

Implicit Bias Jury Instructions: Should All Jurisdictions Adopt Them?

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Abstract

The Sixth Amendment guarantees a defendant the right to an impartial jury; however, studies have shown that members of the jury are often unknowingly influenced by biases that are present in our social and cultural norms. Jurors, like all individuals have biases, both positive and negative, that can affect their decision-making. In order to ensure a fair trial, the jury must be aware of their biases, especially their implicit ones. Implicit biases are of particular concern because they are held at an unconscious level and can be extensive and difficult to change.

The purpose of the following research was to determine whether all judicial jurisdictions in the United States should use implicit bias jury instructions in criminal trials. Implicit bias jury instructions introduce members of the jury to the concept of implicit bias and urges them to avoid such biases during trial. This research examined existing studies on implicit bias and explored the current and future use of these instructions throughout the country. Although further research is needed to understand the full extent of the effects of implicit bias jury instructions in a courtroom, current studies indicate positive results in reducing juror biases. These results could significantly impact the criminal justice system by ensuring a fairer trial for all defendants.

Implicit Bias Jury Instructions: Should All Jurisdictions Adopt Them?

Historically in the United States, racial discrimination has played a significant role in the disparate outcomes of trials and the varying lengths of sentences among people of different races. Although the Sixth Amendment guarantees a defendant the right to an impartial jury, biases continue to impact the decisions that jurors make. There are two types of biases, explicit and implicit biases. Explicit bias is a view about an attribute of a particular group or individual which is expressed either through spoken words, writing, or symbols (Clarke, 2008, p. 513). These biases can be more easily identified because they can be openly expressed (Clarke, 2008, p. 507). Other biases such as implicit ones, are not as easy to identify.

Implicit biases are views that one holds at an unconscious level and are displays of an individual's social and cultural norms (Levinson, 2007, p. 351). Even though implicit biases are made at an unconscious level, they can be harmful to a person's decision making and memory processes because they are extensive and difficult to change (Levinson, 2007, p. 352). Many past studies have thoroughly looked at the effects of explicit bias, but the covert effects of implicit bias have only recently become of primary concern (Greenwald & Krieger, 2006, 945).

In 2015, a group of judges and lawyers in the Western District of Washington met up to discuss the United States Supreme Court's finding in *Peña-Rodriguez v. Colorado*, where the Court held that a jury's final verdict is impeachable if a defendant can provide evidence of racial bias in violation of the Sixth Amendment's right to an impartial jury (Doyle, 2017, p. 1). As the committee discussed the Court's findings, the group recognized that racial bias can have significant consequences in a courtroom (Doyle, 2017, p. 1). As a result, they appointed an academic committee of judges and lawyers to review the issue of bias (Doyle, 2017, p. 1).

In the course of two years this committee worked with other judges, attorneys, and jurors to develop a script and produce a video regarding the effects of implicit bias in a courtroom (Doyle, 2017, p. 1). The video can be found here: <https://www.wawd.uscourts.gov/jury/unconscious-bias>. Along with the video, this group created implicit bias pattern jury instructions that could be used in criminal cases at a judge's discretion. These instructions were included into three separate instruction stages of a trial (Doyle, 2017, p. 1). They were included into preliminary instructions that are given before opening statements, into the witness credibility instruction, and finally into closing instructions (Doyle, 2017, p. 1). The language used in the instructions introduces the jury to the concept of implicit bias and urges them to avoid their biases when evaluating the case and potential witness information, credibility, and final verdict (Doyle, 2017, p. 1, also see Appendix B for the Western District of Washington's jury instructions).

Following the Western District of Washington, other courts have developed their own implicit bias jury instructions. States such as Illinois, California, and Arkansas have changed the language in their jury instructions to include information about implicit bias and the importance of not letting biases affect their decision-making (see Appendices B, C, D, and E). In an effort to encourage other states to follow suit, the American Bar Association (ABA) has expressed its support for such instructions. In 2016, the ABA adopted Resolution 116 in which it called for judges to instruct jurors on implicit bias and to encourage them to not make decisions based on personal opinions, such as likes and dislikes of protected classes (Laird, 2016). Despite progress and support from a growing number of states and the ABA, the majority of states have not made the necessary changes in their jury instructions to reduce implicit bias in the courtroom.

