Fordham Law Review

Volume 86 | Issue 6 Article 24

2018

Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response

Praatika Prasad
Fordham University School of Law

IMPLICIT RACIAL BIASES IN PROSECUTORIAL SUMMATIONS: PROPOSING AN INTEGRATED RESPONSE

*Praatika Prasad**

Racial bias has evolved from the explicit racism of the Jim Crow era to a more subtle and difficult-to-detect form: implicit racial bias. Implicit racial biases exist unconsciously and include negative racial stereotypes and associations. Everyone, including actors in the criminal justice system who believe themselves to be fair, possess these biases. Although inaccessible through introspection, implicit biases can easily be triggered through language. When trials involve Black defendants, prosecutors' summations increasingly include racial themes that could trigger jurors' implicit biases, lead to the perpetuation of unfair stereotypes, and contribute to racial injustice and disparate outcomes.

This Note examines and critiques the current approaches that courts and disciplinary authorities use to address implicit racial biases in prosecutorial summations. Recognizing the inadequacy in these current methods, this Note proposes an integrated response, which involves lawyers, jurors, trial courts, and appellate courts. The proposed approach seeks to increase recognition of implicit racial bias use, deter prosecutors from using language that triggers implicit racial biases, and ensure that Black defendants' equal protection rights are upheld.

* J.D. Candidate, 2019, Fordham University School of Law; B.A., 2014, Smith College. I would like to thank Professor Bruce A. Green and the editors and staff of the *Fordham Law Review* for their guidance and assistance. I would also like to thank my family and friends for their constant support and encouragement.

INTRODUCTION

> I was always told that sticks and stones may break my bones but words would never hurt me. I found out that is a lie. Words carry weight.
>
> —Gina, Johnny O'Landis Bennett's sister[1]

Johnny O'Landis Bennett, a Black[2] man from South Carolina, was convicted of murder and sentenced to death in 2000. Mr. Bennett remained

1. Justice 360, *Bennett Film, YouTube*, YOUTUBE (July 12, 2016), https://youtu.be/sfd7D-6vh4Q?t=2m6s [https://perma.cc/5QM6-ZXS8].

2. This Note capitalizes the term "Black." For an explanation of why, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710 n.3 (1993).

on death row until 2016.[3] During trial, the prosecutor, Donald Myers, referred to Bennett as a "monster," "caveman," and a "beast of burden," and he unnecessarily brought up Bennett's sexual history with a "blond-headed lady."[4] Later, in his closing argument,[5] Myers referred to Bennett as "King Kong."[6] The court overruled defense counsel's multiple objections, and the all-white jury sentenced Bennett to death.[7] Six years later, one of the jurors from Bennett's case stated that he believed that Bennett had killed the alleged victim "[b]ecause [Bennett] was just a dumb n[——]r."[8] Even this clearly prejudicial statement did not bring Bennett relief. The South Carolina state court concluded that the juror's statement did not establish that he was racially biased at the time of the trial.[9] In 2013, the South Carolina Supreme Court refused to reconsider the issue.[10] Finally, in 2016, a federal trial judge in South Carolina overturned Bennett's death sentence after recognizing that the trial "was so infected by racial animus by the prosecutor and a juror . . . that Bennett was deprived of his constitutional right to due process."[11]

As Martin Luther King Jr. reminded the American people in 1965, "the arc of the moral universe is long, but it bends toward justice."[12] The arc has since moved, but it has not travelled in a straight line. Racism has evolved from the blatant "Whites Only" signs of the Jim Crow era to more diffuse and less obvious forms of racial biases.[13] Although today's reigning ideology of colorblindness insists that racism has significantly diminished, it has not. Black people make up only about 13 percent of the nation's population, but they constitute 40 percent of those incarcerated and 42 percent of the population on death row.[14] Scholars have recently recognized a largely unconscious contributing factor to this systemic disparity. They have found

3. *Federal Court Reverses Death Sentence Because of South Carolina Prosecutor's Racially Biased Arguments*, EQUAL JUST. INITIATIVE (Apr. 26, 2016), https://eji.org/news/south-carolina-death-sentence-reversed-due-to-racially-biased-prosecutor-comments [https://perma.cc/4242-EBTT].

4. Andrew Cohen, *A Judge Overturned a Death Sentence Because the Prosecutor Compared a Black Defendant to King Kong*, MARSHALL PROJECT (Mar. 28, 2016, 7:15 AM), https://www.themarshallproject.org/2016/03/28/a-judge-overturned-a-death-sentence-because-the-prosecutor-compared-a-black-defendant-to-king-kong [https://perma.cc/95ZM-7TG8].

5. "Closing argument" and "summation" are used interchangeably throughout this Note.

6. *See* Cohen, *supra* note 4.

7. *Id.*

8. *Id.*

9. *See generally* State v. Bennett, 632 S.E.2d 281 (S.C. 2006).

10. Cohen, *supra* note 4.

11. *Id.*; *see also* Bennett v. Stirling, 842 F.3d 319, 327–28 (4th Cir. 2016).

12. Elise C. Boddie, *The Arc of the Moral Universe*, AM. CONST. SOC'Y FOR L. & POL'Y: ACSBLOG (Jan. 19, 2015), https://www.acslaw.org/acsblog/the-arc-of-the-moral-universe#_ftnref5 [https://perma.cc/MSC6-FB99].

13. *See infra* Part I.A. *See generally* Christopher Cerullo, Note, *Everyone's a Little Bit Racist?: Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127 (2013).

14. *Presumption of Guilt*, EQUAL JUST. INITIATIVE, https://eji.org/racial-justice/presumption-guilt [https://perma.cc/9EG9-FANU] (last visited Apr. 13, 2018).

that everyone harbors unconscious stereotypes and attitudes about race,[15] which shape the way that they understand the world and reflexively respond to racial stimuli.[16] This is known as implicit racial bias.[17]

The manifestation of implicit racial biases is difficult to detect and, even when detected, is capable of racially neutral interpretations. Myers's statements to the jury did not ask the jurors to draw on their explicit biases.[18] Instead, his statements drew on common themes that could evoke negative racial associations in the listener.[19] Still, there was no way to conclusively prove that the juror's stated reason for imposing the death penalty on Bennett was triggered by one of Myers's many "subtle" racial references. So, courts reviewing Bennett's case between 2000 and 2016 viewed each racial reference as isolated and characterized Myers's "King Kong" comment as a harmless reference to Bennett's size. Only after sixteen years did a court recognize that the King Kong reference "stoked race-based fears by conjuring the image of a gargantuan, black ape who goes on a killing spree."[20]

When prosecutors' summations, such as Myers's, involve subtle references to race or racial stereotypes as a result of their own implicit biases, in an attempt to appeal to jurors' implicit biases, or both, the potential of prejudice influencing a decision is often not detected or is dismissed.[21] This is not only a problem of due process but also one of equal protection as implicit racial biases can cause otherwise fair-minded actors in the criminal justice system to unknowingly perpetuate a racially inequitable society.[22] Unnoticed racially tinted arguments made during trial, whether implicit or explicit, reinforce racial biases. These reinforced biases create and legitimize new generations of racially biased adjudication, legislation, policing, and prosecution.[23] These biases also cause Black people to endure humiliations and disadvantages in all facets of their lives: suspicious people on the street and potential employers, fearful cab drivers, and hovering storeowners.[24]

While U.S. society has been trying to rid itself of the vestiges of slavery and racial language, this Note argues that the legal system is not effectively playing its part. This Note posits that courts and disciplinary authorities allow for the perpetuation and reinforcement of racial biases because they do

15. *See* Chris Cialeo, Note, *[In]equality Under the Law: Remedying Unequal Antidiscrimination Ethics Rules for Federal Prosecutors*, 28 GEO. J. LEGAL ETHICS 435, 437 (2015).

16. *See* Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1009 (2013).

17. *Id.* at 1009–10. There are many ways in which implicit racial biases enter the criminal justice system and contribute to disparate racial results, but this Note focuses specifically on the impact of implicit racial biases used in prosecutorial summations.

18. Explicit biases are "preference[s] deliberately generated and consciously experienced as one's own." Chad Schmucker & Joseph Sawyer, *Decision Making, Implicit Bias, and Judges*, *in* ENHANCING JUSTICE REDUCING BIAS 1, 14 (Sarah E. Redfield ed., 2017).

19. *See infra* Part II.

20. Bennett v. Stirling, 842 F.3d 319, 325 (4th Cir. 2016).

21. *See infra* Part III.

22. *See* Rapping, *supra* note 16, at 1002.

23. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1567 (2012).

24. *Id.*

not adequately recognize or deter the use of implicit racial biases in prosecutors' summations. While Bennett's death sentence was overturned, if the case was not a capital case, had fewer racial references, or lacked a clear due process violation, the 2016 judgment may have also ignored the implicitly racial component of Myers's arguments.

History shows that the arc of the moral universe does not bend towards justice on its own.[25] U.S. society and the criminal justice system are striving toward racial neutrality and implicit racial biases impede this goal. Thus, even if courts do not want to use resources to reverse convictions, implicit racial biases need to be adequately addressed to bend the arc closer to justice. This Note proposes an integrated response, involving multiple actors in the criminal justice system, to fully address the use of implicit racial biases in prosecutorial summations.

Part I describes the evolution of the United States' racial history and shows how historical racial stereotypes are now manifested through implicit racial biases. It also explains the role of implicit bias in the criminal justice system by describing how the explicit and implicit biases of prosecutors impact jurors. Through the examination of illustrative cases, Part II explores common ways in which implicit racial biases are injected into prosecutorial summations. Part III analyzes the shortcomings in the current approaches taken by trial courts, appellate courts, and disciplinary authorities to address the use of implicit racial biases in prosecutorial summations. Finally, Part IV recommends an integrated response to the problem of prosecutorial summations that trigger jurors' implicit racial biases. The proposed response includes (1) training judges and lawyers to recognize implicit racial themes, (2) judges uniformly giving pretrial implicit-bias instructions to educate the jury, and (3) judges immediately addressing arguments that may activate implicit racial biases by uniformly issuing comprehensive curative instructions and better rebuking prosecutors and trial judges to disincentivize veiled appeals to racial prejudice.

Through such examination, this Note highlights the major impact that implicit racial biases can have on trial outcomes and on the perpetuation of societal racial injustice. This Note seeks to provide practical guidance to courts and lawyers to identify implicitly racial themes in summations and deter their use, thus reducing the unfair impact on Black people both in the criminal justice system and in everyday life.

I. RACIAL BIAS IN THE LAW

The U.S. criminal justice system is premised on fairness,[26] and most participants in the criminal justice system believe that they can make fair and unbiased decisions, but data continue to show results markedly differentiated

25. *See* Schmucker & Sawyer, *supra* note 18, at 82.

26. *See* U.S. CONST. amend. VI (guaranteeing all criminal defendants the right to an impartial jury).

by race.[27] This Part describes some of the reasons for this disparity. Part I.A contextualizes the issue this Note seeks to address by discussing the enduring effects of historical racism on U.S. society. Part I.B then provides an overview of implicit bias, with Part I.B.1 explaining how implicit biases function, Part I.B.2 discussing how implicit racial biases can impact jurors, and Part I.B.3 discussing how prosecutors' implicit biases may manifest or activate jurors' implicit racial biases. Part I.C then describes the especially powerful impact that racially biased arguments can have in summations.

A. The Arc of Racial [In]justice: Enduring Effects

After every significant social transformation in U.S. history, the arc of racial justice has shifted and changed the way race is perceived in U.S. society. This shift occurs because of the social impact of racial ideology combined with the unique characteristics of the particular transformative moment in time.[28] Today is no different. The historical oppression of Black people has left a deep imprint on the American psyche that now manifests through implicit biases.[29] Racial bias today involves widely shared stereotypes about Black people, which were initially "forged by the engineers of racial animosity in the days of slavery"[30] and which still affect U.S. society in insidious and subterranean ways.

