Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis

Ryan Patrick Alford
United States District Court for the Southern District of New York

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* Law clerk to The Honorable Robert L. Carter, Southern District of New York
and doctoral candidate of the University of New Mexico. B.A., Carleton University, 1998;
M.A., University of Amsterdam, 2000; J.D., New York University School of Law, 2005.
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INTRODUCTION

The United States has a sordid history of denying Blacks fair criminal trials. The Civil Rights Movement brought this history to light and spurred the evolution of jurisprudence aimed at preventing overt racism from infecting the criminal trial process. However, the effectiveness of the doctrine is an open question at present. While courts have explicitly forbidden the use of argumentation that injects “the issue of race” into the trial, and have admonished prosecutors not to make use of racist arguments, it is unclear whether these holdings bar indirect, yet highly inflammatory, racist prosecutorial summations.

This Article addresses the question of the appropriate response of appellate counsel for Black defendants tarred at trial by the indirect deployment of powerful racial stereotypes. The crux of the problem is that even now, the courts only take exception to blatant racist appeals, even though indirectly racist summations can have a determinative impact at trial. In laying out the contours of the problem, we must draw upon the discipline of rhetoric, or persuasion through oration, to describe various techniques of intentional indirectness that prosecutors use to obviate the possibility of appellate review under the stringent standards of the Fourteenth Amendment.
In doing so, it is possible to demonstrate how the congruency between the techniques being used to deploy racist stereotypes in prosecutors’ closing argument and the classical techniques of indirect assertion might be used to provide evidence of intentional misconduct, and thus to provide access to this more searching standard of appellate review of these summations. This Article will hopefully serve as an indication of how an interdisciplinary approach to the problem will not be useful only in illuminating its contours, but also to any challenge to the injustices that result from this type of prosecutorial misconduct. To this end, the second half of the Article also outlines an interdisciplinary approach to writing appellate briefs that attempts to highlight and address these implicitly racist prosecutorial summations.

Part one of this Article is an outline of the history of judicial approaches to racist summations. This section is dedicated to supporting the proposition that racist argumentation in prosecutors’ summations was widely acceptable to the appellate courts until two decades ago. Until that time, prosecutors could describe defendants with racially tinged analogies or even with recognizable racial epithets, if the evidence “supported” the characterization. This changed in 1987, when the death penalty decision McCleskey v. Kemp included reasoning that suggested that racist descriptions of a defendant were good grounds for an equal protection challenge to the conviction.\footnote{McCleskey v. Kemp, 481 U.S. 279, 309, n.30 (1987).} Several of the federal Circuit Courts of Appeal then elaborated upon this position, making it clear that a defendant subjected to racist oratory by the prosecutor is entitled to a standard of review that places the burden of proof on the prosecutor to demonstrate a good faith reason to advance the allegedly racist arguments. However, as this Article details, the decisions of the courts that explicitly forbade racist prosecutorial discourse did not destroy the incentive to engage in this practice rather, they merely created an incentive for prosecutors to avoid being caught.

Part two explains the continuing and powerful incentive to “define” Black defendants by reference to widely circulated and deeply rooted racist caricatures. After McCleskey, prosecutors can continue to try to call these racist stereotypes to the minds of the jurors surreptitiously during their closing arguments. Both classical rhetorical theory and modern persuasion theory indicate how useful appeals to stereotypes can be, and provide some evidence that prosecutors concerned with winning close cases might be prepared to appeal to any latent racism in the minds of the jurors. As such, it is unclear whether the doctrine in McCleskey that allows for equal protection challenges to racist summations has provided, or will provide, a significant disincentive to implicitly racist rhetorical practices. The key question is whether or not judges can learn how to recognize
the techniques that prosecutors have used to covertly advance racist argumentation.

Part three demonstrates that the appellate courts are not adept at scrutinizing summations for implicitly racist arguments, as they failed miserably to notice the most thinly veiled attempt to tar Wanda Jean Allen, a Black woman convicted of murder and later executed. Allen's case demonstrates the impact of the court's failure to recognize and address racist arguments that rely on classical rhetorical figures of definition, which are extremely effective in catalyzing a racist response in jurors.

In part four, I explain why it is so easy for prosecutors to evoke strong racist responses towards African Americans without explicitly deploying any clearly objectionable language that would invite reversal. Here, I focus not on the rhetorical techniques that would serve to achieve this end, but on the raw material for these operations—the enduring fear and mistrust of African Americans, which has crystallized into a stereotype known as the "brute caricature." Empirical psychological studies of the predictive power of this caricature illustrate why it is a powerful resource for prosecutors charged with making a case against Black defendants charged with violent crimes. The incentive for the deployment of figures of definition that associate a Black defendant with the stereotype is thus made clear.

