

Defending Fairly - Our Brains on Race™

Implicit Bias, Racial Anxiety & Stereotype Threat as
Obstacles to Fairness

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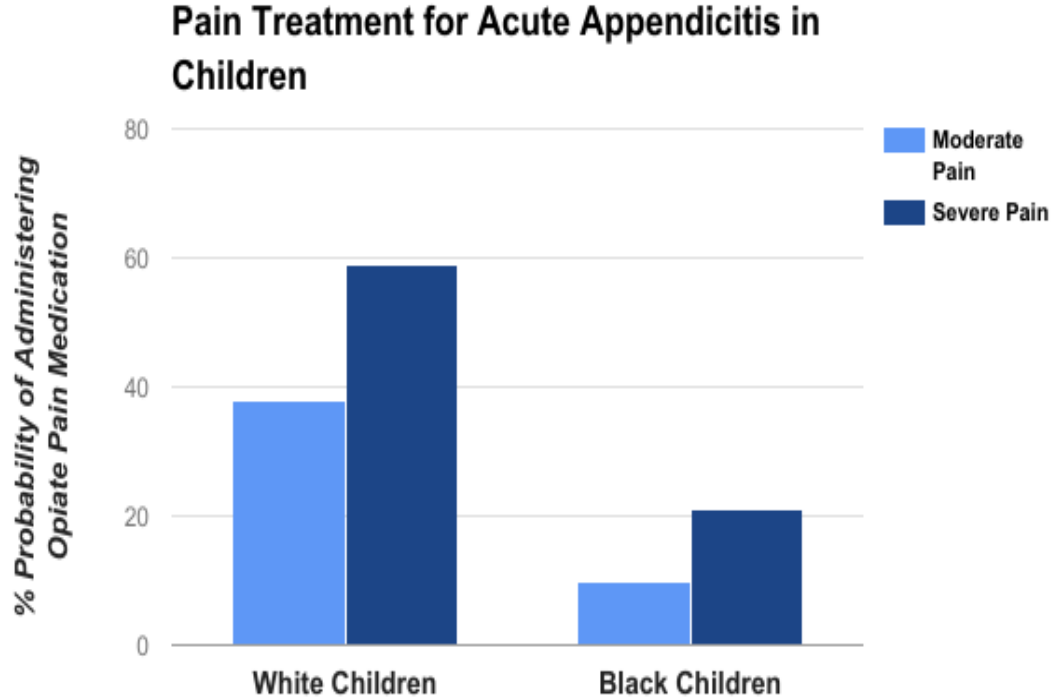
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Explicit bias is on the rise. . .but most of us reject it.



But harm linked to race and ethnicity persist.