When slavery first began in the American colonies, its proponents explained that God had created different "types of mankind" and that Black people were "cursed by God."[31] Black people were thus seen as deserving of enslavement, and white slave owners as advancing God's plan. With the growth of science, several pseudosciences purported to study the physical variations across races to give scientific credence to the conception of whites as a species distinct from, and superior to, Black people.[32] Along with these explanations came a set of caricatures—refined and exaggerated stereotypes that reinforced the image of Black people as naturally inferior, ill-equipped for freedom, and "destined for subordination to their white guardians."[33]

Following the Civil War, white Americans were anxious about the potential for "black retaliation for two centuries of enslavement."[34] These anxieties could no longer be described in vividly racist terms, so these postbellum constraints, fears, and needs led to new, more frightening caricatures of Black people.[35] The once loyal, docile caricatures were

27. *Achieving an Impartial Jury (AIJ) Toolbox*, A.B.A. 1, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf [https://perma.cc/S73E-G8S2] (last visited Apr. 13, 2018).

28. Imani Perry, *Post-Intent Racism: A New Framework for an Old Problem*, 19 NAT'L BLACK L.J. 113, 136–37 (2006).

29. *See* Murray, *supra* note 23, at 1557.

30. *Id.*

31. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L.L. REV. 413, 432 (2006).

32. *Id.* at 433–34.

33. *Id.* at 435.

34. *Id.* at 436.

35. *Id.* at 437.

transformed into ones of Black people as "raging, rapacious, and threatening."[36] These caricatures showed that white people were alarmed that Black people might "compete with them economically, politically, and sexually."[37] The caricatures were used to confirm the belief that Black people were immoral and "incapable of self-government, unworthy of the franchise, and impossible to educate beyond the rudiments."[38]

Since the end of slavery and the inception of the NAACP,[39] efforts have been made across society to rid America of vestiges of slavery,[40] but postbellum stereotypes remain and the arc has a long way to bend to reach justice.[41] Today, most Americans believe that society is "postracial" and that they are "colorblind."[42] Most Americans also believe that "racism is immoral, and that valuing racial classification over individual character is wrong."[43] Although public ideology today teaches equality and nonracism, there are many conscious and unconscious ways by which cultural patterns of racism interfere with a truly race-neutral society.[44] Contemporary reasons used to explain racial disparities are different from those of the Jim Crow era—"whites today rely more on cultural rather than biological tropes to explain blacks' position in this country"—but the substantive content of the underlying stereotypes remains fundamentally the same.[45] These underlying negative attitudes about Black people perpetuate a "thought system accenting white superiority and black inferiority."[46]

Colorblindness is a guise used to hide racial bias today. It includes the belief that because of equal opportunity, unequal outcomes between races are not unjust and merely reflect a lack of effort or ability.[47] Thus, it faults Black people for persistent societal racial inequalities, including disparities in the criminal justice system, education, employment, and housing.[48] Colorblindness also considers only direct references to color or explicitly

---

36. *Id.*

37. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 859 (2004).

38. *Id.*

39. *Oldest and Boldest*, NAACP, http://www.naacp.org/oldest-and-boldest/ [https://perma.cc/UR28-6XDB] (last visited Apr. 13, 2018).

40. Efforts continue to be made to educate Americans about U.S. racial history and the resulting disparities. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); MARSHALL (Open Road Films 2017).

41. *See* John C. Duncan, Jr., *The American 'Legal' Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL'Y & L. 315, 376 (2000).

42. *See* Murray, *supra* note 23, at 1544.

43. Perry, *supra* note 28, at 116.

44. Duncan, *supra* note 41, at 377.

45. Murray, *supra* note 23, at 1551 (quoting EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 7 (2d ed. 2006)).

46. Sami C. Nighaoui, *The Color of Post-Ethnicity: The Civic Ideology and the Persistence of Anti-Black Racism*, 20 J. GENDER RACE & JUST. 349, 355 (2017) (quoting JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 105–06 (2000)).

47. Murray, *supra* note 23, at 1543.

48. *Id.* at 1552.

derogatory racial epithets to be morally, legally, and politically wrong.[49] This discounts the reality that modern analogues of Black slavery tropes, "dog whistle[s]," and other racially coded language are now used to distinguish between races.[50] Even political leaders mobilize white opposition to civil rights through coded vocabulary capable of marshalling racial fears without openly violating egalitarian norms.[51] Racial coding and linguistic proxies for race, like "inner-city,"[52] "welfare queens,"[53] and "thugs,"[54] extend the racial narrative by alluding to race without specifically referencing it. Additionally, when people attempt to discuss the enduring relevance of race in modern-day social and political institutions, they are often silenced with accusations of "playing the race card."[55] To preserve the myth of equal opportunity and a postracial society, colorblindness propagates an image of Black people as "lazy, irresponsible, aggressive, and criminal."[56]

Today's institutions continue to bend the arc away from justice by "enhanc[ing] slavery's oppressive shadow" and perpetuating a two-tiered system of justice, even as actors and their institutions seek to end slavery's legacy.[57] Research on implicit bias finds that today's racial biases and discrimination largely occur because of unconscious stereotypes about Black people.[58] These stereotypes have endured the end of slavery, contributed to

---

49. Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1063 (2010).

50. *See* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 9–10 (2015) (describing President Nixon's use of coded appeals "as the centerpiece of his Southern Strategy"); *see also* Liam Stack, *Alt-Right, Alt-Left, Antifa: A Glossary of Extremist Language*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/us/politics/alt-left-alt-right-glossary.html [https://perma.cc/4C4Z-XGMG].

51. *See* Lopez, *supra* note 49, at 1032. President George H.W. Bush's 1988 presidential campaign used the Black brute caricature to inflame white fear of Black criminality. The campaign included an advertisement featuring Willie Horton, a Black man who was imprisoned for murdering a young boy. *See* Lenhardt, *supra* note 37, at 860.

52. Neil Irwin, *Trump Says More Jobs Will Help Race Relations. If Only It Were So Simple.*, N.Y. TIMES (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/upshot/trump-says-more-jobs-will-help-race-relations-if-only-it-were-so-simple.html [https://perma.cc/Z24M-9PND].

53. Ronald Reagan's campaign rhetoric tapped into an emotional reaction to the civil rights movement's remedial measures among recession-wounded whites. *See* Perry, *supra* note 28, at 129.

54. Lisa Desjardins, *Every Moment in Trump's Charged Relationship with Race*, PBS (Aug. 22, 2017), https://www.pbs.org/newshour/politics/every-moment-donald-trumps-long-complicated-history-race [https://perma.cc/ZE7P-LWVE].

55. Murray, *supra* note 23, at 1550 (quoting Lopez, *supra* note 49, at 1072).

56. *Id.* at 1551.

57. *See* Nick J. Sciullo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201, 222 (2015); *see also* Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45, 59–60 (Justin D. Levinson & Robert J. Smith eds., 2012).

58. *See* Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 35 (2014).

the unfair administration of criminal justice, and continue to negatively affect all aspects of Black people's lives.[59]

B. Implicit Racial Bias: An Overview

Although overt racism has declined,[60] racial bias has the ability to transform itself. Modern manifestations of racial disparities through implicit biases have roots in the pervasive, negative historical stereotypes about Black people.[61]

Implicit biases are activated involuntarily and without one's awareness or control.[62] As such, these biases are not consciously accessible even through introspection.[63] Implicit biases are formed by implicit attitudes (unconscious preferences)[64] and implicit stereotypes (nonconscious mental associations between a group and a trait).[65] Social cognition theorists believe that implicit attitudes represent "traces of past experiences" that inform and shape preferences prospectively,[66] and they believe that implicit stereotypes determine how people treat members of other social groups.[67]

The most prevalent conception of social behavior is that humans are guided solely by explicit beliefs and conscious decisions to act.[68] In contrast, implicit associations arise outside of conscious awareness and do not necessarily align with individuals' openly held beliefs.[69] When implicit and explicit attitudes toward the same object differ, the discrepancies are referred to as dissociations.[70] People who believe that they have favorable attitudes toward different racial groups may be surprised to learn that their implicit associations tell a different story.[71] These dissociations can be tested through the Implicit Association Test (IAT).[72] The IAT is the best-known, most

59. *See Personal Experiences with Discrimination*, PEW RES. CTR. (June 27, 2016), http://www.pewsocialtrends.org/2016/06/27/5-personal-experiences-with-discrimination/ [https://perma.cc/CX7Z-ZNHV].

60. *See supra* Part I.A.

61. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580 (2013) (stating that racism is "perpetuated within our culture in subtle, yet highly effectual, ways").

62. *See* KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 6 (2013).

63. *See id.*

64. *See* Hutchinson, *supra* note 58, at 35.

65. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946, 949 (2006).

66. *See* Hutchinson, *supra* note 58, at 35.

67. *Id.*

68. *See* Greenwald & Krieger, *supra* note 65, at 946.

69. *Id.*

70. *Id.* at 949.

71. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 803 (2012).

72. To take the IAT or for more information about the IAT, *see Preliminary Information*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/9KEA-P7WW] (last visited Apr. 13, 2018). For more information about the IAT, see Lee, *supra* note 61, at 1570; Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 191 (2010).

thoroughly tested measure of implicit bias.[73] It tests implicit responses by inferring associations in a manner that is not apparent to participants.[74] IAT results are statistically significant and not due to random chance variations in measurements.[75] Over a decade of research shows that implicit racial stereotypes can be activated easily and can lead to biased decision-making.[76] There is also evidence that implicit biases predict everyday behavior.[77]

Because implicit biases can produce behavior that differs from a person's endorsed beliefs, they are difficult to control or remedy.[78] But there is significant evidence that implicit biases are malleable.[79] Attempts at being colorblind can exacerbate the power of implicit racial biases because ignoring race can cause automatic engagement of stereotype-congruent responses.[80] Implicit biases can be controlled, however, if actors are aware of their biases, are motivated to change their responses, and possess cognitive resources necessary to develop and practice correction strategies.[81]

In the criminal justice context, implicit biases can influence how actors in the criminal justice system behave when confronted with applying race to decision-making.[82] Jurors,[83] lawyers,[84] and even judges[85] are not immune to implicit biases. Implicit negative racial biases coupled with implicit white favoritism perpetuates racial disparities.[86] Understanding how implicit racial

---

73. *See* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 3 (2009); Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 880 (2015).

74. Greenwald & Krieger, *supra* note 65, at 952–53. In the racial IAT, respondents pair "black" and "white" faces with "positive" and "negative" words. The results show that, when measuring response times and error rates, most people are quick to pair "positive" words with "white" faces and "negative" words with "black" faces. Over 90 percent of white people show implicit white over Black preferences on the IAT, which demonstrates that they implicitly associate Black people with dangerousness, criminality, and violence. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006); *see also* Smith, Levinson & Robinson, *supra* note 73, at 880.

75. *See* KANG, *supra* note 73, at 3. A recent meta-analysis of 122 research reports involving a total of 14,900 subjects revealed that implicit bias IAT scores better predict behavior than explicit self-reports. *Id.* at 4.

76. *See* Smith & Levinson, *supra* note 71, at 805.

77. *Id.*

78. *See* Greenwald & Krieger, *supra* note 65, at 951.

79. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 834–35 (2012). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002).

80. Lee, *supra* note 61, at 1560.

81. *See* KANG, *supra* note 73, at 5; Nicole R. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 278, 290 (2014).

82. *See* Rapping, *supra* note 16, at 1010.

83. *See infra* Part I.B.1.

84. *See generally* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

85. *See generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L.F. 1 (2001); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

86. *See* Smith, Levinson & Robinson, *supra* note 73, at 874–75 (defining implicit favoritism as "the automatic association of positive stereotypes and attitudes with members of

bias works can help to illustrate how legal actors who believe in justice and may not be conscious of their racial preferences or animus can perpetuate a racially unjust system and society.[87]

1. Racial Bias and the Jury

During trial, the jury is meant to establish facts based on evidence and apply the law as instructed.[88] Since every defendant has the right to a fair trial, the jury is expected to be indifferent to the defendant's immutable characteristics, regardless of the alleged crime committed or probability of guilt.[89] Because selection of biased jurors violates this right, a fair cross section of the community must be represented on the jury,[90] prosecutors must not use race-based peremptory strikes,[91] and courts are constitutionally required to inquire into potential jurors' racial biases.[92]

While potential jurors are screened for explicit racial biases, they may still possess implicit racial biases. As the IAT has repeatedly shown, race influences the behavior of individuals who endorse egalitarian beliefs and can even affect jurors who believe themselves to have no racial biases.[93] Cognitive theory has shown that latent biases do not have a force of their own and require a stimulus to elicit the stereotype from and produce a motivating response in the audience.[94] Thus, jurors' implicit biases must be triggered before they can adversely affect a defendant's trial.

Researchers have found that even the "simplest of racial cues" can automatically evoke racial stereotypes and affect the way jurors evaluate evidence.[95] Therefore, "subtle manipulations" of a defendant's background affect juror decision-making to a greater extent than explicit references to race.[96] Once racial stereotypes have entered a trial, the defendant's ability to be judged by an impartial jury is lost. While jurors may be more "careful and thoughtful" about their opinions when a prosecutor explicitly references race,

---

a favored group, leading to preferential treatment for persons of that group"). This Note does not discuss implicit favoritism at length.

87. *See* Rapping, *supra* note 16, at 1000.

88. *See* Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV 233, 268 (2013).

89. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961).

90. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 364–66 (1979) (holding that jury venires consisting of only 15 percent women violated representative requirements because women constitute 54 percent of the adults in the county).

91. *See* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

92. *See, e.g.*, United States v. Love, 219 F.3d 721, 728–29 (8th Cir. 2000) (finding that courts are required to inquire into racial prejudice when the reasonable possibility of racial prejudice exists because an all-white jury's opinion about Blacks is unknown). *But see, e.g.*, United States v. Ortiz, 315 F.3d 873, 890–91 (8th Cir. 2002) (finding that the trial court was not required to make further inquiries of venirepersons who found Blacks and Hispanics more violent because venirepersons said race would not affect their decision).

93. Lee, *supra* note 61, at 1560.

94. *See* Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 347 (2006).

95. *See* Rapping, *supra* note 16, at 1014.

96. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1144 (2012).

they are not usually as careful with implicit racial references.[97] A study measuring the effect of implicit bias on the presumption of innocence showed that jurors struggled to reconcile the presumption of innocence with negative stereotypes of Black people.[98]

2. Racial Bias and the Prosecutor

Prosecutors are representatives of the people and, thus, have an additional set of ethical rules and guidelines to follow.[99] Prosecutors play two distinct roles in the criminal justice system.[100] They must act as agents of compliance with the law and as quasi-judicial officers seeking justice.[101] Additionally, prosecutors are expected to be fair to the opposing party and not "allude to any matter that the lawyer does not reasonably believe is relevant or . . . supported by admissible evidence."[102] Because the jury places its confidence in prosecutors and considers them unprejudiced and impartial, prosecutors must operate with "one hand on the throttle and the other hand poised firmly on the brake."[103] Prosecutors are expected to prosecute with "earnestness and vigor," and while they are permitted to "strike hard blows, [they are] not at liberty to strike foul ones."[104] Thus, prosecutors must refrain from using race to deny defendants their right to equal protection and a fair trial.[105]

Although prosecutors largely report egalitarian racial attitudes,[106] they often still inject racial references into jury deliberations.[107] Prosecutors commit misconduct[108] when they make improper racial references and must, therefore, understand the difference between permissible and impermissible references. While prosecutors may discuss race in certain situations, such as

---

97. *Id.* at 1134.

98. *See* Levinson, Cai & Young, *supra* note 72, at 190.

99. *See generally* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2015); MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2013).

100. Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1219 (1992).

101. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions."); *id.* § 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict."); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

102. MODEL RULES OF PROF'L CONDUCT r. 3.4(e).

103. Henry Blaine Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 22 (1973).

104. Berger v. United States, 295 U.S. 78, 88 (1935).

105. *See* Vess, *supra* note 103, at 22.

106. *See* Smith & Levinson, *supra* note 71, at 803.

107. *See* BENNETT L. GERSHMAN, PROSECUTION STORIES 80 (2017) (stating that prosecutors often try to "inflame a jury's fears and stereotypes with predictions of bloodshed, terror, and violence unless the jury convict[s] the accused black man").

108. Sandra Uribe, *A Primer on Alleging Prosecutorial Misconduct on Appeal*, CENTRAL CAL. APPELLATE PROGRAM, https://www.capcentral.org/criminal/articles/docs/primer_da_misconduct.pdf [https://perma.cc/SMC8-4V23] (last visited Apr. 13, 2018) (defining prosecutorial misconduct as "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury").

whether it pertains to motive regarding, for example, hate crimes,[109] they must not make racial arguments that could "appeal to the prejudices of the jury"[110] or that "would divert the jury from its duty to decide the case on the evidence."[111]

Prosecutors possess implicit biases like everyone else, so they may sometimes make improper racial references unconsciously[112] or may make "subtle" references to trigger jurors' implicit racial biases. Whether intentional or not, prosecutors strike foul blows when they make negative racial references as they wrongly conflate stereotypical constructions with Black defendants' inherent character traits.[113] These racial stereotypes are never relevant, may appeal to juror prejudice, and may prevent the jury from making a decision based on the evidence alone.

3. The Climax of the Case: Racial Bias in Summations

In closing arguments, prosecutors have a chance to sum up the trial evidence with a narrative to help the jury understand and interpret the evidence.[114] While prosecutors may inject racial bias at any point during the trial, the closing argument is the most opportune moment to do so.[115] Not many cases are won or lost through the closing argument alone, but it is a powerful tool for the prosecutor.[116] The closing argument has been described as the "most important phase . . . of any jury trial"[117] and "the high point in the art of advocacy."[118] A prosecutors' persuasive power is highest during the summation because it is the last word spoken by the prosecutors to the jury, and social science shows that people tend to be most influenced by the most recent event in a sequence.[119]

When prosecutors make mistakes, whether intentional or not, the system itself "becomes suspect."[120] Overt appeals to race, ethnicity, or religious discrimination in closing arguments have been found to be "the most troubling types of inflammatory arguments."[121] Since overt racial appeals

---

109. *See* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 335 (2001).

110. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-5.8(c) (AM. BAR ASS'N 2015).

111. *Id.* § 3-5.8(d).

112. No published study discusses the participation of prosecutors in IAT research, but there is little reason to believe that prosecutors do not possess implicit biases. *See* Hutchinson, *supra* note 58, at 62–63; Rapping, *supra* note 16, at 1011.

113. Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1143–44 (2014).

114. *See* Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 320 (2015).

115. *See* Alford, *supra* note 94, at 329.

116. *See* Vess, *supra* note 103, at 23.

117. *See* Alford, *supra* note 94, at 329.

118. *Id.*

119. *See* Bowman, *supra* note 114, at 344 (describing empirical research on the "recency effect").

120. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 59 (2013).

121. Bowman, *supra* note 114, at 325.

have largely been replaced with subtle forms of bias,[122] summations that use implicitly racial biases can also result in markedly unfair outcomes for Black defendants and affect larger societal racial attitudes. Still, the power of prosecutorial summations to elicit racial responses from the jury has largely gone unnoticed.[123] One reason for this is that identifying subtle racial themes in summations and differentiating between permissible and impermissible arguments when coded language is used is incredibly challenging for courts.[124]

II. OVERLOOKED RACIAL THEMES IN PROSECUTORIAL SUMMATIONS

Coded language that seems racially neutral but has roots in historical racial oppression is often used in summations.[125] Since prosecutors may use language that varies in source, subtlety, and in which aspect of racial animus or stereotype it evokes,[126] there are a near-infinite number of ways by which prosecutors can surreptitiously inject race into their closing arguments, appeal to juror prejudices, and contribute to racially disparate outcomes.[127]

Through an examination of case law, this Part illustrates some racial themes that are commonly used in prosecutorial summations. Most of these themes draw on postbellum stereotypes to dehumanize Black defendants. If unaddressed, these stereotypes reinforce jurors' biases and perpetuate racial injustice.[128] The cases described in this Part are not exhaustive because criminal trials with racially coded language are difficult to track. This is because reported cases of improper use of racial imagery are merely the visible tip of the iceberg while subtle uses of racial imagery are the "unexplored Antarctica."[129] Many cases with improper summations do not result in appeals and, even if they do, the racial terms may not be in the published opinions because courts may not deem them improper or important.[130]

Part II.A examines prosecutors' use of the Black dishonesty stereotype. Next, Part II.B reviews comparisons made between animals, brutes, and Black defendants. Part II.C discusses language used to distance Black people from jurors. Part II.D then shows how Black defendants' sexual behavior is used to incite animosity. Finally, Part II.E discusses other common themes, such as highlighting neighborhood differences, derogatory pronunciation of certain words, and various inappropriate comparisons. This review of the

122. *See supra* Part I.A.

123. *See* Alford, *supra* note 94, at 330; *see also infra* Part II.

124. *See* Lyon, *supra* note 109, at 335.

125. *See, e.g.*, Charles F. Coleman, Jr., *"Thug" Is the New N-Word*, EBONY (May 27, 2015), http://www.ebony.com/news-views/thug-is-the-new-n-word [https://perma.cc/U85V-APRD].

126. There are hundreds of racial stereotypes and slurs for each disfavored racial group. *See* RACIAL SLUR DATABASE, http://www.rsdb.org/full [https://perma.cc/72BU-52VU] (last visited Apr. 13, 2018).

127. *See* Alford, *supra* note 94, at 353.

128. *See supra* notes 23–24 and accompanying text.

129. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1762 (1993).

130. *See infra* Part III.B.2.

limited available case law is indicative of how commonly implicit racial biases are used in summations, thus hindering the arc on its journey towards justice.

A. Black Dishonesty

Black dishonesty is a racial stereotype that commonly enters prosecutorial summations. A variation of the dishonesty image is that Black people are more likely to lie when they testify for each other and more likely to tell the truth when they testify against each other.[131]

In closing arguments, prosecutors have suggested that witnesses are "more reliable" because both the witness and the defendant were Black,[132] that the Black defendant must be lying because the defendant's testimony did not match the white witness's testimony,[133] that a Black person was "shucking and jiving" on stand,[134] that a Black "anti-snitch code" exists,[135] and that the "evil" Black defendant is always "willing to lie."[136] In a 2015 case, the prosecutor referenced a statement made by a slave in *Gone with the Wind* to show that in the present case, the Black witnesses were lying to protect the Black defendant.[137]

B. Animal Imagery and the Black Brute

Prosecutors' use of animal imagery and the "black brute" caricature in their closing arguments dehumanizes Black defendants.[138] Dehumanization reduces white persons' empathy for Black people, which could explain why violent crimes against white victims typically trigger harsher punishments than crimes against people of color, particularly when the offender is Black and the victim is white.[139]

Animal imagery can both depend on and perpetuate the negative effects of implicit racial biases.[140] By using similes that do not explicitly allude to race

131. *See* Johnson, *supra* note 129, at 1756.

132. McFarland v. Smith, 611 F.2d 414, 416 (2d Cir. 1979); People v. Alexander, 727 N.E.2d 109, 110 (N.Y. 1999).

133. *See, e.g.*, Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979) (claiming that defendant was lying because no white witness contradicted the prosecution's position); State v. Mitchell, No. A08-0464, 2009 WL 1047183, at *2 (Minn. Ct. App. Apr. 21, 2009) (asking the jury whether they were going to believe the "police officer witnesses" or "the greedy defendant").

134. *See* United States v. Pendergraft, 297 F.3d 1198, 1204 (11th Cir. 2002). The court recognized the phrase as having racial origins; it was originally slang adopted by Black people to "describe a situation where blacks lie to whites to stay out of trouble." *Id.* at 1211; *see also* Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995) (referring to a reluctant Black witness as lying on the stand).

135. State v. Monday, 257 P.3d 551, 555–57 (Wash. 2011); State v. Berube, 286 P.3d 402, 403–04 (Wash. Ct. App. 2012).

136. Toler v. State, 95 So. 3d 913, 916 (Fla. Dist. Ct. App. 2012).

137. Long v. Butler, 809 F.3d 299, 305–06 (7th Cir. 2015) ("And sorry, Miss Scarlet, but we don't know nothing about birthing no babies . . . . [T]here are 40 to 60 people around this dead young man, . . . nobody knows nothing.").

138. *See* Smith & Levinson, *supra* note 71, at 820.

139. *See* Hutchinson, *supra* note 58, at 86.

140. *See* Johnson, *supra* note 129, at 1746.

but conjure up stereotypes of Black people as having animalistic tendencies or behaving like an animal would, prosecutors can conjure up violent images about the defendant in jurors' minds.[141]

Prosecutors have repeatedly compared Black defendants to apes in their summations.[142] In one instance, a prosecutor compared a Black defendant to "Curious George," a monkey in a series of children's books.[143] In other instances, prosecutors have referenced movies such as *Gorillas in the Mist*[144] and *King Kong*[145] while discussing Black defendants. Prosecutors have also compared Black defendants to other animals and made references to them belonging in, and having to return to, the jungle.[146]

The brute caricature is an extension of animal imagery. The brute image portrays Black men as "innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death."[147] The image of Black men as "brutes" was proliferated through cartoons and the media extensively from Reconstruction through the twentieth century.[148] The movie *The Birth of a Nation*[149] was shown for fifteen years in the southern states and was instrumental in shaping the stereotype of the "savage black brute."[150] Like other caricatures of the time, the original purpose of the brute image was to justify repressive measures against Black people.[151]

In the early part of the twentieth century, Black defendants were openly referred to as "black brutes" in court.[152] Although no longer primarily used

---

141. Darden v. Wainwright, 477 U.S. 168, 192 (1986) (stating that the prosecutor described the defendant as an "animal" that "shouldn't be [let] out of his cell unless he has a leash on him").

142. *See, e.g.*, Allen v. State, 871 P.2d 79, 97 (Okla. Crim. App. 1994) (comparing the defendant to an ape by pointing to a postcard with a gorilla on it).

143. *See* State v. McCail, 565 S.E.2d 96, 103 (N.C. Ct. App. 2002).

144. State v. Blanks, 479 N.W.2d 601, 602 (Iowa Ct. App. 1991) (describing the defendant in relation to the 1988 movie *Gorillas in the Mist*, which deals with field research on gorilla behavior).

145. Bennett v. Stirling, 842 F.3d 319, 321 (4th Cir. 2016) (referencing the 1933 film *King Kong*).

146. *See, e.g.*, United States v. Ebron, 683 F.3d 105, 142 (5th Cir. 2012) (referring to the defendant as "lions and tigers in the jungle"); People v. Nightengale, 523 N.E.2d 136, 139 (Ill. App. Ct. 1988) (characterizing the defendant as a "debased animal"); State v. Wilson, 404 So. 2d 968, 969 (La. 1981) ("[W]hy is it a black Sunday? Because these two animals decided to shoot white honkies."); People v. Walker, 411 N.Y.S.2d 377, 380 (App. Div. 1978) (referring to people in the defendant's community as a bunch of animals); State v. Richardson, 467 S.E.2d 685, 697 (N.C. 1996) (characterizing the defendant as an "animal" in describing the violent nature of the attack).

147. *See* Alford, *supra* note 94, at 345.

148. *Id.* For more information about Black caricatures and tropes, see Part I.A.

149. THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

150. Leonard M. Baynes, *Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing*, 52 ADMIN. L. REV. 979, 983 (2000) (describing the portrayal of two white men wearing blackface and scaring a young white woman until she leapt to her death).

151. *See supra* notes 33–38 and accompanying text.

152. *See, e.g.*, State v. Washington, 50 So. 660, 661 (La. 1909) (stating that the prosecutor referred to the defendant as a "black brute in human form"); Prokop v. Gulf, Colo. & Santa Fe Ry., 79 S.W. 101, 102 (Tex. Civ. App. 1904) (describing prosecutor as stating that the "darkness would . . . better conceal" the "black brute['s]" identity).

in the same form, this stereotype continues to be associated with fear and loathing, likely motivating a similar response when activated by external stimuli, such as a prosecutor's summation.[153] O.J. Simpson has become an avatar of the brute caricature among white people, and prosecutors cast Simpson in this role.[154] Using Simpson's name in prosecutors' summations may cause jurors to associate Black defendants with violent abuse and evoke negative feelings in jurors who believe that Simpson was not punished for his alleged crimes.[155]

C. "Us-Them" Associations

Implicit racial associations affect how members of racial groups respond to outsiders. Since each group carries its peculiar set of biases, implicit bias scholars argue that "in-group" members treat "out-group" members worse than individuals in their own racial group.[156] By using euphemisms such as "us" and "them," prosecutors can emphasize racial separation while believing that they are not making racial statements.[157] These euphemisms allow white jurors to view "Black defendants" as a separate entity who come from a distinct community. Jurors who hear "us-them" messages may be less likely to think that Black defendants deserve sympathy. They are also less likely to properly weigh the evidence of Black defendants' guilt.[158] In its most outrageous form, this theme implies that the jury must rule against Black defendants to "restrain future interracial crimes."[159]

Prosecutors have evoked this theme in their summations by differentiating between the jurors' and defendants' "worlds"[160] and making statements like

153. *See* Alford, *supra* note 94, at 345.

154. *See* Leonard M. Baynes, A Time to Kill, *the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 559 (1997) (describing the O.J. Simpson's prosecutor as using Simpson's past violent behavior to cause white jurors to "blacken" Simpson with the prevailing stereotype of a violent Black brute).

155. *See, e.g.*, State v. Taylor, 650 N.W.2d 190, 207 (Minn. 2002); *see also* Brief for the Constitution Project as Amicus Curiae in Support of Petitioner, Snyder v. Louisiana, 552 U.S. 472 (2008) (No. 06-10119), 2007 U.S. S. Ct. Brief LEXIS 723, at *10; Hannah Riley, *The Supreme Court Stays Keith Tharpe's Execution at the Last Minute*, HUFFPOST (Sept. 27, 2017, 7:52 AM), https://www.huffingtonpost.com/entry/the-supreme-court-stays-keith-tharpes-execution-at_us_59ca540ae4b0f2df5e83b166 [https://perma.cc/2TU6-5YQ6] (quoting a juror as saying, "I have wondered if black people even have souls. [L]ook at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.").

156. *See* Hutchinson, *supra* note 58, at 28. Implicit in-group favoritism research shows that people automatically associate positive characteristics with the in-group, or "us," and negative characteristics with the out-group, or "them." *See* Smith, Levinson & Robinson, *supra* note 73, at 895.

157. *See* Johnson, *supra* note 129, at 1765.

158. *See* Alford, *supra* note 94, at 353.

159. *See* Johnson, *supra* note 129, at 1756.

160. *See, e.g.*, United States v. Richardson, 161 F.3d 728, 736 (D.C. Cir. 1998) (implying that defense counsel is removed from the reality of the defendant being forced to grow up quickly by differentiating between defense counsel's and defendant's worlds); State v. Shabazz, 48 P.3d 605, 625 (Haw. Ct. App. 2002) (juxtaposing a "young local woman" with "African-American male[]" defendants); State v. Martin, 773 N.W.2d 89, 107 (Minn. 2009) (telling jurors, "welcome to the real world"); State v. Paul, 716 N.W.2d 329, 334 (Minn. 2006) (referencing the "world" several witnesses lived in and using "these people" to describe them);

Black people "execute street justice."[161] Prosecutors have also used language like "them,"[162] "these people,"[163] and "not like us"[164] to highlight the difference between the jurors and Black defendants.

D. Describing Sexual Behavior

In 1903, a respected medical journal published a "lurid and detailed account" of Black men's supposed "sexual madness."[165] This stereotype was used to justify segregation and subjugation as Black men were seen as a threat to white women.[166] Today, prosecutors continue to play on Black men's supposed sexual appetite and sexual threat.[167]

To do this, prosecutors describe negative acts with the racial conclusion left implicit. In cases involving sexual-threat imagery, prosecutors do not argue that miscegeny is wrong. Instead, prosecutors indirectly highlight the Black defendant's race by pointing out that his sexual, domestic, or romantic partners are white, or that the alleged victim is white.[168] Often, prosecutors also imply that sexual interactions with Black men are humiliating and, thus, never consensual.[169] These arguments are not made if the defendant is white because of the purported normality of whiteness.[170]

E. Highlighting Neighborhood Differences, Derogatory Pronunciation, and Improper Comparisons

In some summations, prosecutors discuss the perceived negative qualities and dangerousness of Black neighborhoods or communities.[171] After setting up a dichotomy between Black and white communities, prosecutors

---

Amici Curiae Brief of the Washington Defender Association at 3–4, State v. Lewis, No. 89920-7 (Wash. Aug. 19, 2014), 2014 WA S. Ct. Briefs LEXIS 685, at *4–6 (referring to the "underbelly of society").

161. State v. Berube, 286 P.3d 402, 407 (Wash. Ct. App. 2012).

162. United States v. Doe, 903 F.2d 16, 23 n.48 (D.C. Cir. 1990) ("Jamaicans are coming in, they're taking over the retail sale of crack . . . .").

163. State v. Paul, 716 N.W. 2d 329, 341 (Minn. 2006) (implying that jurors are collectively distinguishable from defendants and witnesses); State v. Mitchell, No. A08-0464, 2009 WL 1047183, at *2 (Minn. Ct. App. Apr. 21, 2009) (asking "what kind of people are these" and adding that "these other people from the street are upset").

164. State v. Mitchell, 620 S.W.2d 347, 349 (Mo. 1981).

165. *See* Hanson & Hanson, *supra* note 31, at 437.

166. *See supra* notes 36–38 and accompanying text.

167. *See* Johnson, *supra* note 129, at 1754.

168. *See, e.g.*, State v. Shabazz, 48 P.3d 605, 624–25 (Haw. Ct. App. 2002) (describing the incident as a "gang rape" and highlighting that the defendants were Black); State v. Blanks, 479 N.W.2d 601, 605 (Iowa Ct. App. 1991) (comparing a movie plot in which a young white woman was violently murdered by Black hunters to the case of a single white woman allegedly being beaten by Black defendant); State v. Richmond, 904 P.2d 974, 983 (Kan. 1995) (describing "[b]oth of the victims white females, forties").

169. *See, e.g.*, People v. Cudjo, 863 P.2d 635, 661 (Cal. 1993) (pointing out that a white woman would not want to have intercourse with a Black man); Reynolds v. State, 580 So. 2d 254, 256 (Fla. Dist. Ct. App. 1991) (stating that it is humiliating to admit to having been raped by a Black man).

170. *See* Alford, *supra* note 94, at 355.

171. *Id.* at 354.

emphasize the defendant's connection to a Black community and allude to the association between the defendant and criminality.[172]

To imply that the Black defendant committed the crime because of his race, prosecutors have pronounced certain words in a derogatory manner,[173] recited lines from an anthem of the Confederacy,[174] and improperly compared defendants to the "one-eyed jack"[175] and "super-fly."[176] Prosecutors have also alluded to the racial stereotype of Black people having to grow up faster, which makes them more prone to crime.[177]

III. CURRENT METHODS OF ADDRESSING RACIAL BIAS IN SUMMATIONS ARE INADEQUATE

The legal system has not kept up with the increasing research about implicit racial bias. As such, it does not fully recognize that prosecutors' use of implicit racial references appeal to passion and prejudice instead of law and fact, which compromises the fundamental guarantees of equal protection and an impartial trial.[178] With roots in the Constitution and professional ethics, the rule against summoning the "thirteenth juror, prejudice"[179] exists in nearly every jurisdiction,[180] but courts tend to focus primarily on due process in applying this rule. Regulating implicitly racial arguments has been

172. *See, e.g.*, Werts v. Vaughn, 228 F.3d 178, 194 (3d Cir. 2000) (commenting that people in Werts's neighborhood commit crimes haphazardly and often); Glenn v. Bartlett, No. 93-CV-1394, 1995 U.S. Dist. LEXIS 8669, at *12 (N.D.N.Y. June 19, 1995) (insinuating that Black men do not walk in affluent neighborhoods); People v. Johnson, 581 N.E.2d 118, 126 (Ill. App. Ct. 1991) (emphasizing that the crime occurred far away from the Black defendant's home on the south side of Chicago, meaning that there was "no reason for him to be there except to cause trouble"); People v. Nightengale, 523 N.E.2d 136, 139 (Ill. App. Ct. 1988) (pointing out that the defendant committed crime in "our streets," not "some ghetto"); State v. Martin, 773 N.W.2d 89, 107 (Minn. 2009) (implying that Black people in north Minneapolis have different values and lifestyles than whites); State v. Ray, 659 N.W.2d 736, 746 (Minn. 2003) (highlighting the differences between north Minneapolis and Golden Valley, Edina, and Minnetonka to emphasize that the defendants live in an unsafe "hood"); State v. Mitchell, No. A08-0464, 2009 WL 1047183, at *2 (Minn. Ct. App. Apr. 21, 2009) (asking "[whether the] white guy who's come to buy cocaine at Sherburne and Rice is going to get an honest deal").

173. State v. Monday, 257 P.3d 551, 554 (Wash. 2011) (pronouncing police as "po-leese").

174. State v. Kirk, 339 P.3d 1213, 1216 (Idaho Ct. App. 2014) (reciting lines from "Dixie" in closing argument, which the court recognized as "an ode to the Old South, which references with praise a time and place for the most pernicious racism").

175. State v. Scruggs, 421 N.W.2d 707, 715–16 (Minn. 1988) (referring to the defendant as the "one-eyed jack," a movie character from the 1961 film *One-Eyed Jacks* who was known for his dishonesty).

176. Smith v. Farley, 59 F.3d 659, 664 (7th Cir. 1995). "Super Fly" is the hero of the 1972 movie, *Super Fly*, in which a Black cocaine dealer seeks to "neutralize the police by hiring the Mafia to kill the police commissioner's [children]" and succeeds in getting away with his crimes. *Id.*

177. *See generally* United States v. Richardson, 161 F.3d 728 (D.C. Cir. 1998); State v. Cabrera, 700 N.W.2d 469 (Minn. 2005).

178. *See* Earle, *supra* note 100, at 1221.

179. *Id.* at 1213.

180. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor . . . equal protection of the laws."); *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. VI (guaranteeing an "impartial jury"); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2013).

especially difficult because of challenges in prescribing the permissible use of subtle or coded language under legal ethics codes and standards.[181]

This Part describes the methods by which courts and disciplinary authorities currently address racial bias in trial and analyzes the shortcomings of these methods. Since many of the methods apply to both implicit and explicit racial biases, this Part discusses both types of biases under the umbrella term "racial bias" but focuses on implicit racial biases wherever possible.

Part III.A discusses the various options trial courts have to control and remedy racially biased arguments and analyzes the problems associated with these options. Next, Part III.B describes the high standards appellate courts use to address racial bias on appeal and discusses the problems with the appeals process. Part III.C then delves into prosecutorial discipline, discusses the limitations of disciplinary methods, and illustrates the ineffectiveness of prosecutorial discipline through a case study of two erring prosecutors' disciplinary proceedings.

A. Trial Courts in Criminal Litigation

Since racially biased summations occur in trial courts, these courts are in the best position to immediately address improper arguments and to prevent jurors from being negatively influenced by such arguments. This Part describes the methods trial courts can use to minimize harm caused by implicit racial biases in summations. These methods include giving jurors pretrial instructions, sustaining defense counsel's objections, reprimanding erring prosecutors, referring erring prosecutors to disciplinary authorities, offering curative instructions, or all of the above. This Part ends with a discussion of the problems with trial courts' current methods of addressing the manifestation of racial biases during trial.

1. Pretrial Jury Instructions

Trial courts have discretion over whether to provide jury instructions and what those instructions include, and judges have differing opinions about whether implicit racial biases should be addressed in pretrial instructions. Some courts give jurors pretrial implicit bias instructions, and some do not.

In Seattle and Tacoma, every prospective juror is shown an eleven-minute implicit bias video.[182] Through examples, the video discusses the importance of thinking about implicit biases and aims to reduce the negative impact implicit biases may have in trial.[183] Similarly, Judge Mark Bennett of the Northern District of Iowa offers implicit bias instructions in his courtroom

181. *See* Alfieri, *supra* note 113, at 1130–31.

182. *Unconscious Bias*, U.S. DISTRICT CT., W. DISTRICT WASH., http://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/K365-QZY4] (last visited Apr. 13, 2018).

183. *Id.*

before every trial begins.[184] Judge Bennett recognizes that deeply rooted associations of Black people with violence and dangerousness exists going back to slavery and believes that bias persists and can be harmful.[185] After instructing the jury about implicit biases, Judge Bennett asks jurors to sign a certification stating that they will not let implicit biases affect their decision. He acknowledges that the certification does not completely root out implicit biases but believes that it helps with explicit biases and that the "line between the two is often blurry."[186]

Other judges, like Judge Richard Kopf of the District of Nebraska, do not give pretrial implicit bias instructions. Judge Kopf believes that trial judges should "stay out of the 'implicit bias' business" and that there is very little evidence that implicit biases can affect trials.[187] He also does not think implicit bias warrants overt actions like those taken by Judge Bennett and considers Judge Bennett's actions "authoritarianism dressed up in the guise of justice."[188]

2. Objections, Curative Instructions, and Reprimands

If a prosecutor makes racially offensive remarks about a Black defendant, defense counsel can immediately object. Trial courts can then admonish or instruct the jury to disregard the offensive remarks. Some courts will do this even if defense counsel fails to object, but most will not. If defense counsel fails to object during trial, courts use the plain error doctrine, and the defendant is deemed to have waived his right to appeal unless the court finds a substantial error.[189] This requirement ensures that the trial court has an opportunity to correct the error, places the misconduct on record for the appellate court to review, and prevents the defendant from raising the error only if the trial court does not rule in his favor.[190]

After sustaining an objection, judges can verbally reprimand the erring prosecutor and remedy improper racial arguments by instructing the jury "in such a manner as to erase the taint of improper remarks that are made."[191] If the judge determines that a part of the evidence is inadmissible, she may use an "instruction to disregard," which tells jurors not to consider the racial

184. 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, 169 n.85 (2010).

185. Mark W. Bennett, *Dueling Judges: A Judge's Duty to Deal with Implicit Bias*, MIMESIS LAW (Nov. 16, 2016), http://mimesislaw.com/fault-lines/dueling-judges-a-judges-duty-to-deal-with-implicit-bias/14262#_ftn3 [https://perma.cc/RAP6-92RU].

186. *Id.*

187. Richard Kopf, *Dueling Judges: Jurors Should Be Free From "Judicial Immunization" for "Implicit Bias,"* MIMESIS LAW (Nov. 16, 2016), http://mimesislaw.com/fault-lines/dueling-judges-jurors-should-be-free-from-judicial-immunization-for-implicit-bias/14260 [https://perma.cc/35AE-J3JJ].

188. *Id.*

189. *See* Caldwell, *supra* note 120, at 87.

190. Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 351 (2011).

191. United States v. Modica, 663 F.2d 1173, 1185 (2d Cir. 1981).

evidence that they have already been exposed to.[192] The judge may also issue a "limiting instruction," which tells jurors not to use a particular piece of evidence to draw a certain racial inference, although they are free to use the evidence in other ways.[193]

Typically, curative instructions given following a problematic argument are general statements that do not explain the instruction's basis.[194] After issuing curative instructions, trial courts can also send transcripts of improper arguments to disciplinary authorities.[195]

3. Problems with How Trial Courts Address Racial Bias

Trial courts' approaches to rectifying prosecutorial use of racial arguments have largely ignored implicit racial biases.[196] This is partly because implicit racial references face the additional hurdle of first having to be recognized as racial references. Trial courts need to be able to link the prosecutor's improper statements to the defendant's race before even beginning to evaluate the statements' prejudicial content.[197] This is challenging for some courts as they may not recognize the racially coded language and various stereotypes that can be used to trigger implicit racial biases.

Trial courts do not give defendants a fair chance to redress implicit racial biases as the remedies are largely conditioned on the actions of other people. If lawyers and judges do not recognize arguments that may appeal to jurors' implicit racial biases, Black defendants suffer. If defense counsel fails to object to a subtle racial argument immediately or is afraid of being accused of playing the "race card,"[198] the defendant may lose his right to appeal on that ground. While the plain error doctrine may make sense for explicit racial arguments,[199] it takes away the appellate court's opportunity to remedy an implicit bias error that may have been overlooked by defense counsel.

The nonuniform manner in which judges address implicit racial biases in pretrial instructions could lead to vastly different outcomes for Black defendants. Judges who do not give pretrial jury instructions could be negatively affecting juror impartiality as perceptions are difficult to change after opinions have been formed.[200] Even when jury instructions are given, they may not be effective as they are often not based on procedural justice.[201]

---

192. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013).

193. *Id.*

194. *See, e.g.*, State v. McCail, 565 S.E.2d 96, 103 (N.C. Ct. App. 2002) ("Excuse me, [prosecutor]. Ladies and gentlemen of the jury, you're to disregard counsel's characterization of the defendant.").

195. Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 478 (2017).

196. *See* Johnson, *supra* note 129, at 1779.

197. *See* Earle, *supra* note 100, at 1239.

198. *See supra* text accompanying note 55.

199. *See supra* note 190 and accompanying text.

200. *See* Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1714–15 (2015).

201. *Id.* at 1697 ("According to [procedural justice] theory, individuals view the justice system as legitimate if the process by which it reaches outcomes is perceived to be fair.").

Instructions based on procedural justice have been found to diminish biases because the instructions allow jurors to view their decision-making as fair and jurors will thus better comply with the ideal of impartial decision-making.[202]

Like pretrial instructions, curative instructions also vary greatly between courts. While some courts may issue instructions sua sponte, others only do so if defense counsel objects in a timely manner and the court sustains the objection.[203] Failure to give curative instructions sua sponte is rarely deemed an error.[204] Thus, in some jurisdictions, racial bias will not be addressed unless defense counsel raises a timely objection, regardless of the severity of a racial comment, or the trial court recognizes the comment as prejudicial. Additionally, although the criminal justice system relies heavily on these instructions to work and courts are meant to presume that juries follow these instructions,[205] many courts do not issue them. This is because some judges think that these instructions are ineffective and only aggravate the problem they are meant to solve.[206]

The limited use of sua sponte instructions and the negative attitude toward curative instructions[207] could allow comments that trigger implicit racial biases to go unaddressed. Even when issued, most judges' instructions do not directly address prosecutors' improper conduct. Instead, the instructions shift the burden to jurors and do not incentivize prosecutors to refrain from using language that may trigger jurors' implicit biases.

