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U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias

By Judge Theresa Doyle

We all have biases. These unconscious, instantaneous, almost automatic judgments can help us get through the day. However, when those unconscious biases stereotype a person because of race, gender, national origin, sexual orientation, age or other qualities, they are no longer helpful but harmful to the right to a fair trial.

Results of the widely taken Implicit Association Test (IAT) and other research show a high and nearly universal preference of whites over blacks.[1] Even with African-American test-takers, 40 percent showed a pro-white preference. Jurors bring these biases to court when they report for jury service.

A recent U.S. Supreme Court case, *Colorado v. Pena-Rodriguez,*[2] shows the damage inflicted by jurors who harbor racial bias. In *Pena-Rodriguez*, during deliberations a juror revealed his opinion that the defendant "did it because he's Mexican" and that an alibi witness was not credible because the witness "was an illegal" (the witness was a legal resident).

The Supreme Court reversed the conviction despite the federal no-impeachment rule for jury verdicts. Regarding *voir dire* about race, the Court stated:

> In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*.[3]

So, what should courts do about the biases and prejudices that jurors bring with them to court? After the May 2015 annual meeting for the U.S. District Court, Western District of Washington, judges and lawyers began discussing the issue. This led to then-Chief Judge Marsha Pechman appointing a bench-bar-academic committee, chaired by Senior Judge John C. Coughenour, to develop an answer.[4]

"While the committee was meeting, a criminal trial occurred in front of Judge Jones," said committee member Jeffery Robinson, an eminent member of the criminal defense bar. "The federal defenders representing the person accused showed a videotape that dealt with potential race bias as part of the *voir dire*. After the trial was concluded, the committee spoke to Judge Jones, the federal prosecutors, defense lawyers and some of the jurors. Based on all of the committee work, including the interviews, the committee developed a script and worked with a production company to produce a video presentation on the nature and impact of implicit or unconscious bias."

In February, after nearly two years of work, the video was finished and the committee had developed pattern jury instructions on implicit bias for use in criminal cases; they were adopted by the Court.[5] The instructions incorporate language regarding unconscious bias into a preliminary instruction, the witness credibility instruction, and a closing instruction. The preliminary instruction states:

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual preference, or gender of the [plaintiff,] 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 [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

The Court has included the following statement with the online version of the instructions and video:

> The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.…
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> Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The video features Judge Coughenour, Robinson, and Annette Hays, acting U.S. attorney for the Western District of Washington. These three explain how such automatic preferences and biases can influence our perceptions and decisions,

threatening the constitutional right to fair trial and due process, and jeopardizing public confidence in the legal system.

Introducing the topic of implicit bias during juror orientation is optimal. Research shows that awareness of unconscious biases is key to minimizing their effects on perceptions and decision-making. Social science research also shows that impressions formed early can shape the understanding of what follows; this is termed "priming" and "cognitive filtering."[6]

Such timing is important because it is during orientation that jurors are introduced to the concepts of the right to fair trial, the role of the jury system, and the need to discard bias and prejudice to decide the case fairly. Awareness of unconscious stereotypes and biases is logically related.

Building on the juror orientation video are the pattern jury instructions. Preliminary instructions prepare jurors for questioning during *voir dire* related to conscious and unconscious bias. They also legitimize the attorneys' subsequent inquiries because the instructions come from the judge. Other instructions in the packet, to be used before opening statements and at the close of the evidence, caution jurors not to allow biases and stereotypes to affect their evaluation of the evidence and decisions. These instructions are similar to those used in other jurisdictions.[7]

Some have questioned whether these instructions constitute an impermissible comment on the evidence, in violation of Article IV, Section 16 of the Washington Constitution.[8] This is nonsense.

"It's not a comment on the evidence," Robinson says, "it's a comment on the way people think. It's a comment on the existence of unconscious bias and how to identify it and eliminate it. It's the court saying you can't use race to determine if a witness is being truthful, or as a reason to convict my client."

Moreover, courts already caution jurors against relying on prejudice or bias, e.g., WPIC 1.01 and 1.02, in reaching a verdict. The implicit bias instructions simply add references to unconscious prejudices and biases.

Targeted *voir dire* is the third and an essential component when it comes to implicit bias. Studies show that racial bias is most influential when race is not an overt issue in the trial. Where race is prominent, as in a prosecution for a hate crime or a civil case involving racial epithets, jurors make an effort to combat their prejudices.

However, where race is never mentioned but lurks in the background, e.g., where a party in a civil case, or the defendant or victim in a criminal case, or important witness in any type of case, is a person of color, that racial or ethnic bias is most likely to rear its ugly head.[9] Consider *Colorado v. Pena-Rodriguez*. Would the juror who did not reveal his racist views until he got to the jury room have been removed for cause during *voir dire* if he had expressed those views during jury selection?

Counsel's job in jury selection "is to get jurors to reveal their real beliefs," Robinson says. Open-ended questions are best for sparking discussion, especially if focused on controversial subjects such as Donald Trump's travel ban, Black Lives Matter, the Confederate flag, etc. Or lawyers could simply ask what the jurors thought about the implicit bias video. The point is to get jurors talking in order to give the lawyers sufficient information for an intelligent exercise of for-cause and peremptory challenges.

Racial and other prejudice/bias are part of the fabric of American life and, hence, are endemic to the jury system. "The fact is that every single person in that courtroom has racist thoughts. It's not a white or black issue; it's an American issue," Robinson says. ■

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[1] The IAT is available at *https://implicit.harvard.edu/implicit/takeatest.html*.

[2] No. 15-606, slip opinion, March 6, 2017.

[3] *Colorado v. Pena-Rodriguez*, slip op. at 14.

[4] The committee members, drawn from the bench, academia, the civil bar, the U.S. Attorney's Office and the criminal defense bar, were: Judge Coughenour, Judge Richard Jones, Annette Hayes, Corrie Yackulic, Jonathan Markovitz, L. Song Richardson, Michael Filipovic, Patty Eakes, Tessa Gorman and Jeffery Robinson.

[5] The jury instructions and video are available online at: *http://www.wawd.uscourts.gov/jury/unconscious-bias*.

[6] Anna Roberts, "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias," 44 Conn. L. Rev. 827, 863–66 (2012). See also, "Jury Diversity and Implicit Bias: Tilting the Scales Toward Racial Balance" (Parts One & Two), KCBA Bar Bulletin, November 2016 at 4–5 – *https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=11&Year=2016&AID=article3.htm*; KCBA Bar Bulletin, December 2016 at 16–17 – *https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=12&Year=2016&AID=article11.htm*.

[7] See American Bar Association, "Achieving an Impartial Jury (AIJ) Toolbox," at 17–22, available at *http://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf*.

[8] "Judges shall not charge juries with respect to matters of fact, nor comment thereon ...." Wash. Const. Art. IV, section 16. A statement or instruction would be a comment on the evidence "[i]f the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable ...." *State v. Lane*, 125 Wn.2d 825, 838 (1995).

[9] See Samuel R. Sommers and Phoebe C. Ellsworth, "'Race Salience' in Juror Decision-Making: Misconceptions, Clarifications and Unanswered Questions," 27 Behav. Sci. & L. 599 (2009).