SEEKING JUSTICE: PROSECUTION STRATEGIES FOR AVOIDING RACIALLY BIASED CONVICTIONS

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ABSTRACT

Common rhetorical techniques used by prosecutors, even those who reject racially prejudiced beliefs, are likely to trigger jurors' implicit biases. Current case law and ethical rules set up well-intentioned prosecutors by obscuring the racial bias embedded in this rhetoric and the likely impact of coded language on jurors. In 2020, however, California passed the Racial Justice Act, which prohibits "racially discriminatory language" in criminal trials and covers implicit as well as explicit bias. This Article unpacks social science research to show how common prosecutorial rhetoric is racially biased, regardless of prosecutors' intent, and this Article provides prosecutors with concrete strategies to use in reforming their rhetorical choices while still effectively prosecuting cases. It also gives prosecutors strategies for preventing or responding to racially biased rhetoric by other participants at trial rather than singling them out as the sole source of this rhetoric. It therefore gives California prosecutors concrete strategies for complying with the California Racial Justice Act, and it gives prosecutors nationwide tools they need to seek justice rather than convictions tainted by racial bias.

I. INTRODUCTION

Prosecutors have a well-known duty to seek justice, not only convictions. The ABA Standards on Prosecutorial Function makes this clear: "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[1] This ABA Standard echoes the language from a 1936 United States Supreme Court case, *Berger v. United States*, that prosecutors "may strike hard blows [but are] not at liberty to strike foul ones. It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[2] Yet *Berger* and its progeny have failed to provide meaningful guidance to prosecutors on the line between "hard blows" and

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[1] ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (4th ed. 2017).

[2] Berger v. United States, 295 U.S. 78, 88 (1935). While these precepts are long-standing, so too are the critiques of the rhetoric prosecutors sometimes use in seeking convictions. *See* Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535, 535 (2003) (synthesizing common but improper prosecutorial arguments); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 895–913 (2018) (same).

"foul ones."[3] Thus, many prosecutors who are drawn to the job because of its justice-seeking mission[4] face challenges in determining how to best seek justice.

This Article focuses on one specific challenge prosecutors face: identifying rhetoric that, while not explicitly racist, nevertheless reflects or appeals to implicit racial biases. Prosecutors, like other actors in the criminal justice system, are subject to implicit racial biases,[5] which can lead them to use language that plays to juror biases through use of stereotypes.[6] Stereotypes are well-connected associations between groups and traits without a rational evaluation of those associations.[7] Numerous studies show that language can trigger stereotypes, even if the speaker does not intend that result.[8] Prosecutors who are unfamiliar with this research and its application to common prosecutorial arguments may therefore use racially biased rhetoric,[9] that is, language that invokes racial stereotypes,[10] without intending to do so.[11]

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[3] Bennett L. Gershman, *"Hard Strikes and Foul Blows":* Berger v. United States *75 Years After*, 42 LOY. U. CHI. L.J. 177, 179 (2010); *see also infra* Part II (analyzing the shortcomings of current case law and ethics guidance).

[4] *See, e.g.*, Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38, 64 (2017) (reporting the results of a study in which researchers interviewed prosecutors about their views of that role, and concluding that "[t]he prosecutors who spoke with us were, by and large, idealistic people who said that they want to serve their communities."). In these interviews, prosecutors "often explained their commitment to the job or described prosecution itself in terms of 'wearing the white hat.'' The white hat is, at its most basic level, a metaphor for the prosecutor's identity as the good guy in the criminal justice system." *Id.* at 43. Yet prosecutors are subject to a variety of pressures that can take a toll on prosecutors, including pressures from high caseloads, secondary trauma from dealing with evidence in difficult cases, and stress from litigating cases. Hao Quang Nguyen, *Progressive Prosecution: It's Here, but Now What?*, 46 MITCHELL HAMLINE L. REV. 325, 326 (2020); *see also infra* Section II.C.

[5] *See, e.g.*, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) ("Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways."). Smith and Levinson's article explores the ways in which prosecutorial decision-making is likely to be subject to implicit bias. *See id.*; *see also* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 881–83 (2017) (analyzing how the current structure of the criminal justice system makes prosecutors, as well as judges and defense counsel, likely to be subject to implicit bias in ways that will continue to produce racialized outcomes without attention and interventions).

[6] *See generally* Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RSRV. L. REV. 39 (2020).

[7] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 741 (1995).

[8] *See, e.g.*, Smith & Levinson, *supra* note 5, at 798–801 (summarizing various studies).

[9] Rhetoric can be defined narrowly as the art of persuasion or a process for discovering the truth by argumentation, but also can more broadly include "language, conversation, words, and even images" involved in persuasive communication. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 664 (2017) [hereinafter Jewel, *Neurorhetoric*]. The discussion in Jewel, *supra*, focuses on rhetorical language; for a discussion of visual rhetoric and suggested limits on use of images for advocacy, see Lucille A. Jewel, *Through the Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237 (2010).

[10] The term "racially biased rhetoric" in this Article is meant to cover the same language choices as described in my earlier article under the term "racist prosecutorial rhetoric." *See* Bowman, *supra* note 6, at n.36 (discussing use of that term to emphasize the effect rather than the intent of the prosecutor).

[11] Of course, some prosecutors, like some members of other groups, may demonstrate explicit bias, and the line between explicit and implicit bias may not always be clear. *See, e.g.*, Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 521–22 (2018). And implicit bias is one facet of a multi-faceted problem with the behavior of individuals in the criminal justice system and society more generally. *See, e.g.*, Robert C. Holmes, *Building an Anti-Racist Prosecutorial System Through the Adoption of a Community-Oriented Lawyering Approach*, 73 RUTGERS U. L. REV. 1427, 1430 (2021). This Article, however, focuses specifically on prosecutors who consciously reject prejudice and recognize the need for

Language that triggers stereotypes is racially biased because of its effects, which includes shaping how people remember facts,[12] interpret ambiguous facts,[13] and evaluate witness credibility.[14] Studies show this language has effects on listeners even when those listeners consciously reject the associated stereotypes, particularly when language is coded rather than explicitly racist.[15] Thus, even prosecutors can use language that triggers jurors' stereotypes, even when both prosecutors and jurors consciously reject biased beliefs.[16]

Given these well-documented effects, prosecutors should consider the obligation to "seek justice" to include avoiding racially biased rhetoric. This obligation has become increasingly urgent in light of California's new Racial Justice Act (the "CRJA"), which provides that "[t]he state shall not seek or obtain a criminal conviction . . . on the basis of race, ethnicity, or national origin."[17] One way defendants can prove a violation of the CRJA is by showing that the prosecutor used racially biased language, whether or not use of that language was purposeful.[18] While the CRJA obviously applies only in California, California is often seen "as a trend-setter in the criminal justice arena."[19] It is also consistent with the "progressive prosecutors" movement seeking to reform the criminal justice system from within to rid it of racial biases and other problems.[20]

Yet the CRJA, like the ABA Rules and case law following *Berger*, fails to provide prosecutors with effective line-drawing guidance for avoiding

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improvements in the criminal justice system but nevertheless may be inadvertently triggering jurors' racial prejudices.

[12] *See, e.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 376 (2007). In Levinson's study, participants were given identical stories about a fight, except that the participant's name was William in one version and Tyronne in the other. "[S]imply altering a legal actor's race caused participants to remember certain facts or generate false memories in racially biased ways." *Id.* at 351.

[13] Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1267–68 (2018).

[14] *See, e.g.*, *id.* at 1262 (discussing research showing that jurors tend to be less suspicious of witnesses who share their identity and more skeptical of those who do not).

[15] *See infra* Section II.A.

[16] *See, e.g.*, Richardson, *supra* note 5, at 865 ("[R]esearch from the past several decades reveals that implicit racial biases can influence the behaviors and judgments of even the most consciously egalitarian individuals . . . ."). See *infra* Section II.B for more explanation. As discussed in Section IV.A, this effect can be particularly strong in cases argued to all-white juries, whether or not the prosecutor intends the jury to have that composition.

[17] CAL. PENAL CODE § 745(a). The CRJA was passed in 2020 and went into effect January 1, 2021.

[18] *Id.* at § 745(a)(2). The CRJA uses the term "racially discriminatory language" rather than "racially biased rhetoric," but the concepts are similar. This prohibition on racially discriminatory language also extends to judges, witnesses, and jurors. *Id.*

[19] Kay Levine, *The State's Role in Prosecutorial Politics*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 31 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008). "Hence, an analysis of what California's government is doing offers insights into broader trends that are likely to emerge on a national scale in the near future." *Id.*

[20] *See* Nguyen, *supra* note 4, at 329 (stating that the two major goals of progressive prosecutors are to reduce incarceration rates and to increase "fairness in the administration of justice."); *id.* at 342 (including implicit bias training and other diversity and equity measures as tools for progressive prosecutors seeking to change office cultures). *C.f.* Jeffrey Bellin, *Symposium on Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives: Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) ("Instead of embracing a dichotomous (progressive versus traditional) model, scholars could channel the energy of progressive prosecution into an updated normative model for all American prosecutors."). Bellin offers such a model, arguing that all prosecutors should embrace the idea of prosecutors as "a caretaker of justice," in which "[t]he caretaker prosecutor's primary role is to hold the system to its lofty ideals, not to manipulate the system to achieve particular outcomes." *Id.* at 715–16.

racially biased rhetoric. This Article attempts to fill that gap, empowering prosecutors to avoid racially biased rhetoric while still effectively prosecuting cases. It also empowers prosecutors to help protect against racial biases of witnesses and jurors.

Part II discusses in more detail the sources of prosecutorial obligations to seek justice and to avoid racially biased rhetoric, including the systemic challenges for prosecutors who seek to do so. Part III synthesizes the social science research on racially biased rhetoric and how it can affect decision-making. That research provides the foundation for Part IV, which offers several concrete strategies that prosecutors can use in avoiding racially biased language when arguing cases at trial. It also includes strategies prosecutors can use to prevent other participants in the trial from using racially biased language and to minimize the effect of such language when they do so. These strategies collectively will help prosecutors seek justice rather than convictions tainted by racially biased rhetoric.