Cognitive Reasoning/Decision-making

The process of thinking and decision-making involves cognitive processes. There are two types of cognitive processes, System 1 and System 2 (Frederick, 2005, p. 26). System 1 cognitive processes are executed quickly and do not require a significant amount of attention from an individual (Frederick, 2005, p. 26). System 2 cognitive processes require effort, motivation, consciousness, and logical analysis or the execution of learned rules (Frederick, 2005, p. 26). When individuals rely on their intuition (System 1) instead of their reasoning skills and logical analysis, they inherently experience a cognitive bias (Frederick, 2005, p.26). Cognitive biases can be positive or negative and can affect the way in which we encode, store, and recall information (Levinson, 2007, p. 345). Cognitive biases can be problematic because they can end up affecting negatively the way that we perceive people and the decisions that we make. The Cognitive Reflection Test is a three-item test that measures an individual's cognitive ability, specifically the ability to resist reporting the first answer that comes to mind.

Cognitive Reflection Test

A Cognitive Reflection Test requires an individual to suppress the wrong answer that impulsively springs to their mind (Frederick, 2005, p. 27). The following test contains three problems that are considered easy to understand when explained, but often generate incorrect answers that are intuitive (see Appendix A for the Cognitive Reflection Test).

The first problem in the test often generates an intuitive and impulsive answer of 10 cents; however, this answer is incorrect. A study conducted at Princeton found that individuals

who answered incorrectly with 10 cents were found to be significantly less patient than individuals who answered correctly with 5 cents (Frederick, 2005, p. 27). The other two problems in the test also result in common impulsive, erroneous answers (Frederick, 2005, p. 27).

The Cognitive Reflection Test supports the science of implicit cognition which argues that individuals do not always have conscious and intentional control over the process that motivate their decisions (Greenwald & Krieger, 2006, p. 946). This unconscious process in which individuals make decisions is known as implicit cognition (Greenwald & Krieger, 2006, p. 946). Implicit cognitive processes can include implicit memory, implicit perception, implicit attitudes, and implicit stereotypes (Greenwald & Krieger, 2006, p. 947). Two of these processes, implicit attitudes and stereotypes, are especially pertinent because they can lead to negative consequences such as implicit bias and discrimination (Greenwald & Krieger, 2006, p. 948).

Implicit Bias

According to Greenwald and Krieger (2006), implicit biases are unconscious “discriminatory biases based on implicit attitudes and implicit stereotypes” (p. 951). Attitudes are defined as evaluative dispositions, meaning the tendency to like or dislike someone or something (Greenwald & Krieger, 2006, p. 948). For example, a person can have a more favorable attitude towards a particular race over others (Greenwald & Krieger, 2006, p. 951). Stereotypes are defined as favorable or unfavorable mental associations between a social group and a trait (Greenwald & Krieger, 2006, p. 949). These associations are not always based on facts, they can also be based on assumptions (Greenwald & Krieger, 2006, p. 949). For example, in a housing scenario where there are two equally qualified renters of different races, a person

might be inclined to choose one race over another if they believe that particular race to be more likely to pay rent (Greenwald & Krieger, 2006, p. 951). The decision is not always made conscientiously or with negative intent (Greenwald & Krieger, 2006, p. 950). Positive and negative attitudes and stereotypes are developed from repeated exposure to cultural stereotypes (Richardson & Goff, 2013, p.2630).

All individuals rely on imbedded attitudes and stereotypes; however, many of these unconscious attitudes and stereotypes can result in implicit biases (Greenwald & Krieger, 2006, p.950). Implicit biases can be problematic because they can cause an individual to behave in a way that significantly differs from their self-proclaimed beliefs and principles (Greenwald & Krieger, 2006, p. 951). This issue is further complicated by the fact that most people do not have clear access to their own cognitive processes and biases; therefore, they have no intentional control over them (Levinson, 2007, p. 354). The Implicit Association Test was developed to assess the strength of associations between concepts and can be used to predict social behavior and identify biases. (Greenwald, Poehlman, Uhlmann, & Banaji, 2009, p. 18).

