

The RJA on Appeal Part II: Implicit Bias and Language-Based Claims

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My Work on Prosecutorial Rhetoric

(Prior work on cognitive biases
re. search warrants)

- › *Mitigating Foul Blows*, 49 Ga. L. Rev. 309 (2015) re. prosecutorial misconduct in arguments generally
- › *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 Case W. Res. L. Rev. 39 (2021)
- › Expert witness on implicit bias and prosecutorial rhetoric in Racial Justice Act cases (declarations, testimony in *People v. Bryant*, *In re. Romel D*) (both finding (a)(2) RJA violations)
- › *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions*, 32 Southern Cal. Interdisciplinary L.J. 49 (2023)

Today's Presentation



- California Racial Justice Act
- **Social Science Info re Bias**
- Recognizing Biased Language
- **Harmless Error Analysis**
- Discussion

RJA (a)(2) claims based on “racially discriminatory language”

(h)(4): “Racially discriminatory language” means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, **racially charged or racially coded language**, language that compares the defendant to an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or **disproportionately** in cases where the defendant is of a specific race, ethnicity, or national origin is **relevant** to determining whether language is discriminatory.

Can prove a violation of the RJA by showing, by a preponderance of the evidence, that

(2) **During the defendant’s trial**, in court and during the proceedings, the judge, **an attorney in the case**, a law enforcement officer involved in the case, an expert witness, or juror, **used racially discriminatory language about the defendant’s race**, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin, **whether or not purposeful**. This paragraph **does not apply** if the person speaking is **describing language used by another that is relevant to the case** or if the person speaking is **giving a racially neutral and unbiased physical description** of the suspect.

Cal. Penal Code s. 745(a)(2)

Explicit vs. Implicit Bias



Explicit bias – “beliefs that people consciously possess and intentionally express”

Implicit bias – “well-learned associations that reside below conscious awareness and can automatically drive behavior in a manner that is inconsistent with one’s personal attitudes”

- Not always a clear line between the two – depends on whether someone is conscious of their biases & how they feel about them
- “High prejudiced individuals” accept/endorse negative stereotypes, are more likely to acknowledge making decisions based on those beliefs
- “Low prejudiced individuals” consciously reject explicit biases but can be influenced by implicit biases
- <https://implicit.harvard.edu/implicit/aboutus.html> (implicit association test)

Framing Issues

Focus on **effect**, not **intent**



Explicit bias vs. implicit bias vs.
unconscious racism vs. appeal to
stereotypes

- Various useful lenses for understanding how bias operates
- Both individual actors and broader structural concerns are important

***** Strategically, “implicit bias” can be a more useful label than “explicit bias” to avoid having to prove conscious beliefs**

RJA: “racially discriminatory language . . . whether or not purposeful”

- “Racist prosecutorial rhetoric,” “racially biased language”
- **Likely to trigger stereotypes, whether intentionally or unintentionally**

Social science research re. racist rhetoric & decision-making



Ingroup vs. Outgroup Bias:

- more favorable judgments of people in same social category and
- harsher judgments of people not in same social category

Bias can involve favoritism toward **or** prejudice against

Power of Stereotypes

Stereotypes: well-known culturally-created associations used to justify differential treatment (usually negative)

why is milwaukee so **poor**
why is milwaukee so **ghetto**
why is milwaukee so **cold**
why is milwaukee so **segregated**

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- Explicit bias involves agreement with stereotypes; implicit bias involves subconscious operation of stereotypes, even when someone consciously rejects them
- Association of race and crime – study re. news story omitting race re. violent crime
 - E.g. “Black brute” (innately savage, animalistic, destructive, and criminal)
 - E.g. Latino - gang violence, dishonesty, “illegal” regardless of actual immigration status
- Particularly powerful effect on decision-making when people are under stress, pressed for time, not likely to seek out individualized information

Reinforcing & Triggering Stereotypes

Negative racial stereotypes can be **subconsciously reinforced** through the criminal legal system

- when defendants are often people of color
- when lawyers, judges, and jurors are often White

Explicit appeals to stereotype are easier to reject than coded language

- Low prejudiced people reject expressions of explicit bias
- High prejudice people don't want to be seen as biased when context shows that others don't agree



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Repetition is a particularly powerful rhetorical tool for reinforcing stereotypes

Cultural & Societal Forces, Not Just Individual Decision-Making



“[D]eviation from rational decision-making is not simply a cognitive glitch, but a meaningful cultural statement that reflects the way people unknowingly carry society’s weaknesses with them at all times.”

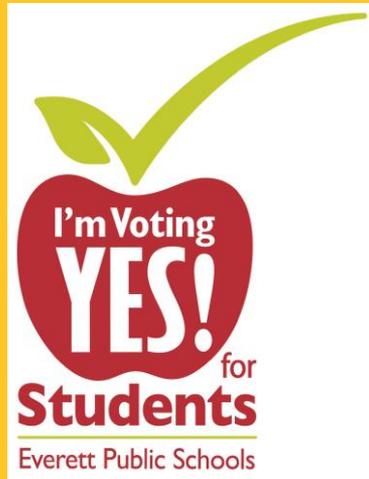
Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345, 420 (2007).

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Priming for Prejudice

Priming: presenting information in a way that triggers associations with other information – including stereotypes – often subconsciously



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Priming studies show affects on decision-making, even when the “prime” is too quick to be consciously noticed

How Implicit Bias Affects Decision-Making



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- **Memory** (e.g. a recent study showed that altering a legal actor's race changed which facts jurors remembered & generated a false "memory" of a "fact")
- **Judgment** (e.g. appropriate punishment for violence, whether petty conduct is excusable, witness credibility determinations)
- **Emotions** (anger & fear increase retributive impulses, decrease empathy)

Recognizing Biased (Prosecutorial) Rhetoric: Dehumanization

Animal References: “Because use of animal imagery is historically associated with racism, **use of animal imagery in reference to a defendant** is racially discriminatory and should not be permitted in our court system.” California Racial Justice Act of 2020, A.B. 2542, 2019 CAL. STAT., ch. 317 § 2(e) (2020).

RJA Definition of Racially Biased Language includes “language that compares the defendant to an animal”

- Invoked directly through references comparing the defendant to animals (e.g. ape/gorilla, Bengal tiger, etc.)
- **Also invoked through words that indirectly reflect dehumanization (can argue as animal references or as racially coded language)**
 - **verb choice (e.g., hunt, breed)**
 - “predator” or “super-predator”
 - “Godzilla” or other monster references
 - Analogies to movies, documentaries, etc. (Animal Planet, Gorillas in the Mist, Curious George)
 - “It’s in his blood”

Recognizing Biased (Prosecutorial) Rhetoric: Linguistic Proxies for Race

Ideas that are commonly associated with a particular racial group, e.g.

- Racial slurs
- Racialized labels for people (e.g. “Welfare queen” or “thug”)
- References to racialized neighborhoods, hairstyles, clothing etc.
- Slang with racial connotation (e.g. “ghetto,” “inner city,” “high crime neighborhood”)

Sometimes used directly re. defendant, but other times to attack **credibility of defense witnesses**

Context matters – look at what words/ideas/concepts/locations have racialized connotation in your particular context, develop that context in briefing

Implicit bias frame is important here – **focus on how these ideas trigger stereotypes**, not what the prosecutor knew or intended

Recognizing Biased (Prosecutorial) Rhetoric: Us/Them Appeals (racialized in context)

Puts the prosecutor and jury on one side of a line, defendant on the other
→ invokes ingroup favoritism or outgroup bias. Examples:

- Emphasis on the defendant & victim being of different races, implying that made the crime worse (especially in sexual assault cases)
- Different characterization of the defendant versus victim re. a similar trait (one case called defendant “evil” as a noun, called the victim a “kid” when both were roughly the same age)
- Gang “evidence” or arguments when defendant disputes being in a gang, arguments about “gang lifestyle”
- “These people” or “protect your community”
- Prosecutor’s use of slang that isn’t from witness testimony (e.g. po-leese, pistol-whip, etc.)

Recognizing Biased (Prosecutorial) Rhetoric: Unnecessary References to Race

Rhetorical repetition creates emphasis, increases emotional power, decreases conscious scrutiny, increases certainty of belief

Should be allowed	Should not be allowed
<i>Limited</i> reference to race for identification purposes when identity is an issue	<i>Repeated</i> references to race to show identity, or a single reference to race to show identity when identity is not disputed
Discussion of race in connection with the validity of cross-racial identification	Accusations that identification argument is based on stereotype that all people of a race or ethnicity look alike
Arguments related to racial motive when there is specific <i>evidence</i> supporting that theory	Arguments related to race as motive that are based on <i>speculation or generalizations</i> rather than concrete evidence, use of race/ethnicity to suggest that explains violence or criminality
Be particularly cautious of (repeated) references when linked to stereotypes (e.g. Black gangs, “Black folk don’t testify against Black folk”) or when creates racialized context for other more coded appeals to race (e.g. neighborhoods, slang)	

Recognizing Biased (Prosecutorial) Rhetoric: Putting it all Together to show an (a)(2) violation

** Look for/bring together

- Explicit references to race, even if not necessarily themselves racially biased
- Various types of coded or other racially biased language (the more the better)
- Repetition of the identified language
- Use of the language in opening or closing arguments (particularly powerful re. framing)
- How the language/use relates to issues in the trial (e.g. to attack credibility, to argue someone is inherently violent/irredeemable, etc.)

** For ambiguous language, develop history/context

Harmless Error – Showing Prejudice

Cal. Penal Code 745(k): “For petitions filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.”

- *Chapman* harmless error standard – burden is supposed to be on the prosecution to prove beyond a reasonable doubt, but research suggests specific standard doesn't matter as much as it should
- Tactically, make affirmative harmless error arguments grounded in the social science research → show how the language could have affected the outcome
- Extended discussion of harmless error in *Mitigating Foul Blows*

Prejudice – Topics to Consider from a Cognitive Science Perspective

- 1) *Demographic background of the jury & the case*
- 2) Repetition versus isolated remarks
 - Repetition of same language
 - Combining as many types of language issues as possible
- 3) Severity of language
- 4) Timing of biased language
- 5) Link to credibility or other issues in the case
- 6) Was there an objection/overruled, and how does that affect the jury
- 7) Corrective measures/protective measures
- 8) “Strength of the evidence” – *but push back against this analysis*

Trial counsel, look at *Confronting Racist Prosecutorial Rhetoric at Trial* for strategies that are specifically focused at the trial level

(1) Consider Demographic Backdrop & Decision-Making

** Did the deliberating jury have members of the same race as the defendant?

** Consider whether to raise the racial demographics of the trial participants generally

“[B]iases in jury decision making often occur in response to the interaction of races among trial parties, not the race of a single party.” Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 *Ann. Rev. L. & Soc. Sci.* 269, 271 (2015).

- Consider the race of the judge, jurors, prosecutor, defense counsel, witnesses, victim(s), etc. → do these demographics **inadvertently reinforce negative stereotypes** and **create a natural backdrop of us/them thinking or ingroup favoritism?**
- Research consistently shows that jury diversity improves decision-making (see *Confronting Racist Prosecutorial Rhetoric at Trial*).
 - Jurors of color may observe and analyze racial dynamics differently than White jurors
 - White jurors may be more aware of the potential for bias & may deliberate more carefully, even when jurors of color do not explicitly address race.

2) Repeated vs. Isolated Remarks

- Courts in many jurisdictions consider this issue more explicitly (often by minimizing as “isolated”) → relevant to both harmless error & to convincing the court that there was an RJA violation in the first place
 - ** If a particular type of racially biased language is repeated, stress that in harmless error analysis
 - ** Also try to aggregate different types of racially biased language, argue that court should look holistically rather than in isolation
- *Consider linking to RJA findings in support of holistic approach*

3) Severity of Language (tactically tricky)

- Research suggests that coded language can be more dangerous than explicit racially prejudiced language like slurs → emphasize the way that coded language can affect decision-making
 - Coded language can trigger stereotype-congruent decision-making below the listener's conscious awareness, and therefore listener is unlikely to recognize and guard against being affected.
 - Low prejudice people reject explicit bias when they hear it
 - High prejudiced people don't want to be seen as explicitly biased if the context suggests that others won't support/agree with their bias
 - ***"The fact that some courts find subtle racial arguments plausible suggests that the jurors might find them persuasive." Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *Fordham L. Rev.* 3091, 3118 (2018).
- On the other hand, don't want court excusing more blatant racism
 - Look to legislative findings from RJA, case law (including from other states), social science research, law reviews
 - Link to later procedural issues (objections, curative measures, protective measures)
- Either way, thoroughly develop arguments about why the language is racially biased and severe

3) Severity Continued: Dehumanization

Dehumanization should be treated as inherently severe:

Dehumanization can lead to moral exclusion, placing those stigmatized “outside the boundary in which moral values, rules, and considerations of fairness apply.” Furthermore, this dehumanization can have subconscious, neurological effects, in that people may fail to activate the part of the brain typically involved in social perception when viewing members of highly stigmatized groups.