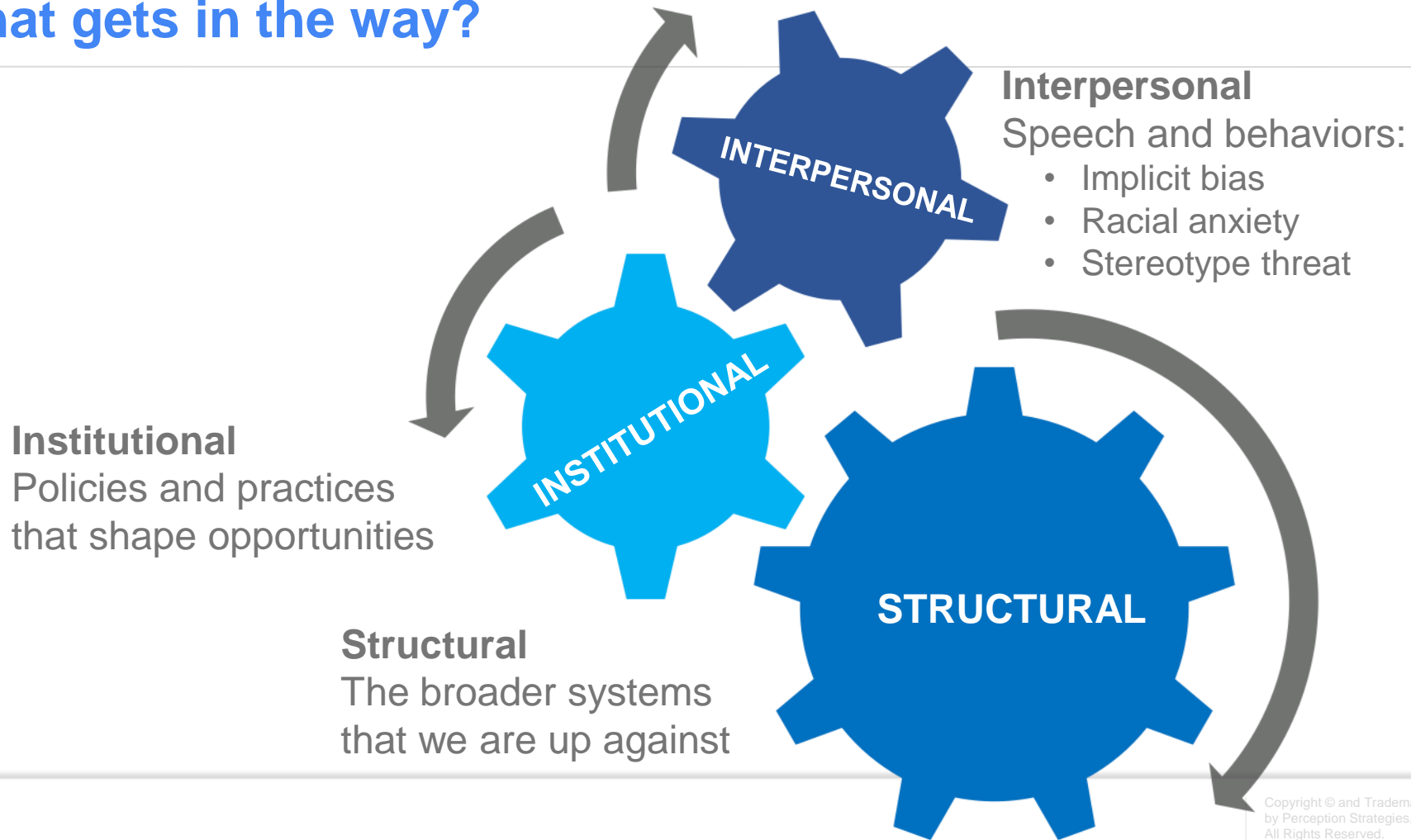


Field study:
Study of children
treated in the ER
between 2003-2010.

Finding:
White children 3X more likely to be treated with opiate pain medication than Black children for *same* level of pain.

**Study controlled for insurance.

What gets in the way?



Implicit Bias

Implicit bias refers to the brain's automatic, instant association of stereotypes or attitudes toward particular groups, without our conscious awareness.



How do implicit biases determine how we see threat?

Misjudging Size

Identically sized black men perceived to be larger, stronger, more muscular, & more capable of causing harm than the white men.

Justifications of force were independently correlated with dark skin and Afro-centric features.



Implicit bias can affect how people remember facts . . .

Describe incident involving either white “William” or black “Tyronne.”
Distract for 15 minutes. Ask to recall details about the incident.

Defendant: William

- Recalled fewer aggressive details about the incident

Defendant: Tyronne

- Correctly remembered more aggressive details about the incident
- Incorrectly attributed aggressive details to Tyronne

How Decision-Makers See Clients

- Prosecutors charge differently?
- Plea offers harsher?
- Judges and jurors presumptions?
- How Judges and others in the system treat clients?

Committed to Defending Fairly

- Might work harder on factually innocent clients.
- Are conclusions about innocence bias free?
- Evaluating evidence differently?
- Interacting less effectively?
- Accepting plea deals?

We think we are connected...but are we really?

White

Black

Asian/
AAPI

Latinx

Indigenous

1. I am.....
2. My elementary school was mostly...
3. My college was mostly....
4. Most of my close friends are....
5. My dentist is...
6. Other people in my home are...
7. People who regularly visit my home are...
8. My supervising attorneys or partners are...
9. The clients I represent are mostly...
10. Those I confide in at work are mostly...
11. Those I look to for guidance at work are are....
12. I socialize with coworkers outside of work who are mostly...
13. My mentors are mostly...
14. My role models are mostly...

When we hold implicit biases . . . It shows.



Implicit Bias: Systemic Solutions


Bias Override: Break the Link Between Bias & Behavior

- Reject assumptions of objectivity
- Identify key decision points & interactions
- Use clear and fair criteria to develop protocols

UCLA LAW REVIEW

Implicit Bias in the Courtroom

Jerry Kang
Judge Mark Bennett
Devon Carbado
Pam Casey
Nilanjana Dasgupta
David Faigman
Rachel Godsil
Anthony G. Greenwald
Justin Levinson
Jennifer Mnookin



ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

Example of Override

Judge Gayle Roberts, New York Family Court

“Efforts to Judge Fairly” Checklist

- Accept that I may not be as fair as I think I am.
- Create a friendly environment in the courtroom.
- Be critical of assumptions.
- Individuate.
- Manage difficult cases.
- Flip the script.

Implicit Bias: Examples from Charlotte

Countering Systemic Bias

- Talk about race – to make sure that it isn't affecting decisions.
- Group rounds for major charging decisions
- Data available about charges in comparable cases for real time comparisons
- Invoke promise to over-ride implicit biases from jurors
- Encourage prosecutors of color to share candid feedback

Racial Anxiety

How do we experience Racial Anxiety?

Out-group members may fear they will experience discrimination, hostile treatment, or invalidation.

In-group may fear their words or actions will be perceived as biased racist.

Shows up as discomfort, distancing, less eye contact, cognitive fatigue, avoidance, awkward attempts to connect, stress of racial disappointment.



First impressions matter. Does identity affect our interactions?



Whites project
warmth

**Goal: Be
liked**



Blacks and Latinos
project agency and
seriousness

Goal: Be respected



Asians assumed
competent and
respected

Goal: Be liked

Do we always recognize when bias is at play?

Bias as Blatant:

when race, ethnicity, gender or other identity characteristics are explicit as a source of treatment.

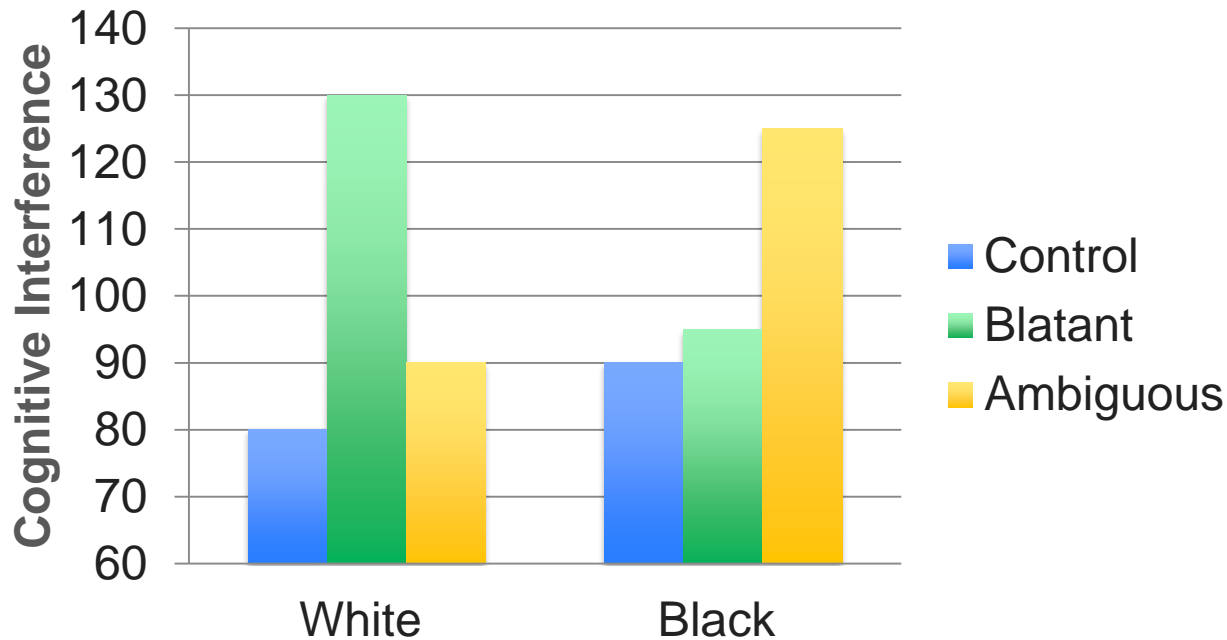


Bias as Ambiguous:

when automatic beliefs and associations might affect the attitudes or behaviors and lead to questions about whether race, ethnicity, gender or other identity characteristics are at play; but it is not clear if a direct or causal relationship exists.

How do dynamics impact our cognition & productivity?

Blatant v Ambiguous Racial Situations



Ambiguous Situations:

- More common in than blatant.
- Often not recognized as harmful.
- Cognitive burden borne by member of the outgroup.

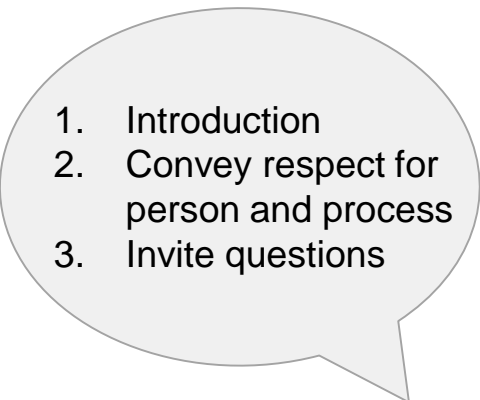
Practice for reducing identity anxiety

1. **Positive Priming:** Have a go-to positive memory before the interaction.
2. **Empathetic Listening:** Focus on the other person's experience during the interaction.
3. **Be Mindful of Body Language:** Engage in direct eye contact and open body language.
4. **Individuation:** Begin by 'bridging' rather than 'bonding.'