Implicit Association Test

The Implicit Association Test is an instrument that was introduced in 1998 by Greenwald, McGhee, and Schwartz (Greenwald, McGhee, & Schwartz, 1998, p.1464). This digital test assesses implicit attitudes by measuring the automatic differential association of two target concepts with an attribute (Greenwald, McGhee, & Schwartz, 1998, p.1464). To assess target-concept discrimination, the test asks respondents to distinguish a group of first names and select whether they belong to Blacks/African-Americans or Whites/European Americans (Greenwald et al., 1998, p. 1465). Next, the test assesses attribute discrimination by asking

respondents to categorize the meaning of words as pleasant or unpleasant (Greenwald et al., 1998, p. 1465). The third step in the test involves superimposing target-concept discrimination and attribute discrimination by adding stimuli to target and attribute discriminations (Greenwald et al., 1998, p.1465). The fourth step reverses the response assignments for the initial target discrimination found in the first step. The next and final step combines step 2, attribute discrimination, with the reversed target discrimination found in step four. Greenwald and his colleagues conducted an experiment in which they used the Implicit Association Test to assess the implicit attitudes that individuals hold towards Blacks and Whites (Greenwald et al., 1998 p. 1474). The test found that White subjects displayed distinct implicit attitudes towards Blacks and Whites (Greenwald et al., 1998, p.1474). The experiment also demonstrated that implicit attitudes in general revealed a preference for Whites over Blacks, meaning that respondents were quicker to associate White categories with pleasant combinations (Greenwald et al., 1998, p.1474). The results of the Implicit Association Test indicate that there is a significant portion of our White population that hold harmful unconscious biases that can, and often do, result in racial bias (Greenwald & Krieger, 2006, p.956).

Implicit Racial Bias

Implicit racial biases are unconscious associations individuals make about racial groups (Richardson & Goff, 2013, p. 2629). These biases are often not intentional, they are simply a coping mechanism that our brain uses to facilitate our ability to manage large amounts of information and make decisions in a quicker and more efficient manner (Richardson & Goff, 2013, p. 2629). During the decision-making process, our brain resorts to implicit racial biases as a way to filter information and fill in information that we might not have (Richardson & Goff,

2013, p. 2629). There are also racial cues such as skin color, age, gender, and accent, that can activate our implicit racial biases (Richardson & Goff, 2013, p.2630). Implicit racial biases may appear insignificant because they are not consciously held or controlled, but they can result in serious real-world behaviors that affect minorities (Richardson & Goff, 2013, p. 2630). Although racial biases are harmful to all aspects of our society, they are especially detrimental to our criminal justice system and the prospect of a fair trial.

Implicit Racial Bias in the Courtroom

A number of studies conducted in the United States have highlighted racial bias as a persistent issue in our criminal justice system, yet little has been done to counteract this issue (Mitchell, Haw, Pfeifer, & Meissner, 2005, p. 621). According to research done by Professor Frank (2016), the history of race in the United States has created a pervasive issue of implicit bias in the courtroom (p. 54). The likely effects of such bias can be seen in the overrepresentation of Blacks in our criminal justice system and the consequent mass incarceration of Black males (Frank, 2016, p. 55). A study by Morrison, Devaul-Fetters, and Gawronski (2016) found that the issue of implicit racial bias is often exacerbated rather than diminished, by prosecutors and defense attorneys (p. 1138). The study found that legal professionals use the voir dire process to screen potential jurors for implicit biases that are beneficial to their side of the case and use their peremptory challenges to select jurors with implicit racial biases that are aligned with their legal interests (Morrison et al., 2016, p.1138).

This study (by Morrison et al.) shows that all members of the courtroom, including judges and attorneys, are susceptible to the effects of implicit bias. In a bid to resolve this issue, the ABA and other organizations have recently encouraged attorneys and judges to attend

workshops where they can discuss the issue of implicit bias and de-biasing strategies (Implicit Bias Initiative). This progress is valuable, but the workshops do not target a key population often involved in the trial process, the members of the jury.

Although the majority of jurisdictions have not addressed this issue, the Supreme Court has weighed in. In *Peña-Rodriguez v. Colorado*, the U.S. Supreme Court acknowledged the persistent presence of racial biases held by jurors (Sixth Amendment). In 2007, two teenage sisters were sexually assaulted in a bathroom at a Colorado horse-racing facility (*Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 861 (2017)). The girls identified Miguel Angel Peña-Rodriguez as their assailant (*Id.*) Peña-Rodriguez was charged with one count of attempted sexual assault, one count of unlawful sexual contact, and two counts of harassment (*Id.*). At the end of the trial, Peña-Rodriguez was found guilty by the jury and he was convicted of unlawful sexual contact and harassment (*Id.*). After the jurors were discharged, two jurors spoke with the defense counsel and stated that another juror known as H.C. had made biased statements during the jury's deliberations (*Id.* at 862). The jurors alleged that H.C. had made statements such as "I think he did it because he is Mexican and Mexican men take whatever they want." (*Id.*). They also alleged that H.C. dismissed Peña-Rodriguez's alibi witness and referred to him as "an illegal" in spite of the explicit trial testimony that he was a legal resident (*Id.*).