Researchers have found that jurors are likely to follow instructions and control their biases if they receive instructions that emphasize fairness and stress the importance of recognizing racial biases.[208] Even when curative instructions are issued, they are not always effective as they often are not based on procedural justice and do not explain their underlying reasons. If jurors are not given instructions, or are given incomprehensible, seemingly baseless instructions, they are more likely to apply their own norms and

202. *Id.* at 1714.

203. *Compare* State v. McCail, 565 S.E.2d 96, 103 (N.C. Ct. App. 2002) (giving a curative instruction *ex mero motu*), *with* Toler v. State, 95 So. 3d 913, 916 (Fla. Dist. Ct. App. 2012) (sustaining the objection but declining to give a curative instruction).

204. *See, e.g.*, State v. Athan, 158 P.3d 27, 41 (Wash. 2007) (observing that "the failure of a court to give a limiting instruction is not error when no instruction was requested").

205. *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii (2015).

206. *See* Caldwell, *supra* note 120, at 84–85; *see also* Alfieri, *supra* note 113, at 1160 (noting that "lines crossed will never be uncrossed"). Justice Robert H. Jackson believed evidentiary instructions are a "naïve assumption" and Judge Learned Hand thought "[instructions are] a mental gymnastic which is beyond, not only [the jurors'] powers, but anybody's else." Sklansky, *supra* note 192, at 408–09 (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)).

207. *See* Sklansky, *supra* note 192, at 408–12 (describing various other judges' skepticism about curative instructions).

208. *See* Ingriselli, *supra* note 200, at 1699.

standards to decision-making.[209] This could lead to unconstrained functioning of jurors' implicit racial biases.[210]

B. Appellate Courts in Criminal Litigation

After a defendant has successfully preserved his right to appeal, the appellate court can rectify errors caused by improper racial references.[211] Like trial courts, appellate courts also impose procedural barriers that make it nearly impossible for defendants to successfully challenge prosecutorial misconduct in closing arguments, especially when subtle racial references are used.[212] This Part discusses factors considered when appellate courts decide to reverse or remand due to improper racial references. It also examines the various procedural devices appellate courts use to explain their frequent inaction and minimization of racial references' adverse effects. It then explores how appellate courts can use their written opinions to informally discipline prosecutors, and it ends with an analysis of the problems and limitations of the existing appellate process for addressing racial bias.

1. Reversing and Remanding Cases

If an appellate court deems a prosecutor's racial comment improper, the court may remand the case to a lower court or reverse the defendant's conviction. Courts are reluctant to do this because of the high social costs involved.[213] Thus, appellate courts analyze prosecutors' improper racial comments under high constitutional and nonconstitutional error standards.[214] The critical question in deciding whether a constitutional violation has occurred is whether the prosecutor's conduct adversely affected the defendant's right to an impartial jury or equal protection by drawing attention to a characteristic that the Constitution generally demands that the jury ignore.[215] The standard for determining if an error is harmless is whether the error "affect[ed] the substantial rights of the accused."[216] Courts have held that the Fourteenth Amendment is not implicated by closing arguments with "irrelevant negative characterizations" of defendants rather than appeals to jurors' racial prejudice, which further limits the harmless error standard.[217]

Appellate courts often consider prosecutors' subtle racial references as "negative characterizations" and, thus, do not recognize them as problematic.[218] Even if courts recognize these comments as problematic,

209. *See* Sklansky, *supra* note 192, at 438, 446 (recommending that judges give clear jury instructions that explain their purpose).

210. *See supra* notes 80–81 and accompanying text.

211. *See supra* Part III.A.2.

212. *See* Bowman, *supra* note 114, at 315.

213. Smith v. Farley, 59 F.3d 659, 664 (7th Cir. 1995); *see also* Earle, *supra* note 100, at 1228.

214. *See* Lyon, *supra* note 109, at 321.

215. *See* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987); *see also supra* note 180.

216. Berger v. United States, 295 U.S. 78, 82 (1935).

217. *See* Alford, *supra* note 94, at 337.

218. *See, e.g.*, State v. Martin, 773 N.W.2d 89, 107 (Minn. 2009); State v. Paul, 716 N.W.2d 329, 338–39 (Minn. 2006); State v. Berube, 286 P.3d 402, 407–08 (Wash. Ct. App. 2012).

they are mostly unwilling to declare the comments alone to be reversible error.[219] Courts only reverse or remand cases when racial comments are especially egregious or multiple errors are found.[220] Thus, when a prosecutor makes improper racial references during his summation, the defendant's chance of remedying any unfair effects is "directly proportional to the transparency" of the racial comments.[221]

2. Methods Used to Downplay Racial Significance

Even when appellate courts recognize the racial aspects of summations, they tend to dismiss or narrowly frame the racial comments. This is likely because courts do not fully appreciate the unfair impact implicitly racial arguments can have on trial outcomes for Black defendants or on society at large.[222]

Some courts go to great lengths to justify prosecutors' racial remarks as relevant or not clearly racial. For example, several cases note that remarks about sexual relations between Black men and white women are not prejudicial because jurors can see the actors' races.[223] Courts also try to find "factual relevance" when a prosecutor subtly references race.[224] Courts often argue that subtle references are "merely descriptive" and are unwilling to recognize the impact the references could have on jurors' implicit biases.[225]

Although inappropriate racial comments may occur regardless of what other evidence indicates about the defendant and regardless of whether the comments were deliberate or unintentional, courts sometimes scrutinize the prosecutor's intent to determine whether a comment had a negative racial implication.[226] If the court does not find any indication that the prosecutor intentionally designed his argument to appeal to jury prejudice, the court will generally refuse to label the challenged comment as prejudicial.[227] Although this allows courts to address flagrant references to race, less obvious references have mostly been deemed neutral and harmless, regardless of the effect on the listener.[228]

Courts are also reluctant to find that racial remarks have prejudiced a trial when they believe that other evidence weighs against the defendant.[229] Courts often use this analysis to find that a defendant has not been prejudiced

---

219. *See, e.g.*, State v. Blanks, 479 N.W.2d 601, 602 (Iowa Ct. App. 1991).

220. *See, e.g.*, State v. Kirk, 339 P.3d 1213, 1218–19 (Idaho Ct. App. 2014); *Blanks*, 479 N.W.2d at 605.

221. *See* Alford, *supra* note 94, at 337.

222. *See supra* text accompanying note 24.

223. *See* Johnson, *supra* note 129, at 1784 n.217. *But see supra* Part II.D.

224. *See* Earle, *supra* note 100, at 1231.

225. *See supra* Part I.B.1.

226. *See* Earle, *supra* note 100, at 1218.

227. *Id.* at 1224.

228. *See, e.g.*, United States v. Martinez, Nos. 89-5805, 89-6301, 1991 U.S. App. LEXIS 11011, at *4 (4th Cir. May 31, 1991); *In re* Pers. Restraint of Gentry, 316 P.3d 1020, 1031 (Wash. 2014); State v. Berube, 286 P.3d 402, 407–08 (Wash. Ct. App. 2012).

229. *See* Lyon, *supra* note 109, at 330–33; *see also* Calhoun v. United States, 568 U.S. 1206 (2013); Darden v. Wainwright, 477 U.S. 168, 192 (1986).

by a prosecutor's racial arguments, even if those arguments have an easily inferable prejudicial effect on the jury.[230] This approach moves the emphasis from the fairness of the proceeding to the guilt of the defendant.[231]

Moreover, courts are disinclined to decide that a single or a few racial references may taint an entire trial. Courts thus examine the full record and count the number of perceived racial references to minimize the impact that the racial references may have on the trial outcome.[232] Regardless of how explicit a racial reference may be, most courts will explain away the reference or view it as neutral by reasoning that it is an "isolated" reference and thus could not have had a significant impact on the jury.[233]

3. Court Opinions as Informal Reprimands

Regardless of whether a case is reversed or remanded, if an appellate court deems a prosecutor's racial comment improper or inappropriate, the court can use its written opinion to highlight the comment's impropriety. The Supreme Court has also stated that an informal way to reprimand prosecutors for improper conduct is to "publically chastise[] the prosecutor by identifying him in [the court's opinion]."[234] Publicly identifying the prosecutor in an opinion taints the prosecutor's reputation and acts as a threat to other prosecutors.[235] This is also useful to disciplinary authorities as they sometimes learn of prosecutors' improper arguments from appellate decisions.[236]

Courts occasionally deem a prosecutor's racial comment regrettable or improper. For example, in *Calhoun v. United States*,[237] although the prosecutor used a fairly explicit and easy-to-detect racial reference, the court declined to grant the defendant's cert petition. Instead, Justice Sotomayor verbally reprimanded the prosecutor, faulted him for "tapp[ing] a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation,"[238] and stated that she "hope[s] never to see a case like this again."[239]

---

230. *See* Earle, *supra* note 100, at 1227.
231. *See id.* at 1228.
232. *Id.*
233. *See* Lyon, *supra* note 109, at 326.
234. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1068 (2009) (quoting United States v. Hasting, 461 U.S. 499, 506 n.5 (1974)).
235. Reputation is considered to be the "most valuable commodity" in the legal profession. *See id.* at 1090–91; *see also* Kozinski, *supra* note 205, at xxxvi ("Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights.").
236. *See* Green, *supra* note 195, at 478.
237. 568 U.S. 1206 (2013) (Sotomayor, J., statement respecting denial of petition for writ of certiorari).
238. *Id.* at 1208.
239. *Id.* at 1209.

4. Problems with How Appellate Courts Address Racial Bias

Appellate courts do not often remedy the use of implicit racial bias in prosecutorial summations. They focus heavily on the fairness of outcomes and, thus, do not fully consider the equal protection implications of racial bias use in summations. Even when appellate courts remedy improper racial arguments, they show their ambivalence by conditioning remedies on whether the defendant preserved the error through objection and whether the defendant has established that the argument resulted in prejudice.[240] Additionally, most cases where improper arguments are remedied have the same narrow view of "racism and racist imagery that permeates the cases which are affirmed."[241] Reversing courts often highlight the fact that offensive remarks were not isolated and analyze the remarks as part of extended discussions.[242]

Often, appellate courts are not even aware of the full extent of racial comments made during summations as the cold record on appeal leaves out important details and context regarding improper racial references used during trial.[243] Although the transcript reflects words, it does not convey a sense of timing, intonation, or juror reaction.[244] Thus, appellate courts cannot fully measure the effect of racial comments on the jury.

Appellate courts also use various methods and devices to minimize racial arguments that do make it onto the record, especially if the arguments are subtle. This largely ignores implicitly racial arguments. The already high harmless error standard is even more difficult to meet when prosecutors' arguments appeal to implicit racial biases because it is challenging to measure subtle arguments' effect on jurors. Jurors themselves may not be aware of their biases or be cognizant of how the prosecutors' arguments may affect their decision-making.[245] Similarly, categorizing racial remarks as merely descriptive ignores the vast literature on the existence and activation of implicit biases.[246] By making an argument with underlying implicit racial biases, prosecutors solicit a judgment based on status that goes beyond the evidence and the issue of the defendant's conduct.[247]

While considering the relevance of a statement can be important in some situations, appellate courts often do not fully examine the underlying connotations of remarks that could appeal to jurors' implicit biases.[248] The intent-based approach also fails to consider the use of implicit racial biases

240. *See* Holland, *supra* note 190, at 351.

241. Johnson, *supra* note 129, at 1786.

242. *See, e.g.*, State v. Monday, 257 P.3d 551, 555 (Wash. 2011) (finding that the prosecutor referenced the "code" ten times during his closing argument).

243. *See* Lyon, *supra* note 109, at 327.

244. *See* Earle, *supra* note 100, at 1229. *Monday* may not have been reversed if the transcriber had not spelled out the prosecutor's pronunciation of "po-leese." 257 P.3d at 554–57.

245. *See generally* Bennett v. Stirling, 842 F.3d 319 (4th Cir. 2016); *see also supra* note 28–30 and accompanying text.

246. *See supra* Part I.B.

247. *See* Earle, *supra* note 100, at 1215.

248. *See supra* Parts I.A, II.

as these biases do not manifest consciously.[249] It is almost impossible to ascertain whether a prosecutor intended to make a comment that triggers jurors' implicit biases. In addition, the prosecutor's intent "is of little or no importance in assessing the impact of racial imagery on the jury."[250] Thus, the question should not be one of intent but one of effect. Even if motives should matter, racial motives may encompass more than explicit racial animosity.[251] The fact that some courts find subtle racial arguments plausible suggests that the jurors might find them persuasive.[252]

The evidence-weighted approach[253] can result in inconsistent standards and allow for unconstrained use of explicit and implicit racial biases if the evidence against the defendant is significant.[254] The evidence-weighted approach fails to recognize that, although injustice is greater when it harms the innocent, subtle racial arguments are unjust even when used against the guilty as everyone is entitled to the Constitution's full protection.[255]

Although courts can use their opinions to deter future misconduct, they often do not do so. Most opinions do not name the erring prosecutor.[256] Instead, judges go to great lengths to redact the names of misbehaving prosecutors. This not only unnecessarily immunizes erring prosecutors but also may hinder disciplinary authorities from being able to recognize and punish the prosecutors.[257] Thus, appellate courts usually fail to cure the harm done to the affected defendant, uphold defendants' right to equal protection, informally discipline erring prosecutors, or even disincentivize future misconduct. Appellate courts' ambivalence toward racial comments and efforts to minimize the comments' importance may also signal to trial courts and lawyers that they do not need to take the use of implicit racial biases in summations seriously.

C. Formally Disciplining Prosecutors

When prosecutors err, courts prefer professional discipline over adjudicatory remedies, such as reversal of criminal convictions,[258] as those remedies are often unavailable.[259] Prosecutorial misconduct, including the

249. *See supra* Part I.B.
250. *See* Johnson, *supra* note 129, at 1750.
251. *See id.* at 1779–80.
252. *Id.*
253. *See supra* Part III.B.2.
254. *See* Earle, *supra* note 100, at 1232.
255. *See* Caldwell, *supra* note 120, at 54.
256. *See, e.g.*, Calhoun v. United States, 568 U.S. 1206, 1208 (2013) (reprimanding a prosecutor's conduct without naming him).
257. *See* Gershowitz, *supra* note 234, at 1062.
258. Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 143 (2016).
259. *See supra* Part III.B.

use of racial references during closing argument, can constitute ethical violations and expose erring prosecutors to disciplinary action.[260]

1. Scope of Prosecutorial Discipline

When the Supreme Court immunized prosecutors from civil liability, the Court assumed that discipline would be adequate to deter misconduct.[261] State courts and disciplinary bodies have the authority to discipline lawyers.[262] This discipline is intended to protect the public and the courts and to deter other lawyers from engaging in similar misconduct.[263] Discipline can take many forms, including private reprimands, public reprimands, suspension from practicing law for a period of time, or permanent disbarment from practicing law. Erring lawyers may also be charged the cost of the disciplinary proceeding.[264]

As a first step, judges may choose to reprimand erring prosecutors on the spot or after the jury has left the courtroom.[265] Judges may also file formal grievances to assess the need for disciplinary proceedings or initiate proceedings to suspend the prosecutor from practice if the prosecutor has committed persistent misconduct.[266]

The American Bar Association's Model Rule 8.4 lays out behavior considered to be professional misconduct. Professional misconduct occurs when lawyers violate or attempt to violate a Model Rule[267] or when they "engage in conduct that is prejudicial to the administration of justice."[268] Model Rule 8.4 gives courts wide latitude to find that prosecutors' racial arguments undermine the fairness of the adversarial process.[269]

Although making racial arguments violates numerous rules of professional conduct,[270] courts often interpret rules less restrictively to give prosecutors the benefit of the doubt.[271] For example, implicitly racial arguments arguably violate Model Rule 3.4(e), which disallows alluding to irrelevant matters and matters not supported by admissible evidence or "stat[ing] a personal opinion as to the justness of a cause."[272] Implicitly racial arguments are rarely relevant or supported by evidence, can be seen as personal opinions, and are

260. *See supra* Parts I.B.2–3; *see also* Neil Gordon, *Misconduct and Punishment*, CTR. FOR PUB. INTEGRITY (June 26, 2003, 12:00 AM), https://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment [https://perma.cc/SV58-FJR2].

261. *See generally* Imbler v. Pachtman, 424 U.S. 409 (1976).

262. *See* Green & Levine, *supra* note 258, at 155.

263. *See In re* Zawada, 92 P.3d 862, 866 (Ariz. 2004).

264. *An Epidemic of Prosecutor Misconduct*, CTR. FOR PROSECUTOR INTEGRITY 8 (Dec. 2013), http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf [https://perma.cc/6RVU-WJX4].

265. United States v. Modica, 663 F.2d 1173, 1185 (2d Cir. 1981).

266. *See id.*

267. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2013).

268. *Id.* r. 8.4(d).

269. *See* Green, *supra* note 195, at 474–75.

270. *See supra* notes 102, 110–11 and accompanying text.

271. *See* Green, *supra* note 195, at 475.

272. MODEL RULES OF PROF'L CONDUCT r. 3.4(e).

prejudicial to the administration of justice,[273] but the rule is rarely interpreted in this way.

2. Limitations of Prosecutorial Discipline

Prosecutors are rarely disciplined for their misconduct.[274] In the past, judges did not address improper closing arguments either because they did not notice impermissible arguments or because they assumed that prosecutors were acting within their limits.[275] Today, courts often refuse to discipline or sanction erring prosecutors even if they find that defense counsel properly objected to racial arguments and that the prosecutor committed misconduct.[276] Discipline of erring prosecutors is still mostly limited to cases involving patently illegal conduct such as embezzlement, bribery, or extortion.[277] Prosecutorial discipline is so rare that Judge Alex Kozinski believes that the U.S. Justice Department's Office of Professional Responsibility (OPR) unfairly protects erring prosecutors and suggests that OPR be moved to an independent office.[278]

Prosecutorial misconduct involving implicit racial biases is rarely punished, partly because there is no rule directly addressing it.[279] Some have argued for a rule addressing implicit biases by reasoning that individuals should be held responsible for the real-world implications that can result from their implicit racial biases.[280] It would likely be difficult to garner enough support for such a rule, however. Others have argued that it is not fair to punish prosecutors for implicit racial biases regardless of resulting actions since the biases are not conscious and improper arguments are not "intended."[281]

Regardless of whether a new rule should be enacted, giving prosecutors the benefit of the doubt when they make subtle racial arguments immunizes those who routinely use their closing arguments to trigger racial stereotypes or animus in the jury.[282] Although misconduct is not only committed by "bad

---

273. *See supra* Part I.

274. *See* Caldwell, *supra* note 120, at 54; *see also An Epidemic of Prosecutor Misconduct*, *supra* note 264, at 8. Nine studies analyzing the professional consequences of prosecutor misconduct between 1963 and 2013 identified 3625 instances of misconduct. Public sanctions were only imposed in sixty-three cases and often included just a "slap-of-the-wrist." *An Epidemic of Prosecutor Misconduct*, *supra* note 264, at 8.

275. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 63 (2016).

276. *See* Bowman, *supra* note 114, at 315.

277. *See* Green & Levine, *supra* note 258, at 156 (discussing Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001)).

278. *See* Kozinski, *supra* note 205, at xxxii. Judge Kozinski also recommends that similar independent offices be instituted in every state. *Id.*

279. Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 841 (2016).

280. Jules Holroyd, *Implicit Bias, Awareness and Imperfect Cognitions*, 33 CONSCIOUSNESS & COGNITION 511, 515 (2015) (arguing that reasonable people should be able to be observationally aware of behavioral aspects that may result in discriminatory effects because of their biases).

281. *See* Roberts, *supra* note 79, at 876.

282. Blakemore, *supra* note 279, at 841–42.

apples,"[283] any perceived unfairness toward erring prosecutors is outweighed by the unfair impact these arguments can have on Black defendants.[284] While prosecutors are rarely sanctioned and almost never disbarred,[285] defendants may receive far worse consequences, including the death penalty.[286]

3. The Reality: Discipline in *Bennett* and *Monday*

Even when courts reverse convictions and recognize prosecutorial misconduct involving improper racial language in summations, erring prosecutors are not adequately disciplined. This Part illustrates this inadequacy through an examination of prosecutorial discipline in *Bennett v. Stirling*[287] and *State v. Monday*.[288]

Donald Myers, the prosecutor in *Bennett*, earned the nickname "Doctor Death" because of his record-setting pursuit of executions.[289] He was also known for his repeated misconduct. *Bennett* was not the first time one of Myers's death sentence "wins" was reversed due to misconduct.[290] Twelve of the twenty-eight defendants prosecuted by Myers have had their death sentences overturned, two of which were reversed directly because of Myers's misconduct.[291] Despite this, Myers has only received a private reprimand from the state bar for his many acts of misconduct.[292] Myers's career ended only when he voluntarily retired because he was approaching the mandatory retirement age.[293]

Like Myers, the prosecutor in *Monday*, James Konat, was not adequately disciplined.[294] After Konat used improper racial arguments during trial, the court rebuked him and referred him to the Washington State Bar Authority Disciplinary Board. Konat went on paid leave after sending a letter to his coworkers apologizing for his "poor judgment."[295] The disciplinary board

---

283. *See* Green & Yaroshefsky, *supra* note 275, at 97.

284. *See supra* notes 14, 24 and accompanying text.

285. *See An Epidemic of Prosecutor Misconduct*, *supra* note 264, at 8; *see also* Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFPOST (Feb. 11, 2016, 4:16 PM), https://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a [https://perma.cc/X9YH-4ASN].

286. *See supra* text accompanying notes 3–8.

287. 842 F.3d 319 (4th Cir. 2016).

288. 257 P.3d 551 (Wash. 2011).

289. John Monk, *Avenging Angel? A Look at 5 of Donnie Myers' More Memorable Death Penalty Cases*, STATE (Mar. 19, 2016, 7:44 PM), http://www.thestate.com/news/local/article67122927.html [https://perma.cc/NGC9-2GCG].

290. *See id.*

291. *South Carolina D.A. Donnie Myers Caught Engaging in Misconduct, Again*, FAIR PUNISHMENT PROJECT (Apr. 11, 2016), http://fairpunishment.org/south-carolina-d-a-donnie-myers-caught-engaging-in-misconduct-again/ [https://perma.cc/89RL-4TEZ].

292. *Id.*

293. Steven Hale, *Goodbye to South Carolina's 'Doctor Death,'* WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/12/02/goodbye-to-south-carolinas-doctor-death [https://perma.cc/33J3-3ERL].

294. *See* State v. Monday, 257 P.3d 551, 554 (Wash. 2011).

295. Jonah Spangenthal-Lee, *Prosecutor Apologizes for "Poor Judgment" After Supreme Court Tosses Murder Case*, SEATTLE MET (June 15, 2011, 12:00 PM), https://www.seattlemet.com/articles/2011/6/15/prosecutor-apologizes-for-poor-judgment-after-supreme-court-tosses-murder-case [https://perma.cc/9Q27-JLZG].

found Konat's use of the "anti-snitch code" intentional but did not find his pronunciation of "po-leese" as having any racial connotations.[296] Although the hearing officer found that Konat "employed an unacceptable racial stereotype . . . that was prejudicial to the administration of justice" and deserved a presumptive sanction of suspension, the officer recommended that the sanction be mitigated to a reprimand—a much lesser punishment.[297] One of the mitigating factors found was "absence of a prior disciplinary record,"[298] even though Konat had previously been accused of misconduct.[299] Again, like Myers, Konat was not fired. Instead, he too chose to resign.[300]

Both *Bennett* and *Monday* were reversed and received extensive media coverage. Still, the erring prosecutors were barely affected. They were not shamed, were given paid leave, and were allowed to retire on their own terms. In cases without such clear error or as much media attention, it is unclear what, if any, discipline other prosecutors may face for similar transgressions.

IV. BENDING THE ARC TOWARD JUSTICE: PROPOSING AN INTEGRATED RESPONSE TO IMPLICITLY RACIAL PROSECUTORIAL SUMMATIONS

Parts I and II of this Note highlighted an important but often overlooked type of racial bias used in trials involving Black defendants: prosecutorial summations involving implicit racial biases.[301] Part III concluded that courts and disciplinary authorities do not fully recognize the problem of implicitly racial arguments and do not adequately remedy or deter implicitly biased prosecutorial summations.

While acknowledging that it is not possible to cure the centuries of stereotyping that led to the formation and functioning of implicit racial biases,[302] this Part proposes an integrated response involving lawyers, jurors, and judges to better address the use of implicitly racial references in prosecutorial summations. An integrated response is needed as each actor in the trial process plays a significant role in deterring the use of arguments drawing on implicit racial biases[303] and no single approach focusing on a specific part of the trial process will adequately address the issue.

Part IV.A discusses the importance of recognizing that racially biased summations are not only a due process issue but also implicate broader equal

296. Konat, No. 13#00008, slip op. at 26 (Disciplinary Bd. of the Wash. State Bar Ass'n Dec. 12, 2014), http://mcle.mywsba.org/disciplinefiles/1914/0701.pdf [https://perma.cc/DP8P-HFW2].

297. *Id.* at 22.

298. *Id.* at 30.

299. Jonah Spangenthal-Lee, *Prosecutor on Receiving End of Supreme Court Smackdown Previously Accused of Misconduct*, SEATTLE CRIME (June 10, 2011), https://seattlecrime.com/2011/06/10/prosecutor-on-receiving-end-of-supreme-court-smackdown-previously-accused-of-misconduct/ [https://perma.cc/Z6GM-AH3H].

300. Jennifer Sullivan, *Embattled Deputy Prosecutor James Konat Resigns*, SEATTLE TIMES (Feb. 16, 2012, 7:22 PM), https://www.seattletimes.com/seattle-news/embattled-deputy-prosecutor-james-konat-resigns/ [https://perma.cc/4T4Z-DDBM].

301. *See supra* Part I.B.

302. *See supra* Part I.A.

303. *See supra* Part III.A.3.

protection concerns. Next, Part IV.B proposes that the various actors in the criminal justice system be educated about implicit racial biases so that they can effectively perform their part in deterring improper arguments. Finally, Part IV.C calls on courts to better address prosecutors' use of implicit racial biases in summations and suggests methods by which courts can do so. The suggestions include issuing better instructions and verbally reprimanding prosecutors at the trial level, as well as shaming prosecutors and trial judges at the appellate level.

A. Implicitly Racial Summations Should Be Recognized As More Than a Due Process Issue

Improper racial summations are not merely rhetorical slips. They not only affect the defendant's right to a fair trial; they also have lingering effects on society.[304] While U.S. society has been trying to rid itself of enduring racial stereotypes, these efforts have proven difficult because of the challenges associated with policing private speech. Since the legal system is premised on equality and fairness and courts use public resources, courts are in a good position to police language used in the courtroom. Unfortunately, as discussed in Part III, courts currently treat the use of implicit racial biases in summations as a problem of due process and focus primarily on the fairness of trial outcomes.[305] This allows for courts to use procedural devices to minimize the problem, which perpetuates negative stereotypes about Black people and hinders the broader societal effort to move the racial arc closer to justice.[306] Courts should thus try harder to regulate racial speech in the courtroom and refrain from explaining away racial comments,[307] ignoring "isolated" comments,[308] and categorizing racial comments as merely "negative characterizations."[309] Instead, courts should focus on the potential impact racial comments can have—both on the defendant and on society at large—and begin to recognize the use of implicit racial biases in summations as improper regardless of whether the error is procedurally "harmless."[310]

B. Lawyers, Judges, and Jurors Should Be Trained About Implicit Racial Biases

Each actor in the criminal justice system plays an important role in regulating improper racial summations. When prosecutors inject implicit racial biases into their arguments, the harmful effects can only be effectively addressed if the impropriety is recognized and immediately tackled so unfair stereotypes do not taint jurors' decision-making or inform their out-of-court behavior.[311] As such, prosecutors, defense counsel, and judges need to be

304. *See supra* notes 23–24 and accompanying text.
305. *See supra* Part III.B.2.
306. *See supra* Part III.B.2.
307. *See supra* Part III.B.2
308. *See supra* Part III.B.2.
309. *Supra* note 217 and accompanying text.
310. *Supra* notes 218–21 and accompanying text.
311. *See supra* Part III.A.2.

able to recognize implicit racial biases and jurors need to understand how implicit biases can undermine the fairness of the legal system and perpetuate inequality.[312]

To reduce implicit racial biases' unfair effects, lawyers, judges, and jurors must be made aware of the existence and functioning of implicit racial biases, including their own. This will make it more likely that these actors will work toward controlling their biases and be cognizant of the impact implicit biases may have on their actions.[313] Lawyers and judges can be trained through mandatory continuing legal education (CLE) courses,[314] and jurors can be educated about implicit biases through pretrial instructions. Pretrial implicit bias instructions should be issued uniformly as they can help prevent biased decision-making. These instructions should be based on procedural justice, specifically discuss how implicit racial biases can be manifested, and account for the adverse effects these biases can have on the defendant as well as on societal racial justice.[315] The instructions should also emphasize the importance of closing arguments and caution the jury to pay close attention to the references made at that phase of trial.[316]

Additionally, criminal defense lawyers, prosecutors, and judges should be trained to recognize implicit racial themes, such as those outlined in Part II. The CLEs should include the historical basis of the seemingly innocuous racial language so that lawyers and judges better understand the negative connotations and consequences of such language.[317] This will allow for well-meaning prosecutors to stay away from making such improper arguments, for defense lawyers to be more likely to preserve defendants' rights to appeal by being able to recognize and immediately object to improper arguments, and for judges to be able to effectively explain the basis of their instructions to the jury.

C. Courts Should Use Instructions and Judicial Opinions to Deter Implicitly Racial Prosecutorial Summations

Since courts are reluctant to reverse cases,[318] prosecutors are rarely disciplined,[319] and a model rule directly addressing implicit biases will be difficult to enact,[320] courts should use other methods within their authority to dissuade prosecutors from making implicitly racial summations. In cases

312. *See supra* Part III.A.3.

313. *See supra* notes 79–81 and accompanying text.

314. The ABA's Implicit Bias Initiative and series of toolkits can be a starting point in creating training programs to make actors in the criminal justice system aware of implicit biases. *See Implicit Bias Initiative*, A.B.A., https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html [https://perma.cc/9TVM-JNYL] (last visited Apr. 13, 2018); *Implicit Bias Videos and Toolkit*, A.B.A., https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/implicit-bias.html [https://perma.cc/5DLK-QUSJ] (last visited Apr. 13, 2018).

315. *See supra* text accompanying notes 200–02.

316. *See supra* Part I.B.3.

317. *See supra* notes 33–38 and accompanying text.

318. *See supra* note 213 and accompanying text.

319. *See supra* note 274.

320. *See supra* notes 279–81 and accompanying text.

with Black defendants, trial judges should be more willing to immediately respond to implicitly racial arguments made during summation. In such cases, failure to issue sua sponte instructions should be an error so that judges can address improper summations irrespective of whether the defense counsel acts appropriately.[321]

Judges' curative instructions should be comprehensive and should informally discipline erring prosecutors. Curative instructions should not just be general statements to disregard or limit certain evidence but should include specific reasons about why the argument has been deemed improperly racial.[322] Judges should thus be prepared to describe what implicit associations and stereotypes the improper argument may draw. By highlighting the prosecutor's improper racial comments and explaining the reasons for the comments' impropriety in open court, judges will be damaging the prosecutor's reputation, which may prevent him from using similar references again.[323]

Appellate courts should stop using procedural devices to minimize the impact of racial comments and should make it clear that implicitly racial arguments will not be tolerated, regardless of the trial's overall fairness or outcome. In doing so, appellate courts should not only publicly rebuke erring prosecutors but also trial judges who do not adequately address the use of implicit biases in summations.

Courts should also start taking the Supreme Court's directive to "shame and name" prosecutors seriously.[324] Judicial opinions should prominently display erring prosecutors' names. These opinions should be circulated in law newspapers and recorded for future disciplinary use. This will allow courts to keep track of prosecutors who repeatedly make arguments that could trigger implicit racial biases, even if the prosecutors are not referred to disciplinary authorities. Courts should determine a limit to the number of times a prosecutor's name may appear in the record before the prosecutor will be referred to disciplinary authorities. And disciplinary authorities should be more willing to appropriately punish an erring prosecutor with multiple recorded acts of misconduct.[325]

This proposed system will protect prosecutors who unconsciously make arguments that could trigger implicit racial biases, but it will also punish repeat offenders who have been put on notice for their impropriety and, thus, should serve to better regulate their comments.[326] It will also likely dissuade prosecutors from making similar arguments and committing misconduct, if only because of the threat of having their reputations ruined.[327] Indeed,

321. *See supra* note 189 and accompanying text.
322. *See supra* note 209 and accompanying text.
323. *See supra* note 235.
324. *See supra* note 234 and accompanying text.
325. *See supra* text accompanying note 298.
326. *See supra* note 81 and accompanying text.
327. *See supra* note 235.

verbally reprimanding and recording past accusations of misconduct may have prevented the misconduct in *Bennett* and *Monday*.[328]

CONCLUSION

The U.S. legal system is not effectively playing its part in addressing the use of implicit racial biases in prosecutorial summations. Social psychologists have recognized the severe impact these biases can have on trial outcomes and on the perpetuation of racial injustice, but courts and disciplinary authorities do not adequately address or deter their use. Although no solution can erase centuries' worth of stereotyping, the legal system should respond to the problem with an integrated approach to deter prosecutors from making summations that could trigger jurors' implicit biases. Courts should first recognize the equal protection implications of the problem as it is not only a due process issue. Since implicit biases are malleable, lawyers, judges, and jurors should be trained to recognize and understand implicit racial biases. This will allow them to control their own biases, recognize and object to biases inserted into summations, and informally discipline erring prosecutors. Courts should use their authority to deter prosecutors' racial speech, even if manifested as implicit racial biases. Courts can do so by issuing better pretrial and curative instructions, using their written opinions to shame prosecutors, and rebuking trial judges who do not appropriately address the use of implicit racial biases. This integrated response will not fully prevent or cure the problem of implicitly racial summations, but it will help to deter future misconduct and to bend the arc of the moral universe closer to justice.

328. *See supra* Part III.C.3.