



# Jury News

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## Addressing the Conundrum of Implicit Bias in Juror Decision Making

A recent “Jury News” column discussed *Peña-Rodriguez v. Colorado*, which was then pending before the U.S. Supreme Court.<sup>1</sup> *Peña-Rodriguez* raised the issue of whether an exception to the widespread prohibition on allowing juror testimony to impeach a jury verdict should be created for instances in which the deliberations were tainted by racial or ethnic bias. On March 6, 2017, the U.S. Supreme Court ruled in the affirmative, reasoning that the “central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”

This was a close case — the decision was 5 to 3 — due to concerns that any exceptions created might eventually swallow the “no-impeachment rule,” which is the prevailing approach in state and federal courts. In addition to the “unique historical, constitutional, and institutional concerns,” the rationale for the justices in the majority opinion was recognition that the traditional safeguards against racial bias by jurors are mostly ineffective after the jury begins deliberations. Which brings up the question, what can courts do to prevent racial bias in jury deliberations from violating defendants’ rights to a fair and impartial jury?

Part of the problem for courts is that racial bias is very difficult to detect among jurors. It is socially disfavored in contemporary society, so jurors are extremely reluctant to disclose it during jury selection, even when asked directly. More critically, many jurors are completely unaware of their own biases, and thus would not even think to bring them to the attention of the judge and attorneys during jury selection. The existence of implicit bias is an especially challenging problem for courts.

## What Is “Implicit Bias”?

Explicit racial prejudice has no place in the American justice system, and most people make a concerted effort to suppress biased behavior or speech, even when they consciously recognize that they have those attitudes. But some biases operate on a subconscious level, without the person’s knowledge or control, and can affect how people interpret information and make judgments. Social scientists have coined the phrase “implicit bias” to describe this phenomenon. There is extensive evidence that implicit biases contribute to racial disparities in a wide range of consequential real-world decisions and growing evidence that implicit biases contribute to racial disparities in decisions at every stage of the criminal process (e.g., police investigations, prosecutor charging decisions and plea negotiations, bond hearings, trials, and sentencing, including capital punishment).<sup>2</sup> Implicit bias can also distort juror decision making by affecting how jurors interpret trial evidence. Jurors with strong implicit biases toward whites and against blacks may be more likely to assume the worst about a black witness’s trustworthiness or a black defendant’s dangerousness while giving a white witness or defendant the benefit of the doubt.

Courts have developed educational programs for judges and court staff that are designed to raise awareness of implicit bias to reduce its impact on judgment and behavior. Self-awareness is a critical first step. Many promising strategies for reducing bias in decision making require the person to be acutely aware of her own propensity for implicit bias and to have a genuine desire to correct for it. The Race Implicit Awareness Test (IAT), an online self-assessment tool developed by researchers at Yale and the University of Washington, is a popular test developed to identify, measure, and study implicit bias. Education about

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implicit bias is not sufficient by itself, however. How that information is delivered can influence its effectiveness. For example, messaging that attempts to coerce compliance with racial fairness (*extrinsic motivation*) can result in hostility that may increase expressions of racial prejudice; a more effective approach is to appeal to each person's personal standards for fairness (*intrinsic motivation*).

Researchers have also identified other educational approaches to address implicit bias. For example, the traditional color-blind approach to adjudication, which has been embraced by the American justice system for more than a century, tends to generate greater individual expressions of racial bias on both explicit and implicit measures. In contrast, a multiculturalism approach that promotes the value of diversity tends to minimize the effects of implicit bias. In addition, greater exposure to individuals who contradict prevailing racial or social stereotypes may reduce those implicit biases. Finally, discrimination tends to emerge more in ambiguous decision-making contexts than straightforward ones. The more concrete the decision-making criteria, the less room implicit biases have to distort individual judgments.

## Addressing Implicit Bias in Juror Decision Making

While many of these educational approaches have become staples in judicial training initiatives, opportunities to provide similar opportunities for trial jurors are extremely rare. Most jurors only serve for the duration of a single trial and, understandably, judges and lawyers are reluctant to prolong

the duration of the trial long enough to replicate the judicial education experience as each new pool of prospective jurors reports for orientation. That leaves only two small windows of time in the typical jury trial in which judges and lawyers can highlight implicit bias for the jury: jury selection and final jury instructions. For a variety of reasons, court policymakers have focused primarily on jury instructions as the intervention best suited to minimize expressions of implicit bias by trial jurors. Judges instruct jurors on the law in every trial, so adding an implicit-bias instruction does not complicate trial procedures. In most jurisdictions, judges and lawyers use pattern jury instructions, reducing the risk that individual judges would include counterproductive elements, such as extrinsic motivation or colorblind ideology, in the instructions delivered to jurors.

Given this interest, the NCSC Center for Jury Studies undertook a research study in 2015 to test the effectiveness of an implicit-bias jury instruction. Working with an advisory committee of nationally recognized experts on implicit bias, project staff drafted an instruction designed to reflect the most efficacious approaches in implicit-bias educational programming. We also adapted a trial scenario used in previous studies that had repeatedly demonstrated racial bias in juror decision making. We then conducted a mock-jury experiment in which jury-eligible citizens were recruited online and asked to read one of eight versions of the trial scenario (varying the race of the defendant, the race of the victim, and the type of jury instruction); watch a video of a judge delivering either an implicit-bias instruction or an admonition prohibiting Internet use while on jury duty; and answer survey questions

about their verdict preference in the case, their confidence about their verdict preference, and the appropriate sentence if the defendant was found guilty. Finally, jurors were asked to complete the Race IAT and a series of explicit-bias measures.

We wish we could report that our implicit-bias instruction was a smashing success and that all traces of implicit bias evaporated in the sample of jurors who received the instruction. Unfortunately, the results were considerably more ambiguous.<sup>3</sup> The implicit-bias instruction did not significantly influence the mock-juror verdict preferences, verdict confidence, or sentencing recommendations. In fact, we were not even able to replicate the traditional pattern of white-juror bias against black defendants. The only meaningful impact of the implicit-bias instruction was that the defendant's claims of self-defense were perceived as stronger by white jurors in black-on-black trial scenarios compared to white-on-black trial scenarios. We did not detect evidence of backlash effects from our instruction, but could not rule out the possibility of individual differences between jurors (where backlash effects are likely to be observed).

## Is the Justice System Ready for an Implicit-Bias Instruction, Even if We Crafted One that Really Worked?

Added to the disappointing study results, we received a sobering assessment of the receptiveness of trial judges to using an implicit-bias instruction in jury trials. We had circulated the instruction for comment on a listserv for members of pattern-jury-instruction committees. Many of the comments were generally supportive of the concept, but thought that our instruction was much, much too long. For the record, our instruction was 342 words, which takes approximately two minutes to deliver using a measured speaking cadence. This resistance to extending the time allotted for instructing the jury does not bode well for the likelihood of systemic implementation.

Some judges also raised substantive objections. For example, one thought that the instruction that encouraged jurors “to openly discuss the possible influence of hidden biases on decision-making” might intrude on jurors’ prerogatives to manage their own deliberations. Another was concerned that the instruction did not differentiate adequately between illegitimate biases based on race or ethnicity and legitimate factors about the defendant that would be legally relevant to the jurors’ decision-making task. And one judge identified a fundamental paradox in the very concept of a jury instruction

on implicit bias — namely, that jury instructions are intended to express the rule of law that is applicable in the case, but an implicit-bias instruction focuses on the intrinsically personal question of “can you be fair as a juror?”

## The (Renewed) Importance of a Diverse Jury

Based on the difficulty of crafting a jury instruction that effectively addresses implicit bias, or developing other approaches to educate prospective jurors, it appears that jury diversity continues to be an efficacious and eminently feasible way to minimize the impact of implicit bias on juror decision making. Research has repeatedly found that diverse juries are, on average, less biased by the defendant's race. The quality of jury deliberations benefits from the presence of minorities when jurors engage with one another on an equal basis and expressly confront different conclusions about the trial evidence. A diverse jury obviously brings more diverse perspectives to deliberations, but also increases white-juror awareness of race-related concerns in a way that stimulates a more thorough and more factually accurate evaluation and discussion of trial evidence. For jury managers, this means that ensuring the jury pool reflects a fair cross-section of the community takes on a heightened importance.

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### NOTES

1. Paula Hannaford-Agor & Greg Hurley, *Jury News: Racial Bias and the American Jury*, CT. MANAGER, Winter 2016, at 41.
2. See Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013).
3. See Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116 (2015).