Peña-Rodriguez made a motion to reverse his conviction but was denied by the trial court (*Id.*). The Colorado Court of Appeals, and later the Colorado Supreme Court, both affirmed his conviction (*Id.*). His case was finally reversed when it reached the Supreme Court (*Id.* at 874). This reversal was significant because historically the Supreme Court had favored a no-impeachment rule, meaning that jurors' testimony about jury deliberations could not be used to

impeach a verdict (*Id.* at 863). Justice Kennedy, part of the majority, argued that racial bias is a unique exception to the no-impeachment rule for two significant reasons. 1) There are unique historical, constitutional, and institutional concerns and 2) previous safeguards against racial bias were substantially weaker (*Id.* at 868). This decision by the Court and Justice Kennedy, reaffirms the existing literature that racial bias is a threat to our justice system and further safeguards need to be put in place to guarantee a defendant's constitutional right to an impartial jury.

Effects of Implicit Bias

Some effects of implicit bias can be easily identified such as the disproportionate amount of Blacks in our criminal justice system. Other effects are not as easy to identify. According to Richardson and Goff (2013), implicit biases have been shown to affect the evaluations of ambiguous evidence (p. 2635). Previous studies conducted on mock jurors have shown that implicit biases influence the way that they evaluate evidence that is ambiguous in respect to guilt (Richardson and Goff, 2013, p. 2635). For example, in one study a researcher "activated" implicit biases in participants by priming them with words associated with blacks, such as slavery (Richardson and Goff, 2013, p. 2635). The researcher then asked participants to read a vignette about a male who was racially unidentified. The participants were told to rate the male's ambiguous behaviors (Richardson and Goff, 2013, p. 2635). The test found that implicit biases made participants more likely to rate the racially unidentified male's behaviors as hostile (Richardson and Goff, 2013, p. 2635). Implicit biases have been found to affect police officers and mock jurors as well (Richardson and Goff, 2013, p. 2635). Jurors with implicit biases were found to be more likely to judge ambiguous evidence as being indicative of guilt (Richardson and Goff, 2013, p. 2635). The end result is that "IBs [implicit biases] can negatively affect

judgments about cases involving clients stereotyped as criminal and crimes stereotyped as black” (Richardson & Goff, 2013, p. 2636).

Implicit bias can result in more severe forms of discrimination such as implicit dehumanization (Richardson & Goff, 2013, p. 2639). Implicit dehumanization is caused by the tendency to unconsciously associate certain stigmatized groups with animals (Richardson & Goff, 2013, p. 2639). Oftentimes, due to its presence in our history and culture, this implicit dehumanization is characterized by the unconscious association between Blacks and apes (Richardson & Goff, 2013, p. 2639). One study examined the reporting in Philadelphia newspaper articles of death-eligible cases (Richardson & Goff, 2013, p. 2639). The purpose of this study was to examine the use of ape-related metaphors in these articles (Richardson & Goff, 2013, p. 2639). The study concluded that Black defendants who were sentenced to death had a higher probability of being characterized with ape-related representations in newspaper articles (Richardson & Goff, 2013, p. 2639). Implicit dehumanization can have serious consequences on the way that Blacks are viewed by the public and, ultimately, the way that they are treated by police (Richardson & Goff, 2013, p. 2639). Researchers also found that police officers are more likely to use force against Black children when they held a stronger association between Blacks and apes (Richardson & Goff, 2013, p. 2640). These associations between humans and apes can ultimately affect the decisions that jurors make during a trial and sentencing.

In addition, implicit bias can result in another bias known as features-based implicit bias. The effects of this particular bias is that individuals who hold more stereotypically known black features are, unconsciously, believed to be more guilty and dangerous (Richardson & Goff, 2013, p. 2640). One study found that defendants, even those who were white, who possessed more

Afrocentric features were more likely to receive longer sentences (Blair, Judd, & Chapleau, 2004, p. 676). This study indicated that Afrocentric features can be used as a predictor of sentence length (Blair, Judd, & Chapleau, 2004, p. 677). These results are troubling because they indicate a correlation between the race of a defendant and the sentence-length chosen by a judge.

De-biasing Strategies

Implicit bias is not an issue that will go away on its own. A number of strategies have demonstrated some success in reducing bias. In order for these strategies to be effective, there must be some conscious effort to identify the manifestation of such biases. Some strategies that have proven to be particularly effective in reducing bias are awareness, exposure, and clear jury instructions. Not only are each of these strategies effective, they are also easy to reproduce in different settings as well as easy to modify to fit the needs of a particular court.

Awareness

According to Richardson and Goff (2013), implicit bias can be reduced if individuals are aware that their decision-making can be biased and they have the possibility of preventing the influence of such biases (p. 2626). Awareness of the fact that implicit biases can affect behaviors and judgments, can motivate individuals to make a conscious effort to reduce the prevalence of such biases (Richardson & Goff, 2013, p. 2646). Raising awareness of racial bias can reduce the degree of bias (Pope, Price, and Wolfers, 2018). Additionally, researchers, Sommers and Ellsworth (2009), conducted a study in which they found that mock jurors were more likely to be racially biased when race remained a silent background issue during the trial (p. 608). In

addition, they found that trials involving racially charged incidents, were less likely to result in racial bias among white jurors (Sommers & Ellsworth, 2009, p. 608).

The type of approach that is used to educate individuals on implicit bias is as important as the message. The approach matters because it can result in distinct ramifications (Elek & Hannaford-Agor, 2013, p.193). Some individuals can feel threatened by pressure and, as a result, choose not to comply with authoritative figures (Elek & Hannaford-Agor, 2013, p.193). Instead of pressuring individuals to comply with social and institutional norms on race, it is argued that authoritative figures should design their educational messages to inform and appeal to individuals based on a respect for personal standards for egalitarianism (Elek & Hannaford-Agor, 2013, p.193). An appeal to personal standards for egalitarianism is more effective because it can result in the reduction of explicit and implicit expressions of prejudice (Elek & Hannaford-Agor, 2013, p.193). As long as authoritative figures encourage individuals to reduce their biases for personal rather than institutional reasons, awareness can be an effective de-biasing strategy (Elek & Hannaford-Agor, 2013, p. 193).

Exposure

Both explicit and implicit biases can be reduced when individuals are exposed to situations that contradict their particular biases (Elek & Hannaford-Agor, 2013, p. 194). This exposure can be achieved by increasing the contact that individuals have with members of other racial groups who contradict their cultural and social stereotypes (Elek & Hannaford-Agor, 2013, p. 194). Interacting with a diverse group of respected leaders or role models, as well as observing their behavior, can allow individuals to rethink their prevailing stereotypes (Elek & Hannaford-Agor, 2013, p. 194). Exposure to diversity can be an effective strategy in reducing biases in

members of a jury (Elek & Hannaford-Agor, 2013, p. 194). Diversity forces jurors to engage with others who might hold distinct views and biases and results in an increased awareness for white jurors (Elek & Hannaford-Agor, 2013, p. 194). Individuals who engage in the mental practice of counteracting stereotypes can also successfully reduce their implicit biases (Elek & Hannaford-Agor, 2013, p. 194).

Clear Instructions

Researchers have found that discrimination is more prominent in situations in which individuals are faced with ambiguous decision-making contexts (Elek & Hannaford-Agor, 2013, p. 193). Ambiguous contexts can affect jurors by enabling them to use their biases to rationalize information that may be unfamiliar to them (Elek & Hannaford-Agor, 2013, p. 195). For example, White-majority juries are more likely to convict Black defendants and recommend harsher sentences when the prosecution presents ambiguous evidence (Elek & Hannaford-Agor, 2013, p. 194). In one study, researchers attempted to counteract the effects of ambiguous evidence by encouraging participants in their study to commit to clear decision-making standards (Uhlmann & Cohen, 2005, p. 479). In the end, they found that clarified decision-making standards were able to reduce discrimination (Uhlmann & Cohen, 2005, p. 479). These findings are significant because they indicate a need for judges to clarify standards for judgment to the jury. One way that judges can clarify the standards for judgment is through the use of implicit bias jury instructions (Mitchell et al., 2005, p. 633).

