

# Now is the time to talk about implicit bias and race

Implicit bias is tough for prosecutors to talk about, probably because it's wrapped up in the issue of race.

For me at least, the topic of race has long been too sensitive to write about or discuss openly.

But recently I have sensed a change both within me and within our profession, so even though this discussion may be long overdue, I think it's time for us to frankly talk about implicit bias and race, how it can affect the decisions we prosecutors make every day, and how it can affect the public's perception of us.

I know my reluctance to talk about race stems from my time as a prosecutor in the Dallas County Criminal District Attorney's Office. The 12 years I spent there were a dizzying exposure to the good, bad, and ugly of how race and prosecution can intersect. When I joined the office in 1994, my teammates were a fairly motley group of prosecutors (by 1990s standards at least), and we worked in a courthouse that was considered very diverse. Despite this diversity, many in our community believed that we were racists and that we perpetuated a two-tier system of justice—one for white defendants and another for everyone else. While I bristled at the charge of racism, I couldn't help but notice just how many young black males we were sending to prison.

I also learned very quickly that every time I struck a minority juror from a panel, I was going to get *Batson*-ed by the defense. Although this rankled me, I kept my anger and my opinions to myself. My anger subsided some when I found a 1977 voir dire manual in an old file cabinet that explicitly recommended striking all minority jurors. I saw in black and white, on the printed page, what we would now call explicit bias. I was just beginning to understand why some in the defense bar—and the community—were skeptical of our motives.

And when the Dallas DNA exonerations came to light, many of them involving a large number of wrongly convicted African-American



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men, it seemed to me that the issue of race in prosecution was too dangerous for me to discuss openly. My survival strategy became one of trying to treat everyone equally while simultaneously avoiding any discussion of race or racism.

So I kept my head down and my mouth shut.

But that all changed recently, and this article is proof. Over the last few years, it's been increasingly clear to me that certain segments of our society don't trust prosecutors to do justice in a colorblind fashion. Because I care about our profession and because I care about being the best and fairest prosecutor I can be, I've finally decided to talk openly about the issue of race and prosecution. While I don't profess to have all the answers about implicit bias and race, I believe that these topics must be confronted on both a personal level, by each and every prosecutor, and by the profession as a whole.

On a personal level, we must each check ourselves for any hidden biases we might possess. This process will inevitably make each of us better by giving us the confidence to make solid, unbiased prosecutorial decisions, and to be better teammates to our minority colleagues.

As a profession, we must transparently answer tough questions about our past and current practices. Did we have explicitly racist prosecution policies in the past? Are we now unwittingly perpetuating the disproportionate incarceration of minorities? I don't really know. But by having

the courage to try and answer tough questions like this, we prosecutors can gain—or regain—the trust of all the communities we serve.

Some of us in leadership positions around the state have begun asking the tough questions and having frank conversations about race. We are learning much about ourselves, each other, and our profession. My tactic of “head down, mouth shut” will no longer suffice. We must listen to our critics, actively address the difficult issues, and wring whatever lessons we can from the process. It is sometimes painful, but it’s also absolutely necessary. Both individually and as a profession, we must be prepared to confront our past so that we can confidently face our future.

Under the leadership of TDCAA, it seems that Texas prosecutors are finally ready to train on and talk about implicit bias. I’ve always believed that no one can train Texas prosecutors better than Texas prosecutors, and this sensitive subject is no exception. So along with TDCAA President Jarvis Parsons, TDCAA Training Committee Chair Tiana Sanford, and Diane Beckham and Rob Kepple from the Association, I’m happy to finally be joining the discussion on race and prosecution. ❁

<sup>15</sup> See Nosek et al supra note 4, pg. 112: “Black Americans ... do not show positive implicit in-group effects. Instead their own implicit attitudes reveal the influence of the negative attitudes held by the culture toward those groups. Although the exact origins of all forms of attitude and beliefs are not known, we regard implicit attitudes to reveal the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs.”

<sup>16</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>17</sup> K.B. Clark, “Effect of Prejudice and Discrimination on Personality Development” (Midcentury White House Conference on Children and Youth, 1950). Their work is cited in footnote 11 of *Brown I*.