Part five outlines four rhetorical techniques (classically denominated the "figures of definition") that prosecutors often use to provoke a racist response from juries, methods that usually do not lead to reversal. The four figures are systrophe, antonomasia, circumitio, and paralipsis. Despite the fact that these figures are drawn from texts dating back to antiquity, they are still routinely used, as the cases discussed and cited illustrate. The case studies indicate that prosecutors are adept at deploying these figures (even if the prosecutors have no theoretical knowledge of the means they use to accomplish their rhetorical goals) and can even combine them when attempting to brand a Black defendant as a deviant outsider, i.e., one not deserving of mercy or the presumption of innocence.

Finally, part six outlines a method that appellate attorneys raising claims of prosecutorial misconduct on direct review might use to uncover and explain how implicitly racist argumentation has worked to prejudice their clients at trial. This section contains the argument that scholars of rhetoric and persuasion theory should lend their insights to appellate attorneys in order to reconstruct the intention of the prosecution when they make use of figures of definition that mask the deployment of racist stereotypes. The Article concludes with a discussion of how an appellate attorney's scrutiny of these summations through the lens of rhetorical

2. See discussion infra pp. 26–35.
theory might be the first step towards obtaining holdings that would nar-
row the range of rhetorical devices that can be used to racist ends, so that
an even more searching review of prosecutorial argumentative miscon-
duct could be brought about in the near future.

I. UNDERSTANDING THE IMPORTANCE OF RACIST RHETORIC
IN THE SUMMATIONS OF CRIMINAL TRIALS

While prosecutors may attempt to inject racism into a criminal trial
at any point during the proceedings, the closing argument remains the
most opportune moment to do so. The summation is the last word spoken
by the prosecutor to the jury and is relatively unencumbered by formal
restraints. The closing argument has been described as “the high point in
the art of advocacy; it is the combination and culmination of all its many
elements. It is the climax of the case.”5 “It is the most important phase or
segment of any jury trial.”

A. The Impact of a Prosecutorial Summation Alluding to Racist Stereotypes
on a Defendant of a Minority Race and the History of
the Courts’ Failure to Acknowledge that Harm

In criminal trials, the summation is the moment where the persua-
sive powers of the prosecution are strained to their fullest, and also the
moment at which the impact of any “foul blows”7 inflicted by the prose-
cutor upon the defendant have the greatest effect. Racism at this point in
the trial is particularly prejudicial, since the prosecution’s use of unfair and
inflammatory arguments “hurts the defendant just as much [as if the]
prejudicial blasts come from the trumpet of the Angel Gabriel.”8 In re-
sponse, courts have diverged from the common law approach (which
depended upon the corrective mechanisms inherent to the adversarial
system)9 and developed a doctrine that allows appellate judges to address


[the United States Attorney is the representative not of an ordinary party to
a controversy . . . . He may prosecute with earnestness and vigor—indeed, he
should do so. But, while he may strike hard blows, he is not at liberty to
strike foul ones. It is as much his duty to refrain from improper methods cal-
culated to produce a wrongful conviction as it is to use every legitimate
means to bring about a just one.

9. See Marian Neef & Stuart Nagel, The Adversary Nature of the American Legal Sys-
both the inflammatory argumentation advanced by prosecutors in general and racist summations in particular.

The new doctrine developed on the basis of reasoning in *McCleskey v. Kemp*¹⁰ (described extensively infra), involves an application of the Equal Protection Clause (of the Fourteenth Amendment to the U.S. Constitution) to the closing arguments of criminal trials, since the use of a defendant's Blackness as evidence of his guilt is clearly unequal treatment. The new restrictions on summations are an appropriate limitation on the arguments of prosecutors since they are “the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹¹ However, while it has long been noted that the prosecution’s rhetorical blows should be carefully policed, their power to elicit racist responses has until recently gone unrecognized, at least by the courts.

