

Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat

by Rachel D. Godsil and HaoYang (Carl) Jiang

“All of us prosecutors want to do justice—we hold ourselves to a higher standard, so why aren’t we trusted?”

— William Stetzer

The question posed by Bill Stetzer¹ is shared by many prosecutors. Yet too often, those in communities of color have a hard time believing that these values are genuine based upon their personal experiences. This article shares insights from social psychology research and neuroscience that can unlock this conundrum and provide tools to align behaviors with values.

How is this research important? It shows that people can genuinely want to be fair, but their decisions, reactions, and behaviors can be determined by their unconscious processes. These cognitive functions are shaped by the racial stereotypes that continue to be prevalent in popular media and culture. To begin to achieve racially equitable outcomes within the criminal justice system, prosecutors need to understand the risks of these unconscious, stereotypical associations and related phenomena linked to racial and ethnic differences. The next step is to use cutting-edge brain and

Rachel D. Godsil is the Director of Research and Co-Founder of the Perception Institute, as well as Professor of Law and Chancellor’s Scholar at Rutgers Law School. She conducts workshops about the mind sciences for judges, prosecutors, and defense attorneys across the country.

HaoYang (Carl) Jiang is a former fellow at the Perception Institute and currently a first-year law student at Yale Law School.

social science to foster environments that promote equal treatment and guard against the impact of biases.

We are not suggesting that all issues of racial disparity within the criminal justice system are the result of individual decisions—many are systemic and beyond the scope of this article. However, individual decisions and interactions matter enormously to those affected by them. We are in a moment when leaders within criminal justice have access to methods to meaningfully shift dynamics, reduce disparities, and enhance the legitimacy of the criminal justice system. Prosecutors across the country are beginning to make use of these methods and working to engender the trust often missing in communities they impact.

Our purpose is to move the discussion forward by showing how the roles of three intersecting phenomena may play at various decision points or important interactions in the prosecutorial process:

- **Implicit Bias**—“the automatic association of stereotypes and attitudes toward particular groups”;²
- **Racial Anxiety**—“involves the stress response people experience before or during interracial interactions ”;³ and
- **Stereotype Threat**—“involves inhibition in cognitive functioning when a negative stereotype about [one’s] identity group is activated.”⁴

We then describe the interventions that can begin to prevent these phenomena from undermining fairness.

What Is Implicit Bias and Why Does It Happen?

Explicit bias is consciously held hostilities or stereotypes about groups of people that differs dramatically from the automatic processes involved in implicit bias. Implicit biases are not a consequence of an individual’s chosen values; they are automatic associations that follow from stereotypes common in our culture. The fact that biases are implicit does not mean they necessarily dictate our actions, but to prevent them from doing so, we need to be aware that they are operating.

In the context of criminal justice, the distorted stereotypes associating black and Latino men with violence, criminality, and poverty that have been and continue to be common in the media are most dangerous.⁵ Recent studies have found that people judge identically sized black and white men differently; with black

men seen as larger, stronger, and more apt to cause harm in an altercation.⁶

In addition, when people are primed with black faces, they are faster to see crime-related objects; when primed with white faces, they are faster to see neutral objects.⁷ In a 2016 study of college students, the association of black faces with crime-related objects occurred even when the face was of a five-year-old boy.⁸ Also salient to the criminal justice context is a study finding that after hearing about an encounter, people were more apt to remember hostile details about a person named “Tyronne” than “William,” and even wrongly recalled hostile details when the story was about “Tyronne.”⁹

Researchers have assessed the presence of implicit bias using a variety of methods. The most commonly known is the Implicit Association Test (IAT), which can be easily accessed on the website Project Implicit.¹⁰ The IAT is a computer task that measures how quickly participants can link particular groups with positive or negative words (race attitude) or different racial groups with weapons (weapons association) by pressing a particular key on the computer’s keyboard. The IAT is not akin to a DNA test; it is not a precise and entirely stable measure of bias in any single individual. Rather, it reveals patterns and tendencies among large groups of people.¹¹ Scientists are also beginning to use physiological tools to measure implicit responses to race, including functional Magnetic Resonance Imaging (fMRI), patterns of cardiovascular responses, facial electromyography (EMG), and cortisol responses.

