initiative and the TLAA Diversity Committee, their major panel discussions, the TLAA Women's Champion Award, and the TLAA Diversity Leadership Award.

I am the recipient of the 2009 TLAA Distinguished Service Award, and was awarded the 2015 TLAA Women's Champion Award.

THE AXELROD FIRM, PC
A certified woman-owned law firm

Questions?

Ask me:

Sheryl L. Axelrod, Esquire

www.theaxelrodfirm.com

Direct Dial: 215.461.1768

Fax: 215.238.1779

Email: saxelrod@theaxelrodfirm.com

On LinkedIn

On Twitter: [@sher_lawyer](https://twitter.com/sher_lawyer)



THE AXELROD FIRM, PC
A certified woman-owned law firm