II. PROSECUTORS' OBLIGATIONS TO AND CHALLENGES WITH AVOIDING RACIALLY BIASED RHETORIC

Prosecutors have both an ethical and a legal duty to avoid racially biased rhetoric. In practice, however, the ethics rules and current case law fail to provide clear guidance for prosecutors on the line between appropriate argument and inappropriate racially biased rhetoric.[21] This part summarizes current prosecutorial obligations under both ethics rules and case law, as well as critiques their lack of clarity. It then discusses the problems for prosecutors caused by the intersection of these problems and other institutional and cognitive pressures on prosecutors, which helps explain how well-intentioned prosecutors may fail to recognize racially biased rhetoric. Finally, it discusses the new California Racial Justice Act, which provides some additional clarity regarding prosecutorial obligations and adds urgency to prosecutors recalibrating the line between appropriate and inappropriate rhetoric.

A. CURRENT ETHICS RULES

Prosecutors, like all lawyers,[22] are subject to Model Rule of Professional Conduct 8.4(g),[23] which was enacted in 2016 to address harm to the legal

[21] *See, e.g.*, PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 6 (2009) ("Cases and ethics opinions dealing with prosecutorial conduct often . . . simply not[e] that a particular course of action is dictated by the prosecutor's special obligation to seek justice . . . without explaining the reasoning that connects relatively abstract ideas of justice to [that] course of [action].").

[22] *Id.* at 5. "The notion that there is something exceptional about a prosecutor's ethical obligations is critical in understanding those obligations, but overgeneralization and overstatement can mask the fact that in many situations the prosecutor is subject to precisely the same rules as other litigating lawyers." *Id.* at 10. While cautioning against overstatements of prosecutors' duties, Joy & McMunigal nonetheless argue that prosecutors are expected to "monitor both substantive and procedural justice in ways not expected of criminal defense lawyers and civil advocates" for several reasons, including the government's overall interest in justice, the asymmetry of resources and power between prosecutors and defenders, and the need for public confidence in the criminal justice system. *Id.* at 13, 14–16.

[23] Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions,* 10 GEO. J. LEGAL ETHICS, 317, 323 (1997) (explaining that while the ABA rules are Model Rules, they "form the basis for almost every state's mandatory rules governing lawyers").

system from discriminatory conduct by lawyers.[24] Rule 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race [or other protected categories] in conduct related to the practice of law."[25] The rule explicitly defines "discrimination" to include "harmful verbal . . . conduct that manifests bias or prejudice towards others."[26]

Additionally, prosecutors are subject to the ABA's Criminal Standards for the Prosecution Function, which provides "guidance for the professional conduct and performance of prosecutors."[27] Standard 3.1-6(a) specifically addresses a prosecutor's obligation to avoid racially biased rhetoric: "The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race [or other protected categories]."[28] This language provides the same aspirational guidance as this Article—avoiding use of "words" that would "manifest" "bias or prejudice"—that is, avoiding racially biased rhetoric. Additionally, this Standard specifically requires prosecutors to seek to identify and neutralize implicit bias: "A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority."[29]

In combination, these provisions, particularly Standard 3.1–6, provide an ethical foundation for limits on prosecutorial rhetoric, but they lack clear guidance on how to do so.

B. LACK OF CLEAR LINE-DRAWING IN CASE LAW

Case law also contains both an obligation to avoid racially biased rhetoric and a lack of clarity in how to do so. The Supreme Court stated that "[t]he Constitution prohibits racially biased prosecutorial arguments."[30] This

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[24] ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). For information about the evolution of relevant ethical rules before enactment of Model Rule 8.4(g), as well as the complexities of state versus federal ethics rules, see Chris Cialeo, Current Development, *[In]equality Under the Law: Remedying Unequal Antidiscrimination Ethics Rules for Federal Prosecutors*, 28 GEO. J. LEGAL ETHICS 435 (2015).

[25] MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2016). The other protected categories are "sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."

[26] *Id.* While this rule provides more clarity than previously existed regarding lawyers' ethical obligation to avoid racial bias, it has also been criticized. *See, e.g.*, Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 827–34 (2019). To me, the ABA's ethical opinion interpreting the rule, ABA Comm. on Ethics & Pro. Resp., *supra* note 24, is particularly problematic for excluding from its scope "legitimate advocacy" and concluding that the rule "covers only conduct for which there is no reasonable justification." *Id.* at 6. A full critique of the rule and suggestions for refining it are beyond the scope of this article.

[27] ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 1, at § 3-1.1(b). These standards provide aspirational best practices rather than enforceable rules. *Id.* at § 3-1.2(b). However, these standards "largely reflect a consensus about appropriate professional practice in . . . areas of everyday prosecutorial concern."." John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. PITT. L. REV. 271, 277 (1992).

[28] ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 1, at §§ 3-1.1(b), 3-1.6(a). The other protected categories are "sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status." *Id.*

[29] *Id.*

[30] McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987). Some commentators argued that *McCleskey* significantly changed appellate review of racist language and tropes in prosecutorial summations. *See, e.g.*, Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 327, 329–33 (2006).

general idea is found in case law across jurisdictions.[31] Courts sometimes add more detailed wording, such as the Washington State Supreme Court's version: "[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial."[32]

However, despite broad consistency in the general idea that prosecutors must not use racially biased rhetoric, existing case law has several important flaws in operationalizing this broad prohibition.[33] Substantively, courts commonly but inappropriately minimize or even deny the racial bias involved in certain comments.[34] For example, California courts repeatedly justified use of animal imagery in death penalty cases.[35] In the legislative findings supporting the CRJA, the California legislature cited the need to overturn this line of cases: "Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system."[36] Additionally, courts sometimes avoid confronting the racist dimension of prosecutorial rhetoric by using more generic labels like "inflammatory" or "name-calling."[37] Courts also excuse racially biased language by incorrectly focusing on the prosecutor's intent.[38] Yet "the fact that some courts find subtle racial arguments plausible suggests that the jurors might find them persuasive."[39]

These substantive problems flow in part from the variety of procedural approaches lower courts use to analyze whether a prosecutor's language is improper,[40] in part because the United States Supreme Court has never squarely focused on racially biased prosecutorial rhetoric.[41] The Court's clear statement prohibiting racially biased prosecutorial arguments came in a case dealing with a racially-biased application of the death penalty; it did not analyze the legal significance of the prosecutor's rhetoric.[42] Given this

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[31] Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1213 (1992); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3109 (2018).

[32] State v. Monday, 257 P.3d 551, 557 (Wash. 2011).

[33] For more detailed critiques of existing case law, see, for example, Bowman, *supra* note 6, at 71–82; Earle, *supra* note 31, at 1221–32; and 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 (2001).

[34] *See* Bowman, *supra* note 6, at Section III.B (regarding appellate courts' refusal to recognized racially biased language); Prasad, *supra* note 31, at 3104 (regarding "overlooked racial themes in prosecutorial summations").

[35] *See generally* Shana Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animal Imagery in Criminal Trials*, 51 CRIM. L. BULL. 870 (2015) (summarizing the California cases and explaining why the courts' analysis is wrong).

[36] California Racial Justice Act of 2020, A.B. 2542, 2019 CAL. STAT., ch. 317 § 2(e) (2020).

[37] Scholars often use the "inflammatory" or "name-calling" labels for racist prosecutorial rhetoric. *See, e.g.*, Alford, *supra* note 30, at 329–30, 364. Those categories, however, also include non-racial arguments, such as appeal to patriotism or class. *See, e.g.*, Cantrell, *supra* note 2, at 557.

[38] Prasad, *supra* note 31, at 3118 (noting that prosecutorial intent can sometimes be difficult to discern and arguing for the need to consider more than just explicit bias).

[39] *Id.*

[40] *See* Earle, *supra* note 31, at 1223–32 (synthesizing cases into different approaches for analyzing this issue, and critiquing each of these approaches as flawed); Alford, *supra* note 30, at 327 (noting that many but not all federal circuit courts put the burden on the prosecutor to demonstrate a good faith reason to advance arguments that are challenged as racist).

[41] *See* Bowman, *supra* note 6, at 42 (discussing several cases that tangentially touch on the issue, as well as two recent certiorari denials in cases that would have more directly raised it).

[42] *See* McCleskey v. Kemp, 481 U.S. 279, 310 (1987).

lack of Supreme Court focus on the issue, "an identical comment or reference by the prosecutor may be viewed as unduly racist in one trial and innocuous in another," raising constitutional and fairness concerns for defendants and the system as a whole.[43]

Additionally, appellate procedural doctrines further muddy the analysis. For example, when defense counsel fails to object at trial to a prosecutor's comments, appellate review is limited under the Plain Error Doctrine.[44] Under that doctrine, the court analyzes whether the remarks were so improper as to have denied the defendant a fair trial rather than merely whether the remarks were proper.[45] Furthermore, appellate courts often refuse to determine whether or not particular comments were improper, instead concluding that any possible error was harmless, and therefore reversal is not required.[46] This approach makes it harder for prosecutors to identify the line between proper and improper rhetoric.[47] Appellate courts' opinions can serve a pedagogic function, but only when they draw reasonably clear lines between proper and improper conduct.[48]

C. IMPACT ON PROSECUTORIAL EVALUATION OF APPROPRIATE VERSUS INAPPROPRIATE ARGUMENTS

This line-drawing failure creates problematic incentives for both individual prosecutors and prosecution offices more generally. The current judicial approach to these issues encourages well-intentioned prosecutors to see rhetorical choices as "evidentiary risks" rather than "ethical risks," which in turn makes it easier for prosecutors to make riskier choices.[49] And current case law incentivizes this approach given the lack of meaningful consequences for use of racially biased rhetoric.[50] These incentives dovetail with the idea of systemic triage, where all participants in the criminal justice system become overwhelmed by the volume of cases and therefore lack the time to provide the individual attention and development of each case.[51]

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[43] Earle, *supra* note 31, at 1229.