What Is Racial Anxiety and Why Does It Happen?

In navigating social interactions across lines of difference, implicit bias is but one obstacle. Others include “racial anxiety,” a phenomenon centered on discomfort about the potential consequences of interracial interactions. Research indicates many people of color experience racial anxiety.¹² For a person of color, this anxiety materializes through an expectation they will receive discrimination, hostility, or distant treatment. White people may experience a “mirror anxiety” that they will be assumed to be racist by people of color and face corresponding feelings of hostility.¹³

Racial anxiety has been measured based upon self-reports, but it is also observed behaviorally when someone exhibits behaviors associated with anxiety, such as sweating, increased heart rate, facial

twitches, fidgeting, and avoiding eye contact.¹⁴ Racial anxiety has been shown to have cognitive effects as well, diminishing people's executive functions.¹⁵ As with implicit bias, researchers have developed physiological tools to measure racial anxiety by assessing release levels of norepinephrine from the locus coeruleus to the anterior cingulate cortex.¹⁶

What Is Stereotype Threat and Why Does It Happen?

Stereotype threat is the frequently unconscious fear that one's actions may confirm stereotypes about their identity groups.¹⁷ Stereotypes differ across groups so this anxiety can play out differently for particular identity groups and in different situations.¹⁸ It has been well documented by its effect on the academic performance of students of color who fear confirming the negative stereotypes of intellectual inferiority.¹⁹

Stereotype threat can cause individuals to attempt to discern whether they are confirming negative racial stereotypes or whether they are being judged based on those stereotypes.²⁰ The constant monitoring and increased vigilance expends cognitive resources.²¹ Stereotype threat is particularly likely to be triggered in high-pressure situations or when the task outcome is of high value.²²

This threat occurs when three conflicting beliefs are activated:

1. the group stereotype of inferior ability (e.g., women cannot read maps);
2. the recognition that you are a member of the group (e.g., I am a woman); and
3. the knowledge of one's own ability (e.g., I am good at map reading).

The physical manifestation of this conflict occurs through the diversion of cognitive resources (our brain power) that would be otherwise spent on the task at hand. These effects are detectable in both the body and brain, most often through an increased heart rate and rising blood pressure, as well as in the brain regions that regulate emotion.²³ The resulting stress, combined with a motivation to self-monitor and suppress self-doubt, creates a failure to perform to potential.

It has also been shown to be a risk in the context of patients of color being concerned about the stereotypes held about them by health care providers.^{24,25} In this context, stereotype threat can

undermine communication, lead to discounting of feedback, poor adherence to health plans, and disidentification—viewing health promotion behaviors as “white.”²⁶

Presence of Bias in Prosecutor’s Offices

In a recent study of the Manhattan District Attorney’s Office, the Vera Institute found that in the exercise of discretion at every level from case screening, bail recommendations, charging, and sentences in pleas, black defendants were subject to more severe outcomes compared to similarly situated whites.²⁷ Prosecutors recommended denying bail to black defendants more often, a significant factor, and eventual plea deals included longer incarceration times.²⁸

The Vera study does not address the precise mechanisms explaining the disparate outcomes; however, research in social psychology suggests how bias may operate. For example, if black men are misjudged due to their physical size, leading to higher rates of perceived criminality and aggression, this has ramifications for witness or police officer actions, accounts, and trial testimony, but may also cause prosecutors to perceive such aggressiveness accordingly in charging and sentencing decisions.²⁹

Bias may further manifest in the detailed accounts of crimes provided to police and prosecutors. As noted earlier, a study asked participants to read a short description of a crime committed by “William” and an identical description of a crime committed by “Tyronne.”³⁰ They were then distracted for 15 minutes and asked to recall details of the incident. The participants who read William’s actions recalled fewer aggressive details about the incident. The participants who read Tyronne’s actions not only correctly remembered more aggressive details about the incident, but also incorrectly attributed additional aggressive details to Tyronne.³¹

One can imagine how such selective memory may play out in the courtroom, where prosecutors must routinely determine if defendants are exaggerating or being purposefully deceptive in their description of events. If passersby and witnesses provide a disingenuous version of the facts, one can expect that bias will color the subsequent results.