The recognition of the power of the summation to inflame racist attitudes in the jury is a relatively recent development. Historically, courts have used a legal fiction to forestall an adequate assessment of the dangers inherent in racist prosecutorial argumentation: that closing arguments merely restate the evidence in a logical and sequential manner. This fiction ignores the fact that closing argument is customarily used to persuade the jury and to move them—emotionally—to take action. As a result, even when the courts did take note of the power of the summation in a criminal trial, they cast this power in *logical* terms:

> [C]losing argument serves to *sharpen and clarify the issues* for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony and to *point out* the weaknesses of their adversary's positions.... In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to *marshal the evidence* for each side before the submission of the case to judgment.¹²

However, while the courts embraced this fiction, lawyers disdained this logical approach to summation. The leading texts on summation counsel lawyers that “the closing argument is an exercise in persuasion” and explicitly instruct them not to “consider the closing argument simply

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¹⁰. 481 U.S. 279
as an opportunity to review the evidence and to relate the evidence to the law. Such a view stultifies the noble art of argumentation."

Courts failed to recognize the emotional power of racist argumentation in trials, despite the wide chasm between their idealized view of summation and the reality of summations as delivered by members of the practicing bar. Consequently, appellate courts traditionally rejected appellants' complaints of racist argumentation. Until recently, federal courts embraced an analysis that focused on whether the use of a comparison between a negative racial caricature and the defendant was a reasonable argument, based on facts in the record. The courts ignored the prejudicial impact of the emotional inflammation caused by the racist comparison on the defendant, since the courts ignored all the extra-logical dimensions of prosecutorial argumentation.

While it is difficult to locate an early example of racist courtroom discourse directed against Black defendants, probably owing to the prohibitive costs of appeals before appellate counsel was provided free of charge, it is possible to find analogous examples involving Jewish defendants dating from this era. The case of Michael Heitler is of the most well-known examples of the courts' insistence that racist argumentation should only be considered prejudicial if it is false. Despite the fact that the prosecution's characterization of Heitler repeatedly made use of anti-Semitic epithets, the Court of Appeal affirmed the conviction:

"Counsel is also charged with having said, when speaking of a Jewish defendant named Michael Heitler: 'How much like Shylock he looked. He demanded his pound of flesh and he bled his victims'... It was not for the court to determine the wisdom of the reference, or the appropriateness of the characterization. The court was merely to determine whether there was any evidence to justify the argument."

In essence, before the advent of a more expansive reading of the Fourteenth Amendment, the courts considered a defendant's purported correspondence with the stereotype as enough to justify a comparison between the defendant and a racial caricature like Shylock, the Christian-hating and vicious Jewish moneylender of Shakespeare's *Merchant of Venice*. This analysis gave prosecutors license to describe defendants as

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13. JAMES W. JEANS, TRIAL ADVOCACY 368-71 (1975). Jeans' text was published within that era's leading series of practice guides, West's "Handbook Series."
17. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE ("I hate him for he is a Christian; But more for that in low simplicity. He lends our money gratis, and brings down the
"Shylocks" or as "Black Brutes" (a caricature I will describe extensively infra). However, the courts’ tolerance for overtly racist argumentation declined when overt racism came under attack within society as a whole from progressive social movements.

B. The Courts’ Recognition of the Harm Caused by Racist Summations Did not Destroy the Incentive to Inject Racist Argument into Criminal Trials

In the two decades following the Civil Rights Movement, federal courts began to rule that describing the defendant in derogatory racial terms was a violation of the Due Process and Equal Protection Clauses (of the Fifth and Fourteenth Amendments to the U.S. Constitution.) Drawing upon the holdings in cases decided by the various Circuit Courts of Appeal, the Supreme Court stated in 1987: “[t]he Constitution prohibits racially biased prosecutorial arguments.”

Several Circuit Courts of Appeal subsequently held that both the prosecutor’s use of racial epithets (e.g. “colored”) and calling the jurors’ attention to the defendant’s race (e.g., describing a defendant’s hair in order to call attention to her race) can constitute reversible error, even when not objected to at trial by the defendant’s counsel.

At present, a prosecutor who makes note of the defendant’s race during summation, who describes the characteristics that mark the defendant as a member of that race, or who uses racial epithets, increasingly subjects herself to the risk of reversal upon appeal. The principles of rhetoric and effective persuasion, however, continue to push prosecutors to define the Black defendant in negative terms that pander to the preconceptions of her audience, since racial stereotypes which stimulate fear of the defendant are a strong inducement to find the defendant guilty.

rate of usance here with us in Venice.”) See also Judith S. Koffler, Terror and Mutilation in the Golden Age, 5 HUM. RTS. Q. 116 (1983).


19. Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000) (holding that testimony about Sikh religious practices “that invited the jury to give in to their prejudices and to buy into the various stereotypes that the prosecutor was promoting” was constitutional error, although harmless); United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (holding the prosecutor committed reversible error in a racially charged case “by twice calling the African American defendants ‘bad people’ and by calling attention to the fact that the defendants were not locals, the prosecutor gave the jury an improper and convenient hook on which to hang their verdict”); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) (holding that “what is happening in Washington, D.C. is that Jamaicans are coming in, they’re taking over the retail sale of crack in Washington, D.C.”); United States ex. rel Haynes v. McKendrick, 481 F.2d 152 (2d. Cir. 1973) (holding that “prosecutor’s remarks introduced race prejudice into the trial and thereby denied petitioner his constitutional right under the due process clause to a fair trial.”); see also ROBERT M. GOLDMAN ET AL., 6 CRIMINAL LAW ADVOCACY § 4A.03(2)(t) (2005) (gathering cases after Bains discussing this point of law.)
Techniques that identify the defendant as a threat to the community are especially useful to prosecutors, since they serve to motivate jurors to punish the defendant (and to protect the community) by returning a guilty verdict.\textsuperscript{20}

If racism against Blacks is still pervasive within American society (and this Article posits that this is the case),\textsuperscript{21} there will be a strong incentive for prosecutors to cater to prejudices about African American defendants. It should be noted that trial advocacy texts routinely direct lawyers to “argue in terms of the already acceptable [and] consider the characteristics of the individual jurors”;\textsuperscript{22} thus, where the jurors possess latent racial biases, trial advocacy implicitly teaches prosecutors to pander to that bias. While the jury pool in many communities may no longer be exclusively White, this is not true of others, and legal doctrine reflects the fact that prosecutors often attempt to obtain all-White juries when prosecuting Black defendants.\textsuperscript{23} While one might object that racist jurors may be removed by \textit{voir dire} questions designed to expose juror’s racism, there is no reason to believe that virulent racists will be forthright and will withhold opinions that they know most members of society believe should not be expressed.

If it is likely that White jurors possess negative stereotypes about Black defendants, this creates a clear incentive for prosecutors to cater to jurors’ prejudices with racist argumentation, either overt or subtle. Given these incentives, it is the courts’ willingness to address covert racism that is crucial to the creation of an effective deterrent.

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[P]rosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.

\textsuperscript{21} On the basis of studies cited infra at n.67–68.

\textsuperscript{22} AL J. CONE & VERNE LAWYER, THE ART OF PERSUASION IN LITIGATION 333, (1985).

\textsuperscript{23} See Batson v. Kentucky, 476 U.S. 79 (1986). A potential juror who may admit: “want[ing] to find the [B]lack defendant guilty simply because ‘We gotta teach these niggers how to act’ . . . would destroy his credibility as an impartial factfinder.” JEANS, supra note 13, at 370. Furthermore, for every one venireperson who would otherwise openly use racial epithets, there are likely many more who harbor unconscious racism, of the type that is nearly impossible to expose in \textit{voir dire} (and which therefore necessitates a far more sensitive understanding by the appellate courts of how racist arguments can be promoted unnoticed.)
II. THE INCENTIVE STRUCTURE CREATED BY THE APPELLATE COURTS ENCOURAGES IMPLICITLY RACIST RHETORIC

A prosecutor tempted to make an implicit appeal to racism must consider the balance of risks and rewards. The rewards are particularly high when the case is very close, since it is then that the closing argument becomes determinative. "Closing arguments are best compared to the last minute of a basketball game: If one team leads by 20 points, the last minute will be meaningless; but if the game is very close, that last minute will be all that matters. Similarly . . . for a certain number of cases, the verdict hangs on the summation speeches." There are several related reasons why inserting implicitly racist argumentation into a summation might be attractive to prosecutors that relate to the rhetorical goals that it may help them to achieve, especially when they believe that a conviction is hanging in the balance. To understand the way these motivations might shape prosecutors' closing arguments, we must discuss the tenets of rhetorical theory.

A. Rhetorical Theory Indicates that There is Much to Be Gained by Implicitly Defining the Defendant as a Member of the Racialized "Other"

All modern texts discussing orations before the jury are beholden to Cicero and Aristotle. Countless manuals written about closing arguments highlight the two extra-logical aspects of public speaking, ethos and pathos, which the founders of the Western rhetorical tradition and those who followed in their footsteps elaborated upon in great detail. First is the importance of forming a personal connection between yourself and the jury based on shared beliefs and attitudes, thus creating a positive ethos that will predispose the jurors to be persuaded by your arguments. Second is appealing to the emotions of the jurors, so that they are not only inclined to believe that your arguments are correct, but to be moved to action through an emotional reaction. "Ethos, as well as emotional appeals, may also result in a favorable bonding or rapport between counsel and jury."

