

Originally published in

New York Law Journal

October 9, 2020

A Video to Excavate for Unconscious Bias in Jurors

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At least one federal district court located in the state of Washington has created a 10-minute video that is played at every juror orientation session for every criminal or civil trial in that district, writes Joel Cohen and Gerald B. Lefcourt.

The murder of George Floyd has brought to the surface the history of racism in America and thus—it is hoped, at least—its outgrowth will have indirectly created a transformational moment for race in America. Is it about “systemic racism”? It doesn’t really matter here—one needn’t apply a quotable label to know there’s a problem.

Surely, Floyd’s murder in-plain-sight has been the impetus for a bigger, louder and more vocal national conversation. But conversations often wind up as noise into a void. As we have seen for decades, seemingly loud voices often are reduced to a whisper. What is more, words without action are meaningless and for real change to occur, white Americans actually have to internalize what commentating thought leaders perceive the problem to be and actively work to make change. Meaning, white Americans must explore their own biases *with themselves* and the extent to which that has occurred is unknown.

No place is this more important than in the justice system, particularly with jurors. For years, trial attorneys, jury consultants and advocates for criminal just reform have been focused on the unconscious biases every single one of us possesses. How do we address the notion of such biases without insulting potential jurors? How do we use the jury selection process to identify those unconscious biases? And, how do we make jurors recognize these biases—in whatever form they take—and actively minimize their impact on critical thinking and decision making in the jury room? One federal court, the Western District of Washington, is leading the charge with a short video explaining unconscious bias and how to counteract it, that every juror in every case is required to watch, along with a pattern jury instruction to be used in criminal cases on the subject. All courts, state or federal, should follow suit.

Big business and government have, indeed, been trying to address “unconscious bias”—the subtle biases we’re guilty of without even knowing it. Webinars are excruciatingly plentiful.

Perhaps they're intended to "do the right thing." But also—is it cynical to say?—to help fend off potential lawsuits against them. Whatever good derives from such measures, however, the question remains whether the good will find its way beyond the workplace. That is, will employees or executives who become inspired to "behave" within the workplace regarding race, take their newfound "sensitivity" to their nonwork lives?

As more pertinent here, if these newly enlightened and motivated individuals become jurors, particularly in criminal cases, will they treat Blacks on a level playing field with all the other trial participants? That's our hope, to be sure; but is it only aspirational? Or can the courts employ truly effective measures to address juror biases and prejudices beyond what has traditionally been used?

Those, many judges among them, who worship the jury system profess that jurors, with notable exceptions, simply "get it right"—irrespective of the race of the defendant, the witnesses, particularly police witnesses, and the jurors. They believe that the jury selection process (*voir dire*) and the instructions near a trial's conclusion effectively root out bias. Really?

As most trial attorneys and jury consultants will tell you, all too often the jury selection process, particularly in federal court, is time limited and superficial, relying on self-selecting questions of "Does anyone here believe they cannot be fair" or "Raise your hand if you cannot be fair in this case." Real bias, unconscious or otherwise is not unearthed this way. Worse, there have been instances where the process has allowed potential jurors with biases to self-select their way onto juries with less than honorable intentions. Still, most trial judges, ordinarily better able to address their own personal biases than juries, typically will tell you that they would have decided the same way as did the jury had they presided without a jury, thereby validating the process.

Let's examine that, though, more closely. In cross-racial cases—for example, where the testifying police officer is white and the defendant is Black—how do these judges conclude that they are really able to weed out *juror* bias? Put aside *voir dire*, as noted, hardly a panacea for deeply harbored biases, most judges simply rely on the idea that a jury will follow a judge's instructions. They believe, or choose to accept, that if a judge instructs jurors to ignore race or a witness's position as a member of law enforcement when making credibility determinations, that jurors, albeit perhaps not robotically, will follow that instruction. Such an instruction is typically given in cross-racial criminal cases that pit a white police officer against a Black defendant. But that cannot possibly be sufficient for a serious observer of the criminal justice system, who *candidly* speaks to it.

If we are going to get it right, or at least try our best to do so, the national conversation must find its way into our justice system—and not just with bail, discovery, or police reforms—in a way that requires jury reform. Courts no longer can be willing to rely on what has traditionally been done *to try to* address "unconscious bias" that may move or even push a person in one direction or another. If the many peaceful protestors have taken the George Floyd experience to heart, so too, must our courts. They must, at least in some limited way, use this moment that sadly will drift away more quickly than it should when the world returns to normalcy, to explore measures to sensitize juries or jury pools to the challenging forces within them.

As noted, at least one federal district court located in the state of Washington has done just that. It has created a 10-minute video, linked below, that is played at every juror orientation session for every criminal or civil trial in that district. The video is not perfect—nothing that would attempt to wash off the disturbing barnacles of a lifetime would be. But it is a start, one that should be lauded, tweaked and serve as an example for courts throughout this country. It's seeming goal, a laudable one indeed, is to hold up a mirror to every potential juror and illuminate that, over a lifetime, that juror, like every individual, has been making quick—shortcut, instantaneous, unthinking, automatic and, admittedly, “effective”—decisions to deal with life that may not fairly or accurately address the facts presented to them and that in the context of judging someone else, those shortcuts must be cast aside and ignored. We, as lawyers, have struggled with this problem over our careers, sometimes with the use of jury consultants, but until now have not concentrated on the “effectiveness” that these biases are to all of us.

The video is neutral and that's the beauty of it—it doesn't refer to the prejudices and biases that exist between whites and Blacks in particular or anything else. It doesn't seek to chastise or make jurors feel less open minded. Rather, it teaches that each of us has these automatic biases, for or against individuals or groups, without the video being judgmental about it. It doesn't choose to berate the jurors, only to open their eyes to themselves. Watch it here. <http://www.wawd.uscourts.gov/jury/unconscious-bias>. We can't do the video justice by simply describing it here. Ten minutes. What have you got to lose?

And, if you agree with us, what would every court around the country have to lose in playing it, or something very much like it, at every single jury orientation that takes place going forward? Kudos to the Western District of Washington.

Indeed, adapting the video to the courtroom itself where a case is being tried may be even better. But, we recognize, first steps first.

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