Research establishes that lawyers are not immune to implicit biases. In one study, 60 law firm partners were given an identical memorandum written by “Thomas Meyer,” identified as a third-year associate who went to NYU Law School. The memo contained

seven spelling or grammar errors. Half of the partners were led to believe that Meyer was white and the other half that Meyer was black. Though the memos were identical, partners found an average of 2.9 of the seven errors when Thomas Meyer was depicted as white, and an average of 5.8 of the seven errors when Thomas Meyer was depicted as black.³²

Possible Decision Points Influenced by Bias

In grappling with the myriad ways bias may be present in a prosecutor's office, it is helpful to clearly examine the decision points and interaction moments in which prosecutors exercise their discretion. Possible decision points include: charging decisions, pre-trial strategy, and trial strategy.³³

Charging Decisions

Charging decisions for a prosecutor involve the decision of whether to charge a defendant with a crime and the decision of what crime to charge. Research has indicated that prosecutors are routinely less likely to charge white suspects than black suspects. Even while controlling for the type of crime and existence of a previous criminal record, the data indicates disproportionate charging trends based on race.³⁴

Such findings are magnified by studies around priming, or subliminal exposure via words and images, related to prosecutorial decision-making. For example, the use of an African American name, specific genre of music associated with African Americans, or "black" neighborhood, can cause racial stereotypes to "be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness."³⁵ As previously noted, the priming of a black face caused participants in one study to more quickly detect "degraded images" of an object commonly associated with crime (e.g., knife, gun).³⁶ Again, the impact of this phenomenon may cause prosecutors to charge a defendant of color with more severity or more speed than a white defendant.

The effects of implicit bias do not merely affect adult defendants. Black juvenile suspects were more likely to be charged as adults when compared to their white counterparts, even while controlling for severity of crime and previous record.³⁷ One possible explanation for this disparity may result from the inability of white people to correctly gauge a black child's age. In one study, white

undergraduate students were primed with the face of a black or white child and then asked to identify the next image of a gun or toy as fast as possible. Participants identified the second image as a gun more quickly after primed with black faces than white, and identified the second image as a toy more quickly after primed with white faces than black.

Pre-Trial Strategy

In considering whether to oppose bail or consider a plea bargain, there are many points in which implicit bias can impact a prosecutor's pre-trial decision-making process. For example, research indicates that defendants of color receive worse pre-trial detention decisions than their white counterparts in certain jurisdictions.³⁸ In evaluating bail procedures, implicit bias may also operate through "the implicit devaluation of the defendant."³⁹ Evidence of this devaluation was demonstrated by a comparison of computerized facial images of a white male and a black male.⁴⁰ Researchers showed participants a series of images transitioning from "angry" to "neutral" to "happy," and asked them to determine when a face appeared happy. The results of these findings pointed to a lack of empathy recognition among white participants with black faces. In essence, the black male appeared to be angrier, more hostile, and more serious than the white counterpart.⁴¹ As a result, prosecutors may be unable to gauge their defendants' honesty or intent based on body language alone.

Trial Strategy

Whether through striking black jurors or making closing arguments tinged with racial animus, prosecutors have wide leeway in justifying their trial decisions on non-racial lines even when influenced by racial bias. For example, while prohibitions against race-based strikes of jurors have clear precedent and are well defined, the implementation of the prohibition is often difficult. According to one analysis, courts will "routinely uphold peremptory challenges based on largely unverifiable race-neutral claims, for example, those based on avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness."⁴² While prosecutors may not routinely refer to explicit biases for striking a juror, it is often difficult to ascertain a prosecutor's true intentions or categorize the influences that sway their decision.

For example, according to the same analysis, “prosecutors might associate black citizens with lack of respect for law enforcement and opposition to the prosecution of drug crimes or use of the death penalty as a punishment.”⁴³ As a result, black jurors are unfairly stereotyped and castigated based on the implicit biases that affect black defendants.