25. See the discussion of ethos, in section IIIA, infra.
26. Richard D. Rieke & Randall K. Stutman, Communication in Legal Advocacy, at ix (1990): "In the more than two thousand years since Cicero wrote, the relationship between research in rhetorical/communication theory and the practice of trial advocacy has waxed and waned, but it is probably as vital as it has ever been."
27. Lagarias, supra note 6, at 108: "the process of finding the best available means to persuade a jury or judge to reach a particular verdict may usefully begin by referring to Aristotle's categories: ethos, pathos, logos, and style."
28. Id. at 110.
One of the best means for a prosecutor to establish her ethos and to appeal to the jurors' pathos in the context of the criminal trial is to define the defendant as a member of the "other." In that way, the speaker can draw a line around the defendant, locating both herself and her audience on the same opposite of that line—thereby defining the attorney as a trustworthy member of the jurors' community. Defining the defendant as someone outside of the moral community can also induce a negative emotional response towards the defendant. Prosecutors have used this technique from the time of Cicero until the present. Classical rhetoricians described the methods of defining the terms critical to the oration (in this case, the essential nature of the defendant) in great detail.

Cicero defined "definition" as a rhetorical device whereby the speaker invites his audience to envision the relationship between one thing and the category to which it belongs, so that the audience will consider the similarities between the defined object and other members of the class to which it belongs. A speaker can best accomplish this task with the rhetorical "figures" of definition, which allow the speaker to posit that the person or thing being "defined" can be best understood by reference to its classification within a group. (Classical rhetoricians called these techniques of definition "figures" because at that time, the "figures of speech" included not only ways of expression but strategies of argument.) As will be discussed extensively below, some of these figures are explicit, involving a logical argument about why the defined object should be considered as a member of the class (horismus), while others rely upon the connections and ideas already in the minds of the listeners, and reinforce these already existing connections merely by allusion (antonomasia, systrophe, circumitio, and paralipsis).

29. See generally Craig Haney, Condemning The Other In Death Penalty Trials: Biographical Racism, Structural Mitigation, And The Empathic Divide, 53 DePaul L. Rev. 1557, 1583 (2004) stating that:

[r]acism involves the opportunistic use of race to disempower the group constructed as 'other' in order [t]o empower our group by contrast to 'them.' This requires the creation and maintenance of an essentialist, 'natural kinds' category scheme that imbues the 'others' with intrinsic, immutable qualities making them different from us. If the psychological distance between white jurors and African American defendants is even greater than usual—for example, if the jurors themselves are especially racially prejudiced—then the problem is much worse.


31. Even the trial advocacy texts that refer to the most modern approaches to persuasion and are ostensibly anti-classical in approach make reference to the Aristotelian categories. See Crawford, supra note 24, at 179.

32. CICERO, TOPICA § 3.13–14 (Tobias Reinhart trans., 2004).

33. These techniques will be discussed extensively infra.
According to both the canons of classical rhetoric and modern theories of public speaking, techniques of persuasion cannot be effective unless the speaker first understands her audience members' nature—and in particular, their well-fixed beliefs. Aristotle, a founder of the Western rhetorical tradition, explicitly recommended that the speaker take note of the prejudices likely to be held by the jurors, and to adapt her approach to conform to these preconceptions.\(^3\) While early theorists did not understand ideological beliefs and prejudices in the sophisticated terms that cognitive science employs today, their philosophy of mind led them to draw surprisingly similar conclusions about how preconceptions would shape perception.\(^3\)

In any modern multicultural society, particularly in those founded upon the subordination of one or more racial groups, a prosecutor's desire to adapt his rhetoric to the demands of his audience, especially when that audience is comprised only of members of the dominant race, can lead to oratory containing racist allusions, both open and hidden. The temptation to invoke a commonality with the jurors on the basis of racist beliefs, and to motivate the jury to deliver a verdict by appealing to these same beliefs can be significant. In fact, social science has revealed these beliefs to be both widely held and quite likely to provoke a rhetorically desirable response, if evoked.\(^3\) However, the likelihood that prosecutors will invoke them is determined not only by the probability that these arguments would be well received by juries, but more significantly, whether they will provoke censure by judges.

B. Appellate Courts Cannot Provide a Disincentive to Prosecutors' Use of Implicitly Racist Summations Unless they Learn to Recognize the Rhetorical Techniques that Call to Mind Racist Caricatures

The risks associated with advancing objectionable argumentation include the possibility of sanctions, either at the trial or on appeal. However, the possibility of sanctions is so remote as to be of negligible importance.\(^3\) A trