

JUROR UNCONSCIOUS BIAS

**King County Bar Association
November 29, 2017
Judge Theresa Doyle**

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Implicit Bias

- **“Automatically operating cultural filter” per UW Professor Tony Greenwald**
- **Recognized as a scientific concept -1955**
- **“Attitudes or stereotypes that affect our understanding, decision-making, behavior without our realizing it”**

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Implicit Association Test

- IAT invented in 1988, www.implicitbias.harvard.edu
- Designed to detect strength of a person's automatic association between words and images/categories of persons by noting reaction times
- Race, gender, sexual orientation, age, disability, skin tone, religion

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Results of IAT

- Universal preference for advantaged group, even among members of disadvantaged group
- Jesse Jackson: "There is nothing more painful for me at this stage of my life than to walk down the street and hear footsteps and start to think about robbery, then look around and see somebody white, and feel relieved. How humiliating."

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TD1

IAT Results Consistent With Other Data

- **All-white juries more likely to convict African Americans and Latinos at higher rate than white defendants.**
- **Housing applicants with African American names rejected at higher rate**
- **Job applicants with African American names, “Jamal” v. “Justin”, are rejected for job interviews at a higher rate**
- **Criminal defendants who are African American more likely to be held pretrial on money bail than are white defendants**

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Juror Bias In Courtroom

- **Jurors bring with them their unconscious biases; “juror unexceptionality”**
- **Studies show that implicit bias may be less likely to have an effect in trials where race is NOT obvious.**
- **But where there is clearly a racial dimension:**
 - **Racial slurs**
 - **Hate crime**
 - **Race discrimination**
- **Theory is that when jurors are aware of possible discrimination, they are on the alert for their own biases**

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Slide 5

TD1 add bail data, Rachlinski
Theresa Doyle, 11/8/2017

Color-Blind Approach Rejected

- In Colorado v. Pena-Rodriguez, (137 S.Ct. 855), in 2017, the U.S. Supreme Court took unusual step of reversing conviction because juror's statements during deliberations made clear he had "relied on racial stereotypes or animus to convict."
 - Juror said the defendant was likely guilty because he was Mexican and an alibi witness shouldn't be believed because he was "an illegal."
- Other quotes:
 - The jury "is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice."
 - "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of the Power by the State."

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Colorado v. Pena-Rodriguez: Address Race Bias in Jury Selection

- Court, both majority opinion and dissent, endorsed addressing racial bias during voir dire as an antidote to bias infecting the verdict.
 - Acknowledged ineffectiveness of generic instruction about avoiding bias
 - WPI admonition not to allow "sympathy, bias or personal preference"
 - Endorsed voir dire questioning about race: Alito's dissent said it is "typically advisable in any case if a defendant requests it."
 - Cited law review articles about "race-conscious voir dire" articles
 - Use of juror questionnaires
 - Skillful questioning by attorneys, open-ended and indirect, citing practice manuals
 - But: No right to address racial basis in voir dire except in capital cases OR where race issues overt – not supported by the social science research

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Colorado v. Pena-Rodriguez: Thoughts?

Would that juror have been removed from the panel during jury selection if racial bias had been directly addressed in voir dire?

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How to Address Bias?

- **Federal district court for western district developed a video and pattern instructions regarding implicit race and other bias.**
- **Workgroup formed 2015 with prosecution, defense, private bar, civil lawyers, academics, and judges**
- **Video explaining implicit bias**
- **Jury instructions**
- **King County modified federal video, shows to jurors**

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Advantages of Video in Juror Orientation

- **Captive audience**
- **Introducing concepts of due process, right to fair trial, history of jury**
- **Pride in jury system**
- **Learning theory: “framing”, “cognitive filtering”**
- **Time to ponder – studies show ½ day training has de-biasing effect**

OR

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Video Can Be Shown in the Courtroom

- **Many attorneys request the court show the video in courtroom**
- **Court introduces subject to jurors**
- **Not attributed to either side**

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“But judge, this isn’t a case about race!”

- **Studies show that where “it’s not a case about race”, unconscious bias is most likely**
- **Theory: where race is part of the evidence, jurors take care to avoid their prejudices**
 - **Criminal Cases:**
 - **Minority defendant/white victim**
 - **Law enforcement witnesses are of color, risk of jurors discounting testimony**
 - **Civil Cases:**
 - **Any party or witness not from a dominant group**

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“But judge, this isn’t a case about race!” (Continued)

- **Remember IAT results! We all have implicit bias**
- **Social scientists describe as:**
 - **Presumption of credibility/veracity,**
 - **Whites enjoy “good citizen” illusion**
 - **White men enjoy “leadership illusion”**
- **Remember Pena-Rodriguez**
 - **Not a race case, but with racially biased juror, bias not addressed**
 - **Supreme Court emphasized “generic questions about ability to be fair, impartial may not expose attitudes or biases that can poison jury deliberations”**

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Jury Instructions Can Provide Structure for Race-Salient Voir Dire

Preliminary instruction where counsel plans to address implicit bias:

- **“It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the plaintiff or defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.**
- **“Accordingly, during this voir dire and jury selection process, I or/and the lawyers may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.”**
- **Can be incorporated into WPI(C) 1.01**

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Additional Jury Instructions

- **Before Opening Statements: Duty of the Jury**
- **Before Opening Statements: Credibility of Witnesses**
- **After Parties Rest, Before Closing Arguments: Duty of Jury**

- **See Western District website for text of instructions**

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Lawyers Addressing Bias in Voir dire Is Totally Appropriate

- **Purpose of voir dire is different from addressing unconscious bias in orientation, instructions**
 - **Eliciting bias for use of for cause, peremptory challenges**
 - **Primary goal here is NOT to educate, cf. video, but to elicit bias**
 - **“Justice Alito said I could!” in Pena-Rodriguez: race-salient questioning should be allowed whenever counsel requests it**

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How to Conduct Race-Conscious Voir Dire

- **General, open-ended questions:**
 - **What life experiences juror has had that relate to degree of implicit bias?**
 - **Experience with different cultures, groups?**
 - **Opinion about the video?**
 - **Ever heard of “implicit bias” before today?**
 - **Social science shows intergroup contact has debiasing effect**
 - **Decategorization and individuation**
 - **Like having your client testify**
 - **Jeff Robinson: anything that gets jurors talking**

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How to Conduct Race-Conscious Voir Dire (Continued)

- **Specific, provocative questions:**
 - **Confederate flag, what does flag mean to you?**
 - **What do you think about these police shootings?**
 - **Do we spend too much time talking about race?**
- **Devil's advocate approach:**
 - **Travel ban; doesn't that make sense? (client who is undocumented or immigrant)**
 - **Do black people simply commit more crimes?**

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Get Comfortable Being Uncomfortable

- **Be ready for awkwardness of hearing racially offensive remarks, not admonishing**
- **Vet with the judge beforehand; be ready to respond to issue of making jurors "uncomfortable"**
- **ABA Toolbox:**
www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheck.dampdf

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Questionnaires

- **Recommended by dissent in Pena-Rodriguez to ferret out biased jurors**
 - “Lawyers may use questionnaires or individual questioning of prospective jurors in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors.”
- **Advantage is that it comes from the judge, not parties**

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Effectiveness of Any of This?

- **Social science verification ongoing**
- **Debiasing: interrupt bias from behavior acting on the bias**
 - Data shows intergroup contact, training ½ day or more helps
 - Decategorization
 - Perspective shifting supported by social science
 - Data show even all-white juries less likely to convict after race-relevant voir dire
 - Motive to be egalitarian, beware of hierarchical/authoritarian personalities
- **Doesn't remedy lack of diverse jury pool**
 - Even one juror of color in pool reduces effect race bias
- **Or Batson problem of excluding jurors of color on jury**
 - MJC jury diversity project
 - Pierce County collecting data

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Discussion

- **So what do you think?**
- **This is a work in progress**
- **Washington Pattern Instructions Committee working on state-wide juror orientation video that incorporates implicit bias + updates on avoiding social media, internet research, etc.**

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