Possible Interventions for Bias

Fortunately, while the breadth of decision points and interaction moments between prosecutors and defendants seem intractable, researchers have identified several interventions to address them. These interventions fall into two categories: *bias reduction* and *bias override*. While bias reduction is the fundamental goal for prosecutors, since the biased mindset is itself transformed, it seems unlikely that an amelioration of our biases will occur in the near future. Therefore, pursuing bias override simultaneously is crucial.

One avenue to decrease bias is the constant and consistent exposure of prosecutors to positive images and associations with non-stereotypical out-group individuals. Depictions that counter negative stereotypes create new implicit associations between those positive attributes and the out-group as a whole.⁴⁴ According to experts, the most effective bias reduction strategies require a series of steps to “break the prejudice habit.”⁴⁵ This may require prosecutors to engage in more community building activities and outreach, including know-your-rights trainings and community prosecution workshops. Prosecutors must expand the set of positive pro-social interactions with the out-group in order to succeed in long-term bias reduction.

Since the reduction of bias will take a significant amount of time and energy, it will be critically important for institutions and stakeholders to put long-term practices into place that will minimize the effects of such bias.⁴⁶ These formal and objective decision-making tools may include the creation of a prosecutor override card, similar to a judge’s bench card, which outlines the necessary questions prosecutors should ask before engaging in a charging/sentencing decision. In combating implicit bias, the National Center for State Courts (NCSC) has identified a number of risk factors that increase the severity of bias on the part of prosecutors and judges. These factors include: intensified emotional states, ambiguity of information, salient social categories, low-effort cognitive

processing, distracted or pressured decision-making circumstances, and a lack of clear feedback loops.⁴⁷ As a result, the use of an objective checklist to assist prosecutors in curbing bias is essential to reduce these factors.

As Professor Kristen Henning writes: “Well-intentioned actors can overcome automatic or implicit biases ... when they are made aware of stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.”⁴⁸ Studies show this self-correction is successful when efforts are made to actively engage in thoughtful reflection, scrutiny, and reasoning efforts regarding the rationale for decision-making. According to the NCSC, this process should be routine, systematized, and intentional.⁴⁹ An effective checklist, like the judicial bench cards used in jurisdictions such as Los Angeles County; Omaha, Neb.; Portland, Ore.; and Mecklenburg County, N.C., have been empirically shown to curb biases in judges when considering the appropriateness of foster care for youth of color.⁵⁰

According to an analysis conducted by the Brennan Center for Justice, a number of best practices exist to ensure the effectiveness of judicial bench cards in the reduction of implicit bias.⁵¹ For example, the inclusion of implicit bias questions (e.g., “imagine how one would evaluate the defendant if he or she belonged to a different, non-stigmatized group”)⁵² both prompts the decision maker to the possibility of bias and ensures an objective check in the reasoning process. Other practices include listing alternatives to placement, reminders on the general process for specific hearings, and listing instances where defendants should have public defenders present.⁵³

In addition to an objective decision-making tool, short-term remedies also exist. For example, prosecution offices should begin to collect and store information on racial demographics at each point of the charging and sentencing process. Such an information collecting measure should be shared with stakeholders and consistently reviewed for trends and patterns for prosecutorial success.⁵⁴ Additional trainings focused on the systematization of bias override in new attorney training manuals would go a long way toward providing “explicit reminders” for attorneys to monitor themselves and their peers.⁵⁵

Presence of Racial Anxiety in the Prosecutor's Office and Possible Interventions

Racial anxiety also has the potential to undermine effective prosecution. As Bill Stetzer, a white prosecutor, has observed:

I would be questioning a black prospective juror and what I would be thinking is: Does this juror think I'm a racist? Am I going to offend this juror? If this juror is bad for me, will I get challenged under *Batson*?

All the while, the prospective juror is wondering: Is this guy going to treat me differently because I'm black? Is he trying to find a way to get rid of me?

What this means is that both the juror and I are scared, and we never talk about it. Why does it matter? Because both the juror and I are likely to stiffen up our body language, we'll avoid, eye contact. We will each be sending the other the message that "I don't trust you." As a prosecutor, when a juror doesn't trust me, I lose cases.^[56]

In addition to the interactions between prosecutors and jurors, the behavioral effects of racial anxiety have the risk of undermining effective witness interviewing, as well as potentially leading victims or families of victims to distrust the prosecutor. When a victim or family member is feeling vulnerable, the lack of eye contact or the avoidant body language can be read as linked to their race.

