

MODEL JURY INSTRUCTION – BE FAIR (IMPLICIT BIAS)
PRELIMINARY CHARGE

Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. All people deserve fair and equal treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level, or any other personal characteristic. You have agreed to be fair. I am sure that you want to be fair, but that is not always easy.

One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them and even if we believe we do not have them. Some of you may have heard this called “implicit” bias and that is what I’m talking about.¹ We judges have

¹ There is a near consensus among experts that, in all populations studied to date, humans have implicit biases, which can be measured indirectly and are automatic in the sense that they occur without effort or intent. *See, e.g.*, Cunningham et al., Implicit Attitude Measures: Consistency, Stability and Convergent Validity, 12 Psych. Sci. 163, 165 (2001) (Respondents consistently showed racial bias on the Implicit Association Test, which measures implicit bias.); Green et al., Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients, 22 J. Gen. Int’l. Med. 1231, 1233 (2007) (Physicians demonstrated pro-white racial implicit bias.); Greenwald & Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 946 (2006) (“[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”); Kurdi et al., Can the Implicit Association Test Serve as a Valid Measure of Automatic Cognition? A Response to Schimmack, Persp. on Psych. Sci. 1, 1 (2020) (“[C]onsiderable consensus in the cognitive sciences exists that, in addition to controlled processes of cognition... information can also be activated relatively automatically in the human mind.”); Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 Eur. Rev. of Soc. Psych. 1, 2 (2010) (“[I]mplicit preferences and stereotypes are pervasive across demographic groups and topics.”). This jury instruction does not use the phrase “unconscious bias” because researchers have not proven that implicit bias is always unconscious. *See, e.g.*, Gawronski et al., Are “Implicit” Attitudes Unconscious?, 15 Conscience and Cognition 485, 485 (2006) (“[T]here is no evidence that people lack conscious awareness of [implicit bias] per se”).

There is near consensus among experts, based on studies of populations, that implicit bias can affect human behavior, including decision-making. *See, e.g.*, Green et al., *supra* note 1 at 1237 (Physicians’ implicit biases about race impacted treatment decisions.); Hehmann et al., Disproportionate Use of Lethal Force in Policing is Associated With Regional Racial Biases of Residents, 9 Social Psych. and Personality Sci. 1, 1 (2018) (Police officers who work in areas where White residents have greater implicit racial prejudice against Blacks use disproportionate lethal force against Black residents.); Nosek et al., National Differences in Gender-science Stereotypes Predict National Sex Differences in Science and Math Achievement, 106 Proceedings of the Nat’l Acad. of Scis. 10593, 10596 (2009) (Implicit stereotyping associating science with males, more than females, was predictive of the national-level sex differences in 8th grade science and math achievement.); Vuletich & Payne, The Bias of Crowds: How Implicit Bias Bridges Personal and Systemic Prejudice, 28 Psych. Inquiry 233, 242 (2017) (Research suggests that implicit bias influences behavior.); Penner et al., Reducing Racial Health Care Disparities: A Social Psychological Analysis, 1 Pol’y Insights Behav. Brain Sci. 204, 204 (2014) (Implicit racial bias

the same problem, so let me share a few strategies that we have found useful.²

First, slow down; do not rush to any decisions. Hasty decisions are the most likely to reflect stereotypes or hidden biases.³

Second, keep an open mind. Avoid drawing conclusions until the end of the case, when you and your fellow jurors deliberate. Remember that when you deliberate, you will have all the evidence and all the time you need to make a careful decision. So, there truly is no need to start making your mind up before then.

“can affect physicians’ perceptions and decisions.”). The interventions discussed below have been shown to reduce the risk that implicit bias will produce biased results. Infra notes 2-6.