Preparing for challenging moments . . . Scripts

Scripts: A written sequence for use at the outset of an interaction. When planned, validated, and rehearsed, a script can:

- Decrease threat and anxiety in cross-racial interactions
- Facilitate positive responses from both members

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1. Introduction
 2. Convey respect for person and process
 3. Invite questions

Racial Anxiety: Examples from Charlotte

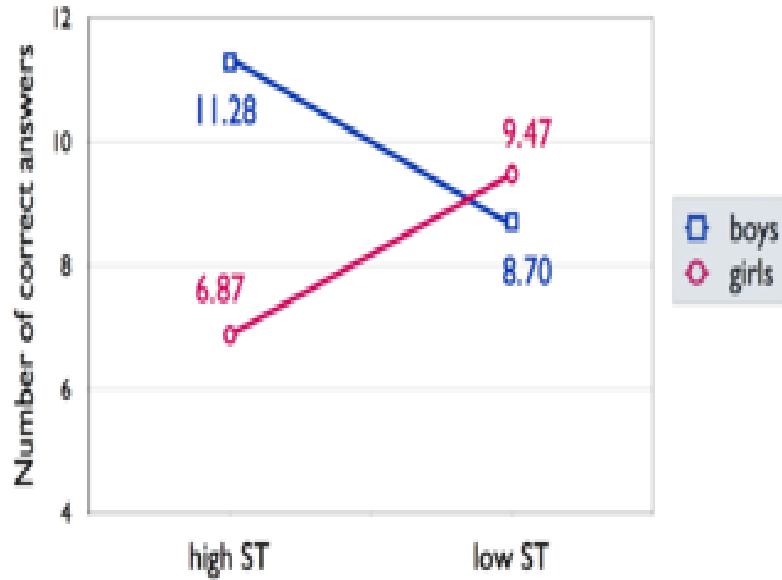
Soothing Racial Anxiety

- Talk about race – to get comfortable so that it doesn't feel weird when talk about it to the jury.
- Develop a script for talking to victim's families that shows respect, true concern, and competence.
- Develop a script for talking about race when it is an issue in a trial – practice in front of people of other races.

Stereotype Threat

Stereotype Threat.

Stereotype threat and test performance



Stereotype Threat:

- When a negative stereotype about an outgroup is triggered, it can undermine our ability to perform.
- The effect is more salient when the outgroup member is the only one.
- Stereotype threat is not the result of a particular identity – it is caused by an environment that undermines the identity.
- Managers can prevent it by setting up conditions for success.

Stereotype Threat

“Undeserving”

“Threatening”



“Angry”

“Inarticulate”

The worry about being seen through the lens of stereotypes can result in a barrier in communications and interactions.

Stereotype Threat

Stereotype threat in our brains and behavior

Heart rate increases

Blood pressure rises

Regions that regulate emotion
go into overdrive

Brain diverts cognitive
resources away from task

Self-monitor and suppress self-doubt

Focus on disproving our group's
negative reputation

Go out of way to avoid failure

If task is complex - trying to transcend
stereotype creates an extra burden

Stereotype Threat

Stereotype threat of being “racist”

- Overly positive feedback on writing.
- Recommendations for job changes despite lack of necessary skills.



People know what stereotypes are held about them . . .



“I think there is...some kind of prejudice of the name. . . there’s a lack of respect. They think they can get away with a lot because ‘Here’s another dumb Mexican.’”
– Mexican-American patient

What if we replace health care provider with public defender?

- Avoidance of health care.
- Impaired communications with healthcare providers.
- Poor adherence to treatment plan.
- Discounting feedback – about elevated blood sugar levels or negative effects of smoking.
- Dis-identification – viewing health promotion behaviors as “white.”

Wise feedback –high expectations/mutual respect, lead with strengths, follow with feedback

1. Work with your client/colleague to understand their goals – and your expectation that they work to meet their goals.
Invoke high expectations and mutual respect.
2. Lead with strengths- Identify and convey specifically why you think they (and you together) have the capacity to meet their goals.
3. Candidly share any constructive feedback on the steps they need to take going forward.

Example of Stereotype Threat Intervention

Charlotte Prosecutors

- Changed the local environment: removed images of police officers on the wall in area where witnesses were prepped.
- Focused on conveying respect across race at initial meeting rather than emphasizing “likability.”

Thank you!

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