It is equally important to consider the many interactions prosecutors of color have with their peers, employees, and managers. From hiring, to discipline, to termination, prosecutors of color often face a different set of expectations and obstacles than their white counterparts. This racial anxiety about interracial interactions has implications for white and minority staff.

For example, one study contrasted the experiences black and Latino college students face in interracial interactions. While racial minorities were more likely to request respect, professionalism, and competence, white students expressed a desire to be well liked and develop rapport with their peers.⁵⁷ One can imagine a scenario in which a prosecutor of color who is interviewing for a prospective position may feel slighted by a white interviewer due to a difference in social interaction goals.

In instances where racial anxiety is present in the workplace, studies indicate a correlative negative response in employee workflow and performance. This is a result of the cognitive impact of perceived prejudice as black subjects are much more likely to face impairment when they saw ambiguous evidence of discrimination, whereas white subjects felt such impairment when blatant evidence of prejudice was experienced.⁵⁸ The evidence indicates that people of color are more sensitive to the presence of racial slights and feel them more acutely than whites.

Prosecutor offices can begin to address such imbalances in ways similar to addressing implicit bias: reduction and override. Not only should new attorney trainings include methods to communicate across lines of difference, more attention should be paid to diversity hiring overall. A more diverse pool of prosecutors may curb implicit bias, racial anxiety, and stereotype threat due to the increased exposure to different viewpoints and perspectives. As research has indicated in the jury context, “diverse group decision-making is better than homogenous group decision-making.”⁵⁹

The Presence of Stereotype Threat in the Prosecutor’s Office and Possible Interventions

The research on stereotype threat in health care is salient to its potential effects in the criminal justice system. If people of color are concerned that they will be viewed through stereotypical lenses, they may be less apt to interact effectively with prosecutors, which has implications for reporting crimes, acting as witnesses, and a host of other instances in which trust and communication are critical.

In addition, stereotype threat has significant salience for the experience of prosecutors of color. Research and anecdotal evidence suggest that they may face added burdens due to the concern about confirming a negative stereotype about their in-group during the course of performing their professional functions. When a negative stereotype is triggered about someone’s group, making one’s identity salient, it can undermine performance because they worry about confirming the stereotype.

A prosecutor of color, for example, can often feel twice the burden/challenge of their white counterpart on the job.⁶⁰ Unfortunately, the reverse can also be true for white managers. For example, the provision of overly positive feedback on writing tasks for a minority employee to compensate for feelings of racism

is a real phenomenon. Research has shown stereotype threat has motivated recommendations for job changes despite the lack of necessary skills.⁶¹

Possible interventions and solutions for decreasing stereotype threat include removing the triggers for stereotype threat, promoting a growth mindset, and providing motivational feedback. A potential tool that prosecutors can adopt for providing feedback is *wise feedback*.⁶² Originally designed to restore minority students' trust in critical feedback, three double-blind, randomized experiments provided a series of interventions that have shown success in the academic context. These steps include:

- working with the client/colleagues to understand their highest goals and aspirations;
- using an *asset frame* to identify and convey the reasons you are confident they can meet those goals and aspirations; and
- candidly sharing any constructive feedback on the steps they need to take going forward to meet their goals and aspirations.⁶³

Through a combination of these tools, it is possible to reduce the feelings of stereotype threat prosecutors of color may feel in the workplace and provide higher rates of retention and better performance from staff of color.

Conclusion

Although bias reduction and override work can be extraordinarily difficult without the dedication and fidelity to objective measures needed to succeed, there are short and long-term steps prosecutors can take to begin their journey toward a productive and safe workspace. It is important to recognize that along with the interventions we have outlined, success is also dependent upon the buy-in of managerial and administrative staff. Without a clear “train-the-trainer” regimen, it can be easy for staff to dismiss such solutions as mere lip service to the issues we have outlined. Through combating implicit bias, racial anxiety, and stereotype threat, we hope to shed light on the various ways these intersecting and interconnecting phenomena can impact the performance of prosecutors and their efficacy in serving their communities. ■

ENDNOTES

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