² Even if one cannot eliminate implicit bias, research demonstrates there are ways to disrupt its impact on decision-making and to maximize the opportunity for relevant information, rather than bias, to determine the outcome of a decision-making process. Methods shown to be effective include slowing down the decision-making process and invoking goals such as fairness. Forscher et al., A Meta-Analysis of Procedures to Change Implicit Measures, 117 *J. Persp. and Soc. Psych.* 522, 522 (2019) (Intervention methods such as invoking goals of fairness were effective in changing implicit bias in the short term.); Penner et al., supra note 1 at 207 (When physicians have more time and opportunity to reflect on treatment decisions, implicit bias may have less of an influence on their decisions).

Some research on implicit bias suggests that telling people they are biased might actually increase their prejudice. Elek & Hannaford-Agor, First Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 *J. of the Am. Judges Ass’n.* 190, 193 (2013) (Pressuring people to change their bias can “incite hostility and generate backlash that may increase expressions of racial prejudice.”); Howell & Ratliff, Not Your Average Bigot: The Better-than-average Effect and Defensive Responding to Implicit Association Test Feedback, 56 *Brit. J. of Soc. Psych.* 125, 138 (2016) (Showing people their scores on the implicit association test can cause defensiveness and amplify biases.). These instructions are intended to minimize that risk.

³ Hughes & Zaki, The Neuroscience of Motivated Cognition, 19 *Trends in Cognition. Sci.* 62, 63-64 (2015) (Bias in favor of in-group members is effortless and requires conscious effort to overcome.); Sherman & Bessenoff, Stereotypes as Source-Monitoring Cues: On the Interaction Between Episodic and Semantic Memory, 10 *Psych. Sci.* 106, 106 (1999) (“[T]here is considerable evidence that perceivers are especially likely to rely on stereotypes” when they do not have enough “processing resources,” such as time, to make decisions.); Ranganath et al., Distinguishing Automatic and Controlled Components of Attitudes from Direct and Indirect Measurement Methods, 44 *J. of Experimental Soc. Psych.* 386, 389 (2008) (Study participants “reported more negativity in their gut reactions...toward gay relative to straight people” than when they were asked to report more thoughtfully on their actual feelings about gay people.).

Third, you should listen closely to all the witnesses. That is the best way to ensure that you decide this case based on the evidence and the law, instead of upon unsupported assumptions.⁴

Fourth, as you listen to testimony about the people involved in this case, consider them as individuals, rather than as members of a particular group.⁵

Finally, I might ask myself: Would I view the evidence differently if the people were from different groups, such as different racial, ethnic, or gender identity groups?⁶

At the end of the case, I will remind you of these strategies and ask you to focus on the evidence instead of any unsupported assumptions you may have. All we ask is that you, individually and as a group, do your best to resolve this case based upon the evidence and law, without sympathy, bias, or prejudice, to the best of your ability as human beings.

⁴ Combatting implicit bias requires us to focus carefully on the relevant information to come to a conclusion, rather than working backward from a presupposed conclusion and filtering the data through that conclusion. Dror, *Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias*, 92 *Analytical Chemistry* 7998, 8003 (2020) (“[A]s a general principle to combat bias, we need to take actions that will cause us to focus solely on the relevant data and not work backward.”).

⁵ Social science research has documented implicit and explicit bias against social groups based on race, sexual orientation, skin tone, age, disability, and body weight. Charlesworth & Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability from 2007 to 2016*, 30 *Psych. Sci.* 174, 174 (2019).

⁶ Forscher et al., *supra* note 2 at 539; Lai et al., *Reading Implicit Racial Preferences: A Comparative Investigation of 17 Interventions*, 143 *J. of Experimental Psych.* 1765, 1775 (2014) (Engaging in intentional strategies to overcome one’s own bias was effective at reducing bias.); Axt et al., *Reducing Social Judgment Biases May Require Identifying the Potential Source of Bias*, 45 *Persp. and Soc. Psych. Bull.* 1232, 1238 (2018) (Warning people about specific types of bias, such as racial bias, can reduce the effect of that specific bias upon behavior).

The three group names listed in the instruction should be read to the jury unless, in consultation with the parties, there is concern that their inclusion would be unfair to either party. The trial judge should also consult with the parties about whether to list additional group categories that are relevant to the case (for example, sexual orientation, age, nationality, or disability).