[44] *See, e.g.*, V.A. Richelle, *Racism as a Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct*, 67 TUL. L. REV. 2357, 2359–60 (1993).

[45] Cicchini, *supra* note 2, at 922; *see also* Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 76, 78 (2001) (discussing the "plain error" doctrine and how it significantly limits appellate review of prosecutorial misconduct when defense counsel fails to object).

[46] *See, e.g.*, Earle, *supra* note 31, at 1213–14 (noting that courts often conflate the analysis of whether a racial remark was uttered and whether any remedy is possible, and arguing that courts should more clearly separate these inquiries, even if the improper remarks are ultimately deemed to be harmless error).

[47] *See* Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 808–09 (2019).

[48] *See id.* at 808.

[49] *Id.* at 813–14; *see also* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992) (noting that harmless error analysis encourages prosecutors to "weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."). Gershman similarly notes that the courts' "deference to prosecutorial discretion in every form . . . [has] stimulated a law enforcement mentality that the 'end justifies the means.'" *Id.* at 394. Of course, not all prosecutors take these views or approaches, but the current system encourages rather than discourages this approach.

[50] *See, e.g.*, Alford, *supra* note 30, at 334 (analogizing closing arguments to a basketball game in the final minute; the closer the score, the more the prosecution has an incentive to use racially biased rhetoric).

[51] Richardson, *supra* note 5, at 879–80 (discussing "systemic triage" as a concept and its effects on prosecutors, defense counsel, and judges).

When time and resources are finite, prosecutors may feel pressure to take shortcuts or may be more influenced by courts' tacit approval of this type of rhetoric.[52]

These incentives can affect not just the behavior of individual prosecutors but also office culture and pressures as well.[53] Office culture can in turn continue to shape individual prosecutors' views of the line between appropriate and inappropriate conduct.[54] And these incentives and cultural pressures may exacerbate other cognitive biases, such as confirmation bias, further skewing perception of the line between appropriate and inappropriate rhetoric.[55]

D. CALIFORNIA RACIAL JUSTICE ACT ADDS URGENCY BUT INADEQUATE CLARITY

California recently passed the Racial Justice Act (the "CRJA") to address some of these issues.[56] The legislative findings for the CRJA specifically criticize the current state of the case law, noting that "[e]xisting precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials."[57] The findings then cited to both specific cases and social science research as demonstrating the need for a new approach to prohibiting language that "should not be permitted in our court system."[58] The legislature also stressed the importance of providing a mechanism to address implicit bias, not just explicit bias.[59] "The intent of the Legislature is not to punish [implicit] bias, but rather to remedy the harm to

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[52] Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 18 (1995) (reviewing researchers' analysis that time pressure on tasks involved judgment increased reliance on ethnic stereotyping in those judgments). For a powerful discussion of how prosecutors are socialized into the system, including the effect of what Richardson calls systemic triage, see NICOLE GONZALEZ VAN CLEVE, *There Are No Racists Here: Prosecutors in the Criminal Courts*, *in* CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 127, 127–156 (2016). Van Cleve's interviews with prosecutors as part of her ethnographic study of the criminal courts show prosecutors drawing lines between their personal beliefs and their perceived duty to perform their expected part within the criminal justice system.

[53] *See, e.g.*, Green, *supra* note 47, at 814.

[54] *See, e.g.*, Richardson, *supra* note 5, at 871 (discussing Gonzalez Van Cleve's ethnographic study of criminal courts in Cook County, Illinois, in which several prosecutors expressed personal misgivings about the criminal justice system but "learned to rationalize their racialized behaviors by separating their perspectives from their practices" and treating their practice of law as a duty that did not need to reflect their personal beliefs). For a discussion of how this happens, see MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 34 (2017) (discussing how bureaucracy can functionally silence individuals' moral compasses through structuring conditions focusing on what is good for the organization).

[55] *See, e.g.*, Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 328–32 (2015) (summarizing how cognitive biases and office pressures may affect prosecutorial decision-making). Confirmation bias, which is the tendency to seek and evaluate evidence so that it confirms existing beliefs or hypotheses, may lead prosecutors to overestimate the likelihood that a defendant is guilty and discount contrary evidence. *Id.* at 329. Institutional pressures to win convictions combined with the courts' failure to impose remedies for improper arguments can combine to both worsen confirmation bias and make prosecutors believe that they are merely engaging in appropriately zealous advocacy rather than making improper arguments. *Id.* at 329–31.

[56] As noted above, while the CRJA only applies in California, prosecutors from all jurisdictions should take seriously its provisions, which can be seen as consistent with Prosecution Standard 3.1-6 and with prosecutors' general duties to seek justice.

[57] CRJA § 2(e). The legislative findings also criticize the courts for "generally only address[ing] racial bias in its most extreme and blatant forms." CRJA § 2(c).

[58] *Id.*

[59] *Id.*

the defendant's case and to the integrity of the judicial system."[60] To remedy harms from both explicit and implicit bias, the CRJA prohibits the state from "seek[ing] or obtain[ing] a criminal conviction . . . on the basis of race."[61] The use of "obtain" here indicates that the conduct involved does not require that prosecutors have a biased intent. Instead, the CRJA allows for reversal of convictions that were tainted by race, even if the prosecutor did not intend such a result.[62]

Defendants can prove a violation of the CRJA by showing, among other things, that the prosecutor or others "used racially discriminatory language about the defendant's race, ethnicity, or national origin, . . . whether or not purposeful."[63] The CRJA defines "racially discriminatory language" as "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin."[64] This definition provides more guidance than case law and the ethics rules about the line between appropriate argument and racially biased rhetoric, although its references to implicit appeals to bias and coded language likely require more explanation for prosecutors seeking to comply with it. When this definition is read in connection with the CRJA's findings, it seems designed to incorporate social science research on racially biased language. That research is discussed in more detail below.

III. KEY LESSONS FROM COGNITIVE SCIENCE ABOUT PROSECUTORIAL TRIAL LANGUAGE

"Social science helps to explain how ethical prosecutors face psychological obstacles in handling specific criminal cases."[65] Social science research into both racial bias and decision-making provides an important foundation for thinking about how prosecutors can avoid racially biased

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[60] *Id*. at § 2(i):

> Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing.

[61] CAL. PENAL CODE § 745(a).

[62] The idea that prosecutorial intent is irrelevant is shown in several ways in the act, including the fact that defendants can show violations based on racially biased language or other behaviors by non-prosecutors, including judges, witnesses, and jurors. *See* CAL. PENAL CODE § 745(a)(1)-(2). Behavior by non-prosecutors may still result in the prosecutor "obtain[ing] a criminal conviction . . . on the basis of race," which the CRJA prohibits, even if the prosecutor did not intend such a result. *Id.*

[63] CAL. PENAL CODE § 745(a)(2). This provision applies to language, not just of prosecutors, but also of "the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror[.]" *Id.* Thus, the statute does not single out prosecutors, and racially biased rhetoric by these other individuals is also important, although largely beyond the scope of this Article.

[64] CAL. PENAL CODE § 745(h)(3). The definition continues "Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory." *Id.*

[65] Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a Brady Problem*, 16 OHIO ST. J. CRIM. L. 307, 315 (2019) (offering suggestions for improved prosecution practices based on social science).

rhetoric.[66] This research also provides strategies for mitigating the effect of biases on decision-making.[67]

A. FOUNDATIONAL CONCEPTS REGARDING BIASES

Everyone, including everyone in the criminal justice system,[68] is subject to cognitive biases, including racial biases.[69] For example, studies show that "jurors tend to make more lenient judgments of same-race defendants and harsher judgments of other-race defendants."[70] Additionally, trial judges' decisions can be influenced by the same type of implicit biases as are found in society more generally.[71]

Some key concepts need to be defined here. Biases are belief systems reflecting a preference toward or a prejudice against a certain group or a person within the group.[72] These biases can be explicit, that is, consciously known and intentionally expressed, or implicit, that is, "resid[ing] below conscious awareness and . . . automatically driv[ing] behavior in a manner that is inconsistent with one's personal attitudes."[73] In other words, implicit biases may be "stereotypical associations so subtle that people who hold them might not even be aware of them."[74]

Stereotypes of Black Americans, and the language used to evoke them, have evolved over time.[75] Before the Civil War, human enslavement was justified through stereotypes of docility and laziness, while post-war segregation and Jim Crow laws were justified through stereotypes of

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[66] Social science research is essential for going beyond individual cases to examine the nature and scope of racial bias, providing theoretical frameworks for "understanding the psychological, sociological, and cultural processes that facilitate bias." Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 270 (2015).

[67] *See id.*

[68] Although there are no published studies specifically focusing on prosecutors' implicit racial biases, there is little reason to believe that prosecutors differ from judges and jurors, who have been studied directly and more extensively. *See* Prasad, *supra* note 31, at 3103 n.112. Some research suggests that prosecutors' role in the criminal justice system may enhance their susceptibility to some types of cognitive biases. *See generally* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009).

[69] By focusing here on individual cognitive biases, I am not discounting or ignoring structural or institutional dimensions of racial bias. *See, e.g.*, Eduardo Bonilla-Silva, *Racial Attitudes or Racial Ideology? An Alternative Paradigm for Examining Actors' Racial Views,* 8 J. POL. IDEOLOGIES 63, 64 (2003) (noting that "most qualitative researchers conceive of 'racism' as having a structural foundation . . . [and] a collective nature [that] affects the consciousness of all actors in any society.") (emphasis removed); *see also* Bowman, *supra* note 6, at 44–46 (noting that explicit bias, implicit bias, and structural racism are all "meaningful lenses through which to understand how and why [racially biased] rhetoric affects criminal trials").

[70] Hunt, *supra* note 66, at 274. This well-documented pattern is sometimes called "the similarity-leniency effect." *Id.* at 271 (synthesizing studies and meta-analysis of the similarity-leniency effect).

[71] Jeffrey J. Rachlinski, Sheri L. Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (summarizing existing research on implicit bias and its effect on behavior generally, then reporting the results of the authors' study of 133 judges from three different jurisdictions across the country). This study concluded that "given sufficient motivation, judges can compensate for the influence of these biases." *Id.*

[72] Isabel Bilotta, Abby Corrington, Saaid A. Mendoza, Ivy Watson & Eden King, *How Subtle Bias Infects the Law*, 15 ANN. REV. L. & SOC. SCI. 227, 228 (2019).

[73] *Id.* at 229.

[74] Rachlinski et al., *supra* note 71, at 1196.

[75] Of course, other racial and ethnic groups are stereotyped as well. *See e.g.*, Thompson, s*upra* note 13, at 1252 (drawing on Professor Cynthia Lee's work discussing stereotypes of Asians and Latinos); *id.* at 1250 (discussing negative stereotypes of Jews).

violence and aggression.[76] More recently, Americans have generally embraced a colorblind ideology that rejects direct use of derogatory racial slurs but instead embraces more indirect references to racial stereotypes through terms like "inner-city" or "welfare queens" that indirectly evoke images of Black violence or laziness.[77] Regardless of the shifting language used to invoke stereotypes, however, research across disciplines has consistently shown negative stereotypes associated with Black people, including stereotypes of violence, dishonesty, and criminal behavior.[78] American culture's stereotypical association between race and crime has been particularly powerful since the 1960s.[79]

Another key distinction is between stereotypes and prejudices. Stereotypes are "well-learned sets of associations among groups and traits established in children's memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes."[80] Prejudice, on the other hand, involves derogatory personal beliefs, that is, acceptance or endorsement of negative stereotypes.[81] Social science literature often distinguishes between high-prejudice individuals, whose beliefs are consistent with negative stereotypes, and low-prejudice individuals, who have reflected on and consciously rejected the validity of those stereotypes.[82] Children learn stereotypes at an early age, and stereotypes are frequently reinforced through media and other cultural influences, so "stereotype-congruent responses may persist long after a person has sincerely renounced prejudice."[83]

Research shows that both high-prejudice and low-prejudice individuals exhibit biased decision-making, although different mechanisms are generally at work. High-prejudice individuals are more likely to display explicit bias, consciously making decisions that reflect their dislike of one group or preference for another.[84] Low-prejudice individuals, on the other hand, are more likely to be influenced by subconscious activation of stereotypes. For example, in one study, participants listened to rap music with violent lyrics and were then asked to read and evaluate a story about a man's behavior.[85] When the story gave the man's name as Kareem, study participants judged him as more hostile, more sexist, and less intelligent than when the story character's name was Donald, with all other aspects of the story being the

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[76] Prasad, *supra* note 31, at 3096–97.

[77] *Id.* at 3097.

[78] *Id.* (concluding that the reasoning used to justify negative stereotypes has changed, but the underlying negative attitudes of "white superiority and black inferiority" have remained "fundamentally the same."). For a more detailed summary of negative stereotypes of Black people seen in interdisciplinary research, see, for example, Thompson, *supra* note 13, at 1247–51.

[79] Holmes, *supra* note 11, at 1436–37.

[80] Armour, *supra* note 7, at 741.

[81] *Id.* at 742 (citing Patricia G. Devine, Margo J. Monteith, Julia R. Zuwerink & Andrew J. Elliot, *Prejudice with and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCH. 817, 817–19 (1991)).

[82] *Id.*

[83] *Id.* at 743.

[84] Clarke, *supra* note 11. For a nuanced discussion of research into biased jury decision-making, including the relatively small role of explicit processes and the more significant role of implicit biases, see Hunt, *supra* note 66, at 276–77.

[85] Thompson, *supra* note 13, at 1269–70 (discussing Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 4 GRP. PROCESSES & INTERGROUP RELS. 133, 133 (2002)).

same.[86] These findings occurred even for people with low levels of prejudice.[87]

In that study, the negative stereotypes of Black people were activated by "priming" study participants with the violent rap music. "Priming" involves using subtle environmental factors as cues to trigger associations with other ideas.[88] Our brains interpret new information by fitting it into existing categories, particularly categories that have been recently accessed, and "[p]riming is a way of influencing the categories that are at the forefront of our brains."[89] In many empirical studies of priming, participants are unaware of the "prime" stimulus, but exposure to the prime consistently affected study participants' attitudes and decision-making.[90]

Priming studies demonstrate a variety of different effects on decision-making.[91] For example, the rap music study demonstrated effects on evaluative tasks, as the variation in names led to a variation in participants' analysis of the study character's intelligence and sexism.[92] Another similar study, involving two identical stories but for the name of the key character, showed differences in mock jurors' memory of key facts.[93] When participants read about Tyronne as compared to William, they more easily remembered "aggressive facts" and were more likely to have a false memory of a fact about Tyronne's aggression that was not actually part of the study story.[94] These memory biases seemed to operate unconsciously, as "participants who manifested more memory bias were not more likely to be explicitly biased."[95]

B. THE ROLE OF CODED LANGUAGE IN PRIMING RACIAL STEREOTYPES

Racially biased language plays an important role in activating stereotypes because implicit bias research shows that something is needed to trigger the power of stereotype for people who do not harbor explicit biases.[96]

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[86] *Id.*

[87] *Id.* (also synthesizing additional similar studies).

[88] Karenna F. Malavanti, Megan K. Johnson, Wade C. Rowatt & Charles A. Weaver, III, *Subtle Contextual Influences on Racial Bias in the Courtroom*, 24 AM. SOC'Y TRIAL CONSULTANTS 2, 5 (2012) (defining priming as "the unconscious influence of individuals' environmental cues on their behaviors.").

[89] LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 107 (2018); *see also id.* (noting that our brains have so many categories in them but tend to use categories that were recently activated when processing new information).

[90] *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1248 (2002) ("If people are shown an image on a screen for a few milliseconds, followed immediately by a 'masking' image, they will behave in ways that reflect their having seen the first image, but without any conscious awareness of having seen it"); Anders Kaye, *Schematic Psychology and Criminal Responsibility*, 83 ST. JOHN'S L. REV. 565, 577 (2009) (summarizing priming studies).

[91] *See* Thompson, *supra* note 13, at 1246–75 (discussing studies of juror bias showing effects on character and credibility assessments, as well as fact interpretation and recall).

[92] Pamela Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 322 (2012) ("[A] group primed with violent rap music, which primed stereotypes of black males as aggressive and violent, 'were more likely than other participants to judge a Black job applicant as less qualified for a job requiring intelligence' [lower intelligence being another stereotype pertaining to blacks].").

[93] Levinson, *supra* note 12, at 398–401.

[94] *Id.* at 399–401.

[95] *Id.* at 404. In two instances, participants who read about Tyronne or Kawika, the Hawaiian character that was another variant in the study, were more likely to misremember facts if they displayed low rather than high levels of prejudice. *Id*. While that was generally true, there was one counter-example, in which participants who read about William had higher explicit bias and memory bias. *Id.* at 406.

[96] *See* Alford, *supra* note 30, at 347 ("[A] stereotype, which lies latent in the mind of its adherent, does not have a force of its own. The appropriate stimulus is often required to elicit the stereotype."); *see*

Remember, high-prejudice individuals accept the validity of stereotypes, while low-prejudice individuals consciously reject stereotypes but may nevertheless be influenced by them. One way that happens is through use of "coded language," which invokes stereotypes without directly referencing them.[97] For example, words like "breed" and "superpredator" can invoke stereotypical associations between Black people and animals.[98] Other examples of coded language that serve as linguistic proxies for race include terms like "inner-city," "thugs," and "welfare queens."[99]

Coded language is particularly powerful in triggering stereotypes precisely because it does not reference race explicitly, and thereby does not violate our current egalitarian norms.[100] Explicit references to race allow low-prejudice individuals to evaluate and reject stereotypical appeals. Coded language, on the other hand, allows our minds to quickly grasp complex concepts and the associated cultural values, while obscuring the racial stereotypes underlying these cultural values.[101] For example, the "[w]elfare [q]ueen" image generates "a synthesis of negative racial stereotypes about struggling mothers living in poverty."[102] More explicit references to these negative stereotypes would likely lead low-prejudiced individuals to reject them, but use of coded language evades this scrutiny and rejection.

Instead, coded language plays into the general ideology of colorblindness.[103] Colorblindness "is indirect, slippery, and apparently non-racial."[104] Commentators have noted that these characteristics of colorblind coded language have created "a near-infinite number of ways by which

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also Prasad, *supra* note 31, at 3101 ("[J]urors' implicit biases must be triggered before they can adversely affect a defendant's trial.").

[97] *See, e.g.*, BERGER & STANCHI, supra note 89, at 45. Neuroscience research helps explain how coded language invokes stereotypes and primes decisionmakers for biased decision-making. "[N]euroscience explains that when rhetoric influences us, it does so in an embodied way, triggering electrochemical reactions that traverse our neural pathways, beyond the purview of our conscious thought." Jewel, *Neurorhetoric*, supra note 9, at 663. Repeated use of coded language that triggers stereotypes entrench these neural pathways, making it easier to trigger the association and creating more certainty in the associated belief. *Id.* at 664, 667.

[98] BERGER & STANCHI, *supra* note 89, at 45.

[99] Prasad, *supra* note 31, at 3098.

[100] *Id.* (citing 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")).

[101] Jewel, *Neurorhetoric*, *supra* note 9, at 667.

[102] *Id.* at 668. The history of the term "Welfare Queen" provides a great example of how this works.

> The Welfare Queen trope developed out of a 1970s news story concerning an unmarried mother who fraudulently used aliases to obtain welfare benefits in the 1970s, abusing the benefits system to amass cash and wealth. Ronald Reagan repeatedly popularized the term in stump speeches, raising ire directed toward the Welfare Queen, her cash, and her Cadillac. The fraudulent practices of one welfare recipient became, in metonymic fashion, the category that stood for all mothers on welfare. The Welfare Queen term relied on the metaphorical category of mother, but defined mother in the alterity, as an exemplar of a mother with loose morals and little virtue. The reference to other attributes of category membership—the Cadillac for instance—functioned to cement an implicit and collective understanding that mothers on welfare were primarily Black, even though the majority of those on public assistance at the time were white.

Id. (internal citations omitted). Today, the term signifies these racialized stereotypes, even for people who do not know the specific history of the term.

[103] Colorblindness rests on "the belief that because of equal opportunity, unequal outcomes between races are not unjust and merely reflect a lack of effort or ability." Prasad, *supra* note 31, at 3098. Sociologist Eduardo Bonilla-Silva describes this set of beliefs as "colour blind racism." Bonilla-Silva, *supra* note 69, at 68.

[104] Bonilla-Silva, *supra* note 69, at 68.

prosecutors can surreptitiously inject race into their closing arguments" through "language that varies in its source and setting, in the subtlety and indirection of its presentation, and in the aspect of racial stereotype or animus it evokes."[105] Yet commentators often fail to recognize the extent to which the prosecutors using this language may themselves be unaware of the racial stereotypes being evoked by this language.[106]

C. AVOIDING COLORBLINDNESS & OTHER DEBIASING STRATEGIES

It is an easy mistake, but still a mistake, to read the research on implicit bias and conclude that biases are uncontrollable and that skewed decision-making is inevitable. Instead, "[i]mplicit biases can be controlled . . . if actors are aware of their biases, are motivated to change their responses, and possess cognitive resources necessary to develop and practice correction strategies."[107] This section aims to give readers those necessary strategies.

The first key de-biasing strategy is recognizing that colorblindness is harmful rather than helpful.[108] "Pretending that race does not matter, which the principle of colorblindness encourages, only exacerbates the problem of implicit bias. When individuals are not cognizant of their implicit biases, those biases can automatically trigger stereotypes and prejudice."[109]

Instead, acknowledging the existence and effect of implicit bias is an important first step in limiting its operation. For example, studies show that simply raising awareness of the effects of implicit bias on decision-making led to a reduction in basketball referees calling fouls in a racially disparate way and enrollment of a more diverse medical school class, without any changes to the underlying processes for making these decisions.[110] Increased awareness of implicit bias helps people make decisions more carefully, particularly for low-prejudice individuals.[111]

A related debiasing strategy involves "making race salient"—that is, making decision-makers "aware of racial issues that can bias their decision-making, like the operation of racial stereotypes."[112] Intentionally addressing the role of race allows low-prejudice individuals "to consciously suppress stereotype-congruent responses that would otherwise be automatic."[113] Doing so can also reduce bias by high-prejudice individuals, as it reinforces the importance of egalitarian values and can pressure them towards acting in

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[105] Prasad, *supra* note 31, at 3104; *see also* Alford, *supra* note 30, at 347–59 (summarizing various ways prosecutors can invoke stereotypes without explicitly mentioning race); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1750–66 (1993) (summarizing cases over twenty-five years that invoke racial or ethnic stereotypes of various groups).

[106] *See infra* Part III for a more detailed discussion of common prosecutorial arguments and rhetoric that can be seen as coded language invoking racial stereotypes, as well as alternatives to use of that rhetoric.

[107] Prasad, *supra* note 31, at 3100.

[108] *Id.* ("Attempts at being colorblind can exacerbate the power of implicit racial biases because ignoring race can cause automatic engagement of stereotype-congruent responses.").

[109] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1610 (2013).

[110] Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 198, 231 (2018).

[111] Richardson, *supra* note 5, at 887–88. Relatedly, it is important to focus on the potential impact of these stereotypes and biases, not the intent of the speaker. For related text, see Smith & Levinson, *supra* note 5 and *infra* Section II.B.

[112] Lee, *supra* note 109, at 1586.

[113] *Id.*

compliance with those societal norms.[114] The key, however, is to explicitly acknowledge the role of race, rather than just expecting that people will perceive race as relevant in routine cases.[115]

The final debiasing strategy crucial for this analysis is priming for egalitarianism.[116] A recent study demonstrated the utility of giving a jury instruction telling jurors to avoid allowing their verdicts to be influenced by bias or prejudice, even without explicitly mentioning race.[117] Similarly, attorneys can use voir dire or closing arguments to guard against biases, reinforcing egalitarianism and therefore helping jurors avoid stereotype-congruent responses.[118]

Together, these strategies provide a foundation for prosecutors who are aware of implicit bias and who are seeking to limit its impact on their prosecutions, as well as for the other actors in the criminal justice system. The next part provides concrete strategies that prosecutors can use for avoiding racially biased rhetoric.

IV. PROSECUTION STRATEGIES FOR AVOIDING RACIALLY BIASED RHETORIC

Many common rhetorical techniques that prosecutors use can inadvertently trigger stereotype-congruent responses, but that does not have to be the case.[119] This section offers a variety of strategies for prosecutors to use to avoid tainting convictions with racially biased rhetoric. The focus here is not on doing the bare minimum to avoid criticism from courts or disciplinary entities, given the narrowness and ambiguity in the law from those entities, as described in Part II. Instead, this section is meant to help California prosecutors comply with the new CRJA and to help prosecutors from all jurisdictions operationalize their commitment to seeking justice rather than convictions tainted by racially biased rhetoric.[120]

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[114] *Id.* at 1608; *see also* Selmi, *supra* note 110, at 229–30 (discussing studies showing that people act with less bias when they know their decisions are subject to review).

[115] *See* Bowman, *supra* note 6, at 89–91. Strategies for making race salient include using voir dire, opening and closing statements, witness testimony, and jury instructions. Lee, *supra* note 109, at 1590–1601; *see also* Thompson, *supra* note 13, at 1294–1306 (analyzing the effectiveness of various approaches to making race salient).

[116] *See* Blasi, *supra* note 90, at 1276.

[117] Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1730–31 (2015).

[118] Blasi, *supra* note 90, at 1276.

[119] *But see* Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 473–74 (2021). The article gets a lot right about the stereotype-triggering effects of some common narratives in criminal cases and that some criminal cases with stereotype congruent facts are cause for concern. However, I disagree with the author's conclusion that prosecutors should decline to prosecute those cases. Instead, this section offers strategies for alternatives that make race salient for jurors and encourage jurors to control operation of their biases. This section also offers rhetorical strategies to avoid reinforcing implicit biases when arguing these cases.

[120] While this section aims to be thorough, prosecutors may encounter other issues or questions not answered by this section. The goal here is to give prosecutors the tools to think through the ways that racially biased rhetoric may arise, or may be avoided, in their work.

A. CONSIDER THE CONTEXT THAT MAY INCREASE OPERATION OF IMPLICIT BIAS

Before thinking about specific rhetorical choices, prosecutors should first reflect on the racial context in which they prosecute cases. "[A]lthough popular discourse and scholarly research tend to focus on the defendant['s] race, biases in jury decision making often occur in response to the interaction of races among trial parties, not the race of a single party."[121] It is therefore important to about demographics and how they can increase the role that stereotypes and implicit biases play.

First, prosecutors should think about the demographics of their courtrooms as compared to the larger area in which that courtroom sits. What are the racial demographics of the area? Comparatively, what are the racial demographics of the people in the courtroom? Are the defendants more often people of color as compared to their overall percentage of the local population? When prosecutors see "overwhelming numbers of people of color" as criminal defendants, it can "strengthen the already ubiquitous conscious and unconscious association linking people of color with crime and whites with innocence."[122] These associations are strengthened subconsciously even when prosecutors consciously understand that these demographics may reflect police focusing on communities of color, for example, rather than higher levels of criminality in certain groups.[123]

Also, think about the professionals within the system—judges, prosecutors, defense counsel, police officers, corrections personnel, and court staff.[124] How do the racial demographics of these groups, both separately and together, compare to the racial demographics of the population as a whole and to the subset of that population that are criminal defendants? Again, consider whether demographic differences can subconsciously strengthen an implicit association between people of color and criminal activity. If so, prosecutors should use the strategies discussed in Section III.C above to take extra care to avoid being influenced by their own implicit biases.

Finally, think about the demographics of the jury population. Much of the focus regarding jury demographics has been on use of peremptory challenges, but think more broadly about who is included in the jury venire and who is not. Research consistently shows that jury diversity improves decision-making.[125] For example, jurors of color may observe and analyze the role that race may be playing in a particular case, including in jury

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[121] Hunt, *supra* note 66, at 274.

[122] Richardson, *supra* note 5, at 881.

[123] *Id.* Richardson and Van Cleve note that new prosecutors and defense counsel may initially be surprised by the extent of racial disparities, but they can quickly become desensitized to it, so that they no longer notice or question these disparities. *Id.* at 885.

[124] For example, during Van Cleve's ethnographic study in Cook County, Illinois, sixty-nine percent of felony defendants were Black, while eleven percent were Latino, and only seventeen percent were white. In contrast, eighty-four percent of prosecutors, seventy-four percent of trial judges, and sixty-nine percent of public defenders were white. VAN CLEVE, *supra* note 52, at 17.