Mitigating Foul Blows at 367-68 (internal citations omitted).

Courts should not take an attitude of “helpless piety” toward racially biased language – don’t minimize, use harmless error as a way of criticizing conduct but refusing to grant any remedy for defendants.

Trial counsel should definitely object to dehumanizing language and link to RJA, even if overruled.

4) Timing of Language

- Closing argument is significant. See, e.g., *United States v. Starks*, 34 F.4th 1142, 1165 n.7 (10th Cir. 2022) (citing my articles *Mitigating Foul Blows* and *Confronting Racist Prosecutorial Rhetoric at Trial* for the proposition that “statements made in closing arguments . . . are likely to have an outsized effect due to their temporal proximity to jury deliberations.”).
 - If racially biased language came from a witness during a trial, look at how the prosecutor handled that topic in closing.
- Some research supports beginning of the case as being particularly significant (voir dire, opening statements) because it frames the issues for the jury.

5) Link to Credibility, Other Issues in the Case

When considering prosecution and defense theories of the case, does the language go to “the entire narrative arc or merely a discrete or insignificant part of it”? (*Mitigating Foul Blows* at 368, citing an article talking about evidentiary issues rather than racially biased language)

- Does the evidence go right to the heart of the prosecution’s theory of the case (e.g. gang experts/evidence, other prosecution expert witnesses)?
- Is there concrete evidence to support the prosecution’s theory, or is the prosecution (largely) relying on stereotypes?
- Does the particular evidence/language pose particular risks (e.g. rap music)? (Focus on social science research)
- How does the evidence relate to the defense’s theory of the case? E.g. is credibility (of defendant or defense witnesses) in dispute?

Use social science research to show effect of implicit bias on evaluative decision-making (like credibility)

6) Effect of Objection (or lack of Objection)

Another area where appellate court's treatment of the issue doesn't track the social science research
→ from a social science perspective, think about whether anything was likely to make the jury to guard against being influenced by bias

- See Professor Cynthia Lee's work, e.g. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555 (2013) (re. when jurors are and aren't likely to guard against racially biased language, the dangers of colorblindness, etc.)
- If no objection, then nothing to alert low-prejudiced jurors to be on guard against potential affect of racial bias
- If there is an objection, was it specific re. racial bias (or more general like "inflammatory") – more specific objection can help low-prejudiced jurors recognize potential for racial bias
- Did the court overrule the objection (suggesting the jurors don't need to be on guard against relying on the language)?
- If court sustained an objection to specific language, was there a larger pattern of racially biased language that was not signaled to the jury as problematic?

7) Corrective/Preventative Measures

- Some research suggests that **jury instructions** against racial bias and in favor of egalitarianism can help jurors guard against being influenced by racial bias (see *Confronting Racist Prosecutorial Rhetoric at Trial* for a summary and citations)
 - Was the jury ever instructed to avoid relying on bias?
 - Were there instructions given **before** the trial?
- Did voir dire help “make race salient” and prime jurors for egalitarianism?
 - See Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843 (2015); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149 (2010).

8) Push back on “Strength of the Evidence” Analysis

“[C]ognitive bias research consistently demonstrates that decisionmakers cannot effectively evaluate the strength of other evidence without there being some taint from the error. The **story model and coherence-based reasoning both show that jurors likely make decisions holistically rather than based on a mathematical calculation about the value of each thing that happens in the trial, and outcome and hindsight bias research shows that reviewing decisionmakers are likely to under-weigh the potential taint from the error.** For these reasons, courts should reject reliance on the strength of the rest of the evidence as a factor for harmless error. Presumably, if the other evidence is strong, then the prosecution should be able to obtain a conviction again upon retrial. And, defendants are entitled to a fair trial regardless of factual guilt.” *Mitigating Foul Blows* at 372.

8) Push back on “Strength of the Evidence” Analysis (Cont.)

- Note that racially biased language can affect memory (see Justin Levinson’s work on these issues)
 - Easier to remember stereotype-congruent facts than stereotype-inconsistent information
 - Some risk of filling in gaps with stereotypes
 - Vividness of word choice can affect recall
- Consider the **emotional effects** of the language used – e.g. increased retributivism, decreased empathy
- See earlier discussion about **evaluative decision-making** like credibility

Ultimately, because courts so often rely on strength of other evidence, you’ll want to undercut the strength of that evidence AND argue for how the racially biased language could have affected decision-making in the case.

Discussion

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