Implicit Bias Jury Instructions

Jury instructions have traditionally been used by judges as a mechanism to aid jurors in their decision-making process (Elek & Hannaford-Agor, 2013, p. 196). They are widely used because they are inexpensive, expedient, and easy to administer (Elek & Hannaford-Agor, 2013, p. 196). Most research indicates that jurors do take the responsibilities given to them by the judge seriously (Elek & Hannaford-Agor, 2013, p. 197). Some researchers have even found that jurors can spend up to one-fourth of their deliberation time on the instructions given to them by the judge (Elek & Hannaford-Agor, 2013, p. 197). Due to the fact that the majority of jurors do not have a significant comprehension of laws, these instructions become essential tools for them to use during a trial (Elek & Hannaford-Agor, 2013, p. 197). Incorporating implicit bias awareness into jury instructions can be effective in reducing bias (Mitchell et al., 2005, p. 633). Otherwise, a lack of implicit bias awareness can result in severe racial discrepancies (Pope et al., 2018). Recently, courts have begun to incorporate implicit bias awareness in their jury instructions.

Implicit bias jury instructions alert jury members to the nature and impact of unconscious biases (Doyle, 2017, p.1). The judge uses these instructions to introduce jurors to the concept of implicit bias and the ways in which they can pose a threat during trial. Jurors are encouraged to identify possible biases that they might have so that they do not let them affect the assumptions and decisions that they make during trial (Doyle, 2017, p.1). In an effort to combat the issue of implicit racial bias, the U.S. District Court of the Western District of Washington became the first federal court to implement such instructions.

Western District of Washington's Approach

In 2017, the Western District of Washington produced a video as well as jury instructions that can be used by judges to instruct jurors on the issue of implicit bias (video can be found at <https://www.wawd.uscourts.gov/jury/unconscious-bias>). The video introduces jurors to the concept of implicit bias and the effects of such bias (United States District Court). The video is informative rather than argumentative. United States District Court Judge John C. Coughenour and attorneys Jeffery Robinson and Annette Hayes provide examples of explicit and implicit biases and encourage jurors to not let their biases affect their decision-making throughout the trial as well as during deliberations.

There are four written jury instructions provided by the court (Washington Criminal Pattern Jury Instruction- Preliminary Instruction). Each instruction is to be given at a different stage of a trial. The first instruction is to be given to the entire jury panel before the jury selection process (see Appendix B1). This instruction is relatively vague but it does list potential biases that jurors might encounter during a trial and instruct them not to base their decision-making on these biases (Washington Criminal Pattern Jury Instruction- Preliminary Instruction). The next jury instructions are to be given before opening statements (see Appendix B2). This instruction is more comprehensive and defines the concept of implicit biases for jurors (Washington Criminal Pattern Jury Instruction- Preliminary Instruction). It instructs jurors not to allow likes/dislikes, opinions, and prejudices, to guide their decisions (see Appendix B2). The third instruction relates to the credibility of witness and provide jurors with examples of what they can take into account regarding the credibility of a witness's testimony (see Appendix B3). The instruction concludes by reminding jurors to avoid biases (Washington Criminal Pattern Jury Instruction- Preliminary

Instruction). The implicit bias closing instruction reminds jurors of the information that was provided to them in the previous three instructions (see Appendix B4).

Jury Instructions in Other Jurisdictions

Following the exposure of several high-profile cases involving juror bias, other jurisdictions have begun implementing their own implicit bias jury instructions. States such as California, Arkansas, and Illinois have recognized the benefits of discussing implicit bias with the members of the jury and have proposed their own instructions (see Appendices B, C, and D). Judge Mark W. Bennett, former Judge of the United States District Court for the Northern District of Iowa, has also proposed his own implicit bias jury instructions for the state of Iowa (see Appendix F).