[125] Bilotta et. al., *supra* note 72, at 227, 235–36 (synthesizing studies showing that diverse juries take more time deliberating cases, consider more evidence, and more accurately evaluate that evidence compared to all-white juries). Diverse juries are also more likely to discuss the role that race may have played in a particular case. Hunt, *supra* note 66, at 279.

deliberations, in ways that may otherwise go unnoticed by White jurors.[126] Additionally, studies show that the presence of jurors of color may make White jurors more aware of the potential for bias[127] and lead them to deliberate more carefully to avoid appearing to be biased.[128] Jury composition matters, and all-White juries are more likely to be susceptible to racial bias, regardless of the reasons for the lack of diversity on the jury. Prosecutors should be mindful of these dynamics, particularly when arguing to an all-White jury while prosecuting a defendant of color. In such circumstances, even low-prejudice White jurors are more likely to be influenced by their own implicit biases and vulnerable to a prosecutor's use of racially biased rhetoric.

B. AVOID RACIALLY BIASED FRAMING AND CASE THEORIES, DEHUMANIZING RHETORIC

Common prosecutorial framing devices and case theories can trigger jurors' implicit biases. Prosecutors should therefore avoid "us-them" rhetoric and dehumanizing appeals. Additionally, prosecutors should ensure that their case theories and language stay focused on the specific evidence in the case being prosecuted and should ensure that witness testimony is not based on stereotypes rather than specific facts.

First, prosecutors should avoid "us-them" framing of a case that separates the defendant from the juror and prosecutor.[129] This "us-them" rhetoric is likely to trigger both ingroup favoritism and outgroup bias.[130] Ingroup favoritism "occurs when people make more positive judgments about individuals who belong to the same social category simply because of shared group membership."[131] Outgroup bias involves the reverse, negative judgments about those who are not part of the same group.[132] "People prefer their ingroup to an outgroup . . . , they interpret more leniently an ambiguous behavior performed by an ingroup member than by an outgroup member . . . , [and] they attribute more positive attributes to the ingroup than to the outgroup[.]"[133] Research shows that the combination of these biases lead jurors to "tend to make more lenient judgments of same-race defendants and harsher judgments of other-race defendants."[134]

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[126] Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1288 (2000); *see also id.* at 1285–87 (discussing other ways that diverse juries can affect criminal trials).

[127] Bilotta et al., *supra* note 72, at 227.

[128] Selmi, *supra* note 110, at 229.

[129] Conway, *supra* note 119, at 473–74. While a prosecutor may be intending to draw a moral line, not a racial one, when appealing to the jury as "us" and the defendant as "them," the racialized context may be crucial. Even when both the prosecutor and the defendant are of the same race, or when a jury has a diverse composition, the broader context may still lead "us-them" rhetoric to have racial overtones, so prosecutors should avoid it.

[130] Bowman, *supra* note 6, at 61 (discussing the long-standing use of this technique and its effect in "situating the prosecutor on the same side of the moral line as the jurors, which helps the jury see the prosecutor as trustworthy").

[131] Hunt, *supra* note 66, at 275.

[132] *See id*. at 276.

[133] Jacques-Philippe Leyens, Paola M. Paladino, Ramon Rodriguez-Torres, Jeroen Vaes, Stéphanie Demoulin, Armando Rodriguez-Perez & Ruth Gaunt, *The Emotional Side of Prejudice: The Attribution of Secondary Emotions to Ingroups and Outgroups*, 4 PERSONALITY & SOC. PSYCH. REV. 186, 187 (2000) (citations omitted). For a longer explanation of ingroup bias and a discussion of how it can affect prosecutors specifically, see Gershowitz, *supra* note 5, at 314–20.

[134] Hunt, *supra* note 66, at 274.

Prosecutors should be careful to avoid invoking either ingroup favoritism or outgroup bias. For example, prosecutors sometimes appeal to ingroup favoritism when emphasizing the ingroup status of the victim.[135] Ingroup status can also be referenced by contrasting the victim's race with that of the defendant.[136] Another contrast that bolsters the ingroup status of the victim involves contrasting the location of a crime in a "good neighborhood" with crimes that occur in communities of color, such as the case where a prosecutor argued that the defendant "committed a crime 'in our streets' and 'not in some ghetto.' "[137]

More commonly, however, prosecutors use rhetoric that emphasizes the defendant's outgroup status by "othering" the defendant.[138] Prosecutors should avoid the common rhetorical "othering" technique of using dehumanizing language,[139] particularly animal imagery or references to language comparing defendants to monsters.[140] This language invokes the "Black brute" caricature, which "portrays Black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace."[141] Case law demonstrates fairly extensive invocation of this stereotype through language that directly compares defendants to animals, often gorillas or apes, but also Bengal tigers, jackals or other animals.[142] It can also be invoked by referring to the victim as "prey," by using descriptive terms such as "primal" or "savage," or by using animalistic verbs such as "hunt" or "pounce."[143]

Invocation of racial stereotypes through this language is likely to be particularly powerful, producing fear and loathing[144] and reducing empathy for those against whom it is invoked.[145] In fact, research on mass atrocities shows that dehumanization "allows the ingroup to psychologically reject full responsibility and engage in moral disengagement."[146] While prosecutors

[135] Bowman, *supra* note 6, at 102 (discussing State v. Shabazz, 48 P.3d 605, 620 (Haw. Ct. App. 2002) (involving repeated references to the victim as a "local woman" and then linking her fear of the defendants to their race)).

[136] *Id.* at 71 (summarizing cases in which the prosecutors argued that the rape was somehow worse because the perpetrator was Black or otherwise called attention to the contrast in races).

[137] Johnson, *supra* note 105, at 1753 (quoting People v. Nightengale, 523 N.E.2d 136, 141 (Ill. Ct. App. 1988)).

[138] Bowman, *supra* note 6, at 102–04 (describing several cases and techniques for doing so); Johnson, *supra* note 105, at 1756–59 (same).

[139] Prosecutors use other types of dehumanizing language beyond the kind of animal imagery discussed in this section. *See, e.g.*, VAN CLEVE, *supra* note 52, at 59–61, 89–90. I recommend that prosecutors reconsider common dehumanization practices, such as referring to defendants by their role rather than by their name. But this section specifically focuses on animal references because that language most directly ties to racial stereotypes, as explained in this section.

[140] Smith & Levinson, *supra* note 5, at 820 ("The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit race bias.").

[141] Alford, *supra* note 30, at 345 (quoting David Pilgrim, *The Brute Caricature*, FERRIS STATE UNIV. (Nov. 2000) http://www.ferris.edu/news/jimcrow/brute/). Alford traces the history and uses of this caricature from Reconstruction through the twentieth century and connects it to extensive empirical research demonstrating the stereotypical connection between Black people and violent crimes. *Id.* at 345–46.

[142] *See* Heller, *supra* note 35, at nn.45-70 and related text (synthesizing cases involving use of "animal" or references to specific animals).

[143] *Id.*

[144] *Id*; *see also* Prasad, *supra* note 31, at 3105–07 (discussing use of this caricature in criminal trials).

[145] Prasad, *supra* note 31, at 3105; *see also* Jewel, *Neurorhetoric*, *supra* note 9, at 675–76 (discussing the variety of different ways that dehumanizing rhetoric against Jews in Nazi Germany affected ordinary Germans' perceptions and paved the way for the Holocaust).

[146] Gershowitz, *supra* note 65, at 323.

may not be trying to inflame juror prejudices in this way when using dehumanizing language, the research demonstrates that effect, and prosecutors should therefore avoid dehumanizing rhetoric.[147]

Prosecutors can avoid dehumanizing language and us-them rhetoric by keeping arguments more clearly focused on the evidence in the case at hand. For example, in cases of violent crime, prosecutors can point to the harm suffered without using dehumanizing "animal" rhetoric to do so.[148] Relatedly, prosecutors can talk about the severity of the crime without suggesting that the harm inflicted is somehow worse because of the races of the defendant and victim. Similarly, if it is necessary to reference the neighborhood where the crime occurred, prosecutors can do so without comparing it to racialized neighborhoods.[149]

Prosecutors should be particularly cautious to focus on the evidence in the case at hand when the prosecutor's theory of the case involves a racial dimension. For example, prosecutors sometimes argue that a crime was racially motivated based on stereotypes or speculation rather than actual evidence.[150] Additionally, prosecutors have inappropriately used defendants' rap music to argue motive or to support theories about violence, when they would not similarly use lyrics or writings of White defendants.[151] Relatedly, prosecutors should not rely on rap music to show evidence of motive or treat a defendant's rap lyrics differently than they would evidence of other types of writing or music.[152] I have argued elsewhere that trial courts should require prosecutors to bring a Motion in Limine so that courts can evaluate the factual basis for arguments about racial motive or other case theories with racial dimensions.[153] But prosecutors could go through the same exercise

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[147] Some might interpret the research as showing that this type of rhetoric "works" in motivating the jury to convict, but that is why it is important to recognize that prosecutors have an obligation to avoid rhetorical "foul blows." *See supra* Part II; *see also* Levine & Wright, *supra* note 4, at 65 (regarding the value of "remind[ing] prosecutors to earn the white hat, every day, by proper behavior and avoidance of gamesmanship: the white hat demands that its wearer actually *be* the good guy, not just claim to be playing the good guy part").

[148] In doing so, prosecutors should not explicitly reference race or invoke the stereotype of Black men as particularly violent. The Supreme Court recently stated that that "[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race." Buck v. Davis, 137 S. Ct. 759, 775 (2017).

[149] If the neighborhood is associated with a particular racial group or people of color more generally, prosecutors should handle this reference carefully, as explained in *infra* Section IV.B.

[150] Bowman, *supra* note 6, at 74 (discussing Aliwoli v. Carter, 225 F.3d 826 (7th Cir. 1995)). In Aliwoli, prosecutors argued that defendant shot police officers because of his "Black Muslim faith" even when witnesses rejected that proffered motive. The concurrence correctly concluded that "to ascribe to a defendant a motive to kill simply because he is Black Muslim and because other African-Americans, or other Muslims, have expressed distrust (or worse) of differing races and religions, is to engage in wholly inappropriate stereotyping." *Aliwoli*, 225 F.3d at 832 (Rovner, J., concurring in part and dissenting in part).

[151] California recently passed The Decriminalizing Artistic Expression Act, which restricts the use of rap lyrics in criminal trials. CAL. EVID. CODE § 352.2 (West 2022).

[152] *See* Andrea L. Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007) (discussing trial courts' admission of rap lyrics more than other types of lyrics, and prosecutors' use of those lyrics for, among other things, the creation of a "narrative framework or theory of the case" that is consistent with jurors' expectations, including their implicit biases); *see also id.* at 4 (noting that courts incorrectly fail to consider "the existing social constraints and artistic norms" of rap music. "Rap music lyrics are neither inherently truthful, accurate, self-referential descriptions of events, nor necessarily representative of an individual's mindset."). Additionally, courts should be particularly cautious about admitting rap music lyrics given that priming studies sometimes use rap music to prime a variety of negative stereotypes. Wilkins, *supra* note 92, at 322.

[153] Bowman, *supra* note 6, at 107–10.

even when a court does not require a motion, looking carefully to ensure that the evidence, rather than mere stereotypes, supports the theory. Additionally, even if a witness offers a racial motive for a crime, prosecutors should make sure that the witness is not simply offering a stereotype, should ensure that they have not suggested the stereotype theory to the witness, and in some cases should consult an expert witness to help evaluate the basis for the racial motive alleged.[154] While hate crime cases may be particularly likely to raise these issues,[155] prosecutors should carefully consider the potential role of stereotyping in witness testimony in all cases.

C. AVOID RACIAL SLURS AND CODED LANGUAGE THAT MORE SUBTLY INVOKES RACIAL STEREOTYPES

Many types of language can invoke racial stereotypes, beyond the dehumanizing and othering language discussed above. Prosecutors should consider the variety of ways that these stereotypes can be invoked, to better guard against using subtle as well as more explicit invocation of stereotypes.

It should be obvious that prosecutors should not use racial slurs.[156] But the list of potential racial or ethnic slurs is more extensive than prosecutors may realize, so it may be helpful to consult the online Racial Slur Database and think about the variety of words that can be considered slurs.[157] While some people may argue with some of the terms that are included in that database, they fit within the dictionary definition of "slur," which is "a. an insulting or disparaging remark or innuendo" and "b: a shaming or degrading effect."[158] Prosecutors should avoid terms that are insulting, disparaging, or degrading. When these terms are used by a witness or other individual, prosecutors should not repeat them, but should instead explicitly disavow the use of the term and reinforce the debiasing instruction discussed below.[159] If it is necessary to refer to the testimony later, use a euphemism, such as "the n word." These methods signal to the jury the need to guard against the effect of the witness's language.

Additionally, prosecutors should avoid coded language that appears to be race neutral but actually triggers racial stereotypes.[160] As discussed in

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[154] For example, the court incorrectly accepted stereotypes, without actual evidence of their applicability in the particular case, in State v. Chu, 643 N.W.2d 878, 883–84 (Wis. 2002). The court allowed a fact witness to offer stereotypes about familial obedience in Korean culture, and the prosecutor to argue motive based on these stereotypes without any evidence that the defendant shared that belief or had acted on it. The opinion notes that the witness testified to having conversations with the defendant about "his family makeup and the Korean culture." The opinion does not indicate that the witness testified about the specifics of those conversations; instead, the witness seems to have just described her own "understanding" of the defendant's beliefs in stereotypical terms, without providing a clear link back to a specific conversation. *See id.* at 884.

[155] *See* Bowman, *supra* note 6, at n.307 (discussing how prosecutors should handle these issues when prosecuting hate crimes and citing scholarship focused more specifically on this issue).

[156] *Id.* at 100. While that should be obvious, prosecutors and even judges have been known to do so. Johnson, *supra* note 105, at 1748-49 n.29 (regarding judges); *id.* at 1754, 1757, 1773–74, 1777 (regarding prosecutors' use of slurs).

[157] *See* THE RACIAL SLUR DATABASE, http://www.rsdb.org/ [https://perma.cc/LUD6-6ZT7] (listing slurs against various racial or ethnic groups across the world and explaining their meaning).

[158] *Slur*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/slur [https://perma.cc/N7WW-NKJE].

[159] *See also infra* Section IV.E regarding damage control.

[160] As explained in Section III.B above, coded language refers to language that invokes stereotypes without directly referencing them. There is no bright line between explicit use of stereotypes and coded

Section III.B, coded language is particularly powerful because it does not violate our egalitarian norms and therefore does not put low-prejudiced individuals on guard against being influenced by it. Thus, prosecutors seeking to avoid triggering racial stereotypes should avoid language that could be perceived as a coded reference to race, regardless of whether the prosecutor intends to invoke race.[161] While it is impossible to summarize all types of coded language,[162] this Article offers three strategies that prosecutors can use to avoid inadvertently using coded language.

First, prosecutors should avoid language that indirectly emphasizes or calls attention to the defendant's race. For example,

> Prosecutors have called attention to the Blackness of the defendant by making extraneous references to African American hairstyles as a coded proxy for pointing out a person's race, the fact that a defendant lives in a segregated Black neighborhood, or to the fact that he or she professes a faith limited to African American adherents.[163]

These examples, and many other potential references, involve an association between the idea being referenced and a particular racial group.

Second, avoid linguistic proxies for race. Scholars have identified terms such as "inner-city," "thug[]," and "welfare queen[]" as being racially coded.[164] While these terms could be used to apply to people of all races, their historical context reveals their racial connotations. For example, during the debates about punishment for crack cocaine, politicians and media members frequently suggested that "crack cocaine was seeping from the inner city into the suburbs and rural America"; this statement in the context of "white flight" from cities shows the linkage of neighborhoods, race, and crime.[165] Other examples include "ghetto," "shady," "sketchy," and "hood."[166] As these examples indicate, slang terms can frequently serve as a linguistic proxy for race, even when prosecutors fail to recognize the racial dimensions of this slang. Prosecutors should be wary of using slang terms, as they may not recognize these terms' racial dimensions.

Even when slang terms are not overtly racial, they can exemplify a third type of coded language, language that reinforces the us-them idea discussed above. For example, a prosecutor inappropriately referred to "po-leese" instead of "police" to subtly reinforce an argument about distrust of the

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language, and many authors categorize use of animal imagery as coded rather than explicit. *See* Heller *supra* note 35; Prasad, *supra* note 31.

[161] *See* Richard Delgado & Jean Stephanic, *Images of the Outsider in American Law & Culture: Can Free Expression Remedy Social Ills?,* 77 CORNELL L. REV. 1258, 1283 (1992) (noting that coded language, "whether intended or not, convey[s] racially charged meanings"). For example, scholars agree that "welfare queen"" is racially coded, but people using that term may not recognize its racial dimension. *See, e.g.*, Jewel, *Neurorhetoric*, *supra* note 9, at 681. However, the effect on the listener will be the same regardless of the speaker's awareness or intent. *See id.*

[162] Bowman, *supra* note 6.

[163] Alford, *supra* note 30, at 353 (internal citations omitted).

[164] Prasad, *supra* note 31, at 3098.

[165] Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 629 (2000); *see also id.* ("Sociologists suggest white fear is the result of an increasing disconnection between the problems of the inner city and life in the suburbs, and an increasing disconnection along racial lines.").

[166] Calvin John Smiley & David Faunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America,* 26 J. HUM. BEHAV. SOC. ENV'T 350, 354 (2016).

police in the community of color where a crime occurred.[167] This use of slang introduced by the prosecutor, rather than referencing witness testimony, inappropriately reinforced the "us-them" dynamic that divided the jury from the defendant.[168] Prosecutors should avoid introducing slang into a trial that is not used by witnesses. When witnesses use slang, it may be justifiable to reference that slang when the context makes it important to do so, such as when needed to clarify the link between the prosecutor's argument and the evidence supporting that argument. Even so, prosecutors should be cautious about any associated stereotypes and should avoid unnecessary repetition of this slang, as discussed below.

It is difficult to catalogue all the possible coded language that can invoke stereotypes, but this section provides ways that prosecutors can think more carefully about their language choices to avoid both explicit slurs and coded language that may inadvertently invoke stereotypes.

D. AVOID UNNECESSARY REPETITION OF OR EMPHASIS ON RACE

Additionally, prosecutors should consider whether they need to mention race at all, and they should avoid unnecessary references or emphasis.[169] For example, race is sometimes mentioned in connection with showing identity, but when identity is undisputed, even a single reference to race for proving identity would be inappropriate.[170] Even when identity is disputed, prosecutors should make only minimal reference to race.[171] In one case, the prosecutor's opening statement was styled as a "mystery" containing sixteen references to "black males," "the larger black male," and "the smaller black male."[172] The court did "not condone the gratuitous use of race," but failed to note that the prosecutor could have simply referred to "the larger male" and the "smaller male" after a single reference to race, while telling the same "mystery" story.[173] The unnecessary reference to and repetition of the defendants' races reinforced the likelihood of triggering unfavorable stereotypes.

That is because repetition is a powerful rhetorical tool that can subtly shape how listeners analyze information.[174] Repetition, when used rhetorically, draws attention to the ideas being repeated and makes them

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[167] State v. Monday, 257 P.3d 551, 553–54, 557 (Wash. 2011).

[168] *See id.*

[169] I have previously argued that courts should require that racial references are considerably more probative than prejudicial. Bowman, *supra* note 6, at 104–07. Prosecutors could also use that framework in deciding whether to use racial references.

[170] *See* State v. Rogan, 984 P.2d 1231, 1240 (Haw. 1999) (concluding that the lower court's reliance on identity to justify racial reference was improper when identity was not an issue).

[171] *Cf.* State v. Mitchell, 783 A.2d 1249, 1253 (Conn. App. Ct. 2001) (prosecutor's opening statement contained sixteen references to "black males," the "larger black male," and "smaller black male" in a crime committed by two people; the court "did not condone the gratuitous use of race" but did not find a reversible error).

[172] *Id.* at 1253.

[173] *See id.* at 1254–55.

[174] For example, repetition of a statement makes people more likely to believe that the statement is true. *See, e.g.*, Lynn Hasher & David Goldstein, *Frequency and Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 111 (1977) ("The present research has demonstrated that the repetition of a plausible statement increases a person's belief in the . . . validity or truth of that statement.").

easier to remember.[175] It can add power, rhythm, and emotion to speech or writing.[176] Dr. Martin Luther King Jr. used repetition to great effect in his "I Have a Dream" speech.[177] Marketers use rhetorical repetition, such as in the phrase "What happens in Vegas, stays in Vegas."[178] And "successful political rhetoric" often involves "repetition, especially repetition of a thematic word or phrase" such as repeated use of "frivolous" when referring to disfavored litigation.[179] Rhetorical repetition encourages unconscious processing of information[180] and creates more certainty in the beliefs being subconsciously invoked.[181] Courts sometimes recognize the rhetorical power of repetition when analyzing prosecutorial misconduct by considering whether misconduct was repeated or pervasive.[182] Given the rhetorical power of repetition, prosecutors should avoid unnecessary references to race and should minimize those necessary references.[183]

E. CONTROL DAMAGE WHEN OTHERS INVOKE RACE

Finally, prosecutors should be prepared to handle racially biased rhetoric by other participants in the criminal justice system. Prosecutors should strive to create a foundation that will protect against racially biased rhetoric tainting criminal trials and to respond appropriately when encountering that rhetoric at trial.

First, prosecutors should work with their own witnesses to educate them about the issues discussed in this Article, including the ways in which coded language and us-them appeals can trigger jurors' implicit biases, even for low-prejudiced individuals. Prosecutors should help their witnesses avoid coded language or other invocation of stereotypes. For example, prosecutors should counsel police to avoid animal imagery, including verbs like "hunt," and to avoid reliance on stereotypes of Black men as violent or dishonest. Similarly, prosecutors should counsel witnesses to avoid unnecessary repetition of explicit references to race or more subtle references to things associated with race, such as neighborhoods. In doing so, prosecutors should

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[175] Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM. & RHETORIC: JALWD 99, 114 (2017).

[176] Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 417 (2002).

[177] John Sonsteng, Samuel Heacox, Hannah Holloran & Cara Moulton, *Teaching the Art of Effective Advocacy in the 21st Century: A Paradigm Shift*, 44 MITCHELL HAMLINE L. REV. 163, 165 n.5 (2018) (noting that this seventeen-minute speech uses the phrase "I have a dream" eight times and also repeats other key phrases, such as "let freedom ring").

[178] Patrick Barry, *Rhetorical Repetition*, MICH. B.J. 38, 38 (Aug. 2020). Classical rhetoric uses different terms for repetition depending on the placement of the repeated terms within the overall construction. *See, e.g.*, *id.* at 39. Barry effectively distinguishes between rhetorical repetition and awkward repetition.

[179] Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC: JALWD 47, 73 (2018).

[180] *See id.* at 51 (analyzing the effect of repeated "us-them" rhetoric in influencing the passage of the Prison Litigation Reform Act by creating an exaggerated dichotomy separating Congress from both the judiciary and the prison population, "pull[ing] listeners into [the speakers'] privileged world and even discourag[ing] independent thought about 'The Other.'").

[181] Jewel, *Neurorhetoric*, *supra* note 9, at 664.

[182] Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 517 (2011).

[183] For additional discussion of the line between necessary and unnecessary references to race, see Bowman, *supra* note 6, at 107–10, 119.

seek not to alter the substance of witness testimony, but instead to help the witness express that substance to avoid invoking stereotypes or biases.

Second, prosecutors should support the use of debiasing jury instructions and should refer to them as needed. As discussed above in Section III.C, empirical research shows the effectiveness of jury instructions to support egalitarian decision-making and to help jurors guard against being influenced by implicit bias. Many authors have proposed model jury instructions to meet these goals,[184] and the value of these models may vary from case to case.[185] While the exact wording of these instructions may vary, they should remind jurors not to let their decision-making be influenced by bias or prejudice.[186] These instructions should ideally be given before opening statements, rather than at the close of evidence,[187] which would then allow prosecutors to refer back to those instructions at trial if a witness or defense counsel uses racially biased rhetoric. By flagging the problematic language and reinforcing these jury instructions, prosecutors would facilitate jurors guarding against being influenced by bias or prejudice.

Third, if defense counsel uses racially biased rhetoric, do not accuse them of "playing the race card" or use the doctrine of "invited error" to justify an aggressive response. The phrase "playing the race card" is pejorative, suggesting "a dirty trick" to "exploit our sympathies to racial injustice in order to secure some political or material advantage."[188] Defense counsel rightly fear being blamed for "playing the race card" when challenging prosecutors' use of racially biased rhetoric, particularly colorblind coded language.[189] Prosecutors should therefore be careful to avoid contributing to that impression by the jury. If defense counsel objects to prosecutorial language, or uses racially biased rhetoric themselves, prosecutors should respond with a measured response that addresses the substantive issue and avoids inflaming the situation.[190] To help ensure a measured response, prosecutors should try to anticipate in advance what

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[184] *See* Thompson, *supra* note 13, at 1301–06 (including an instruction on life experiences that does not mention race, as well as instructions on general racial stereotypes and specific stereotypes that have been invoked in a particular case, and specific language about biases affecting memory, judgments about believability, and decision-making); Ingriselli, *supra* note 117, at 1718–19, 1730–33 (describing an experiment testing the effectiveness of a variety of different instructions, concluding that egalitarian and race-salience instructions were most effective when combined and rejecting the effectiveness of "self-affirming" or "procedural justice" instructions); 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) (quoting the instruction that Judge Bennett gives routinely). Some of these instructions give detail about the ways in which implicit biases can affect judgments.

[185] *See* Thompson, *supra* note 13, at 1301 (showing how an instruction on life experiences would be useful in courts that routinely give a similar instruction or in cases in which the prosecutor argued that jurors should rely on their life experiences in making credibility determinations between people of different races.).

[186] *See* Bowman, *supra* note 6, at 90–92, 95–98 (discussing studies on effective jury instructions and how to effectively make race salient and prime for unbiased decision-making).

[187] *See id.* at 97–98 (explaining empirical studies showing the value of this timing).

[188] Christopher A. Bracey, *The Color of Our Future: The Pitfalls and Possibilities of the Race Card in American Culture*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 89, 93–94 (2009).

[189] Alford, *supra* note 30, at 337.

[190] *See* Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1320–21 (1996) (noting that while formally prosecutors are required to give a proportional response to defense error, in practice "limitations on invited error often give way, leaving prosecutors a blanket license for improper argument"); Bowman, *supra* note 55, at 372–73 (discussing courts' erroneous uses of invited error when considering both whether the prosecutor's comments were proper and whether any error was harmless).

arguments defense counsel might raise, and could even consider bringing a motion in limine to clarify the scope of appropriate argument in cases likely to raise contentious issues.[191] Finally, in cases where defense counsel's rhetoric is an issue, prosecutors should reinforce the debiasing instructions as discussed above. While prosecutors cannot prevent all possible incidents of racially biased rhetoric in the courtroom, their responses can help mitigate any damage from that rhetoric.[192]

V. CONCLUSION

In recent decades, prosecutors have played an important role in leading movements for changes within the criminal justice system.[193] These prosecutorial changes have included, but are not limited to, evolving approaches to domestic violence and child abuse issues, as well as creation of drug and veterans' courts to shift the focus from incarceration to treatment and services.[194] This Article urges prosecutors to act in that tradition of reform by changing their rhetoric used in arguing cases and their approach to racially biased language used by other participants at trial.

Specifically, the Article aims to give prosecutors strategies for framing prosecutions to avoid tainting prosecutions with racial bias. Many common prosecutorial arguments and rhetorical choices are likely to trigger jurors' implicit biases, even when prosecutors do not intend that result. And prosecutors' own implicit biases may obscure the racial dimensions of these rhetorical choices. This Article seeks to unpack the underlying social science research showing the racial biases embedded in this rhetoric, and it provides prosecutors with concrete strategies to use in reforming their rhetorical choices while still effectively prosecuting cases. It also provides strategies for prosecutors trying to prevent racially biased rhetoric by other participants in trials and to respond more effectively when others use this language.

California's new Racial Justice Act may require use of these strategies, and prosecutors in other jurisdictions should see them as best practices for implementing their ethical duty to seek justice in a way that prevents racial bias from tainting prosecutions. These strategies can be used by both prosecution offices broadly, and individual line prosecutors more specifically,[195] to seek justice rather than obtain convictions tainted by racially biased rhetoric.

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[191] Cicchini, *supra* note 2, at 923–25; Bowman, *supra* note 6, at 107–10. While those articles recommend that defense counsel or the court, rather than prosecutors, use motions in limine for this purpose, prosecutors could take a similar approach to help ensure that both parties and the court are all in agreement about the lines between proper and improper argument in particularly difficult cases.

[192] The prosecutor's response is particularly likely to influence the jury, given that jurors tend to view prosecutors more favorably than defense counsel or defendants. *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1529 (2015).

[193] *See* Kristine Hamann & Laura Greenberg-Chao, *The Prosecutor's Evolving Role Seeking Justice Through Community Partnerships and Innovation*, PROSECUTOR, Jan. 2018, at 13, 13.

[194] *Id.* at 17–21; *see also* Kristine Hamann & Rebecca Rader Brown, *Best Practices for Prosecutors: A Nationwide Movement*, GPSOLO MAG., Sept./Oct. 2016, at 62 (noting that twenty states have formed statewide best practices committees for prosecutors).

[195] *See* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 559–63 (2020) (exploring the tensions between career prosecutors and elected prosecutors seeking reform and the role of both groups in effectively implementing changes).