Conclusion

Racial bias, both conscious and unconscious, is a pervasive threat to our criminal justice system and the authenticity of our courts. Despite the evidence in favor of implicit bias jury instructions, the majority of courts continue to avoid their use. When efficiently written and presented, implicit bias jury instructions can be effective in reducing implicit bias in members of the jury. In addition, raising awareness of implicit biases can be an effective strategy to reduce the presence of biases during jury deliberation (Sommers & Ellsworth, 2009, p.608). Courts in states such as Washington, California, Arkansas, and Illinois, have begun the transition towards large-scale use of implicit bias jury instructions. Although progress has been slow and further research is warranted, implicit bias jury instructions appear to result in significant reductions of implicit biases (Mitchell, et al., 2005, p. 633). Not only are they effective, these instructions are

also inexpensive, expedient, and easy to administer (Elek & Hannaford-Agor, 2013, p. 196). In light of the positive findings, all jurisdictions should consider the inclusion of implicit bias in their jury instructions. Implicit biases pose a significant challenge to a defendant's right to an impartial jury and, as such, it is the responsibility of all courts to ensure the protection of this constitutional right.

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Appendix A

**Cognitive Reflection Test
(Intellect vs. Intuition)**

Instructions: Below are three questions to test system 1 vs. system 2 processing. This test is intended to measure your ability to double check your system 1 reaction with your system 2 thought process. Please read the questions carefully. Each question has an intuitive, but wrong answer.

1. A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?

Answer: ____ cents

2. If it takes 5 machines 5 minutes to make widgets, how long would it take 100 machines to make 100 widgets?

Answer: ____ minutes

3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?

Answer: ____ days

Answers: 5 cents, 5 minutes, 47 days.

Cognitive Reflection Test. Adapted from "Cognitive reflection and decision making," by S. Frederick, 2005, *Journal of Economic Perspectives*, 19, p.27.

Appendix B1

Western District of Washington Jury Instructions

**PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION**

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], 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.

Appendix B2

Western District of Washington Jury Instructions

**PRELIMINARY INSTRUCTIONS TO BE GIVEN
BEFORE OPENING STATEMENTS****DUTY OF JURY**

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control or intention.¹ Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.²

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Appendix B3

Western District of Washington Jury Instructions

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Appendix B4

Western District of Washington Jury Instructions

**INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)**

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control or intention.¹ Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.²

Appendix C

California Implicit Bias Jury Instructions

CACI No. 113

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

Appendix D1

Arkansas Proposed Implicit Bias Jury Instructions

AMC1 101

RESPECTIVE DUTIES OF JUDGE AND JURY
CAUTIONARY INSTRUCTIONS

(d) You must decide this case solely on the evidence and law before you and must not be influenced by any personal likes or dislikes, stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious or implicit bias, too, can affect how we evaluate information and make decisions. You should not permit sympathy, prejudice, bias, or like or dislike of any party to this action or of any attorney to influence your findings in the case.

Appendix D2

Arkansas Proposed Implicit Bias Jury Instructions

AMC1 103

JURY – PERSONAL OBSERVATIONS AND EXPERIENCES;
IMPLICIT BIAS

In considering the evidence in this case, you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

Each of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. Witnesses can have the same implicit biases.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her race, gender, ethnicity, national origin, religion, sexual orientation, age, disability, [or] socioeconomic status[, or [insert other impermissible form of bias]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party, witness, or lawyer.

Appendix D3

Arkansas Proposed Implicit Bias Jury Instructions

AMCI 104

CREDIBILITY OF WITNESS

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice or bias for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the case, the consistency or inconsistency of his testimony, its reasonableness or unreasonableness, and any other fact or circumstances tending to shed light upon the truth or falsity of his testimony.

Appendix E

Illinois Implicit Bias Jury Instructions

1.08 Implicit bias.

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called “implicit biases” or “unconscious biases.”

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist, and help each other to resist, any urge to reach a verdict that is influenced by bias for or against any party or witness.

Instruction, Notes on Use and Comment approved May 2018.

Notes on Use

This instruction should be given at the start of trial and again before the jury begins its deliberations. Jurors, in their role as impartial decision-makers, need to be aware of their own implicit biases so that these biases do not affect their view of the case. Ideally, jurors would have already seen a short video about implicit bias when they were waiting in the Jury Assembly Room, as is done in some jurisdictions, but even if they are not shown such a video, they should still be given this instruction.

Appendix F

JUDGE BENNETT'S INSTRUCTION

"Introduction

Congratulations on your selection as a juror! ... You must decide during your deliberations whether or not the prosecution has proved the defendant's guilt on the offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions.

Additional Instruction

Do not decide the case based on "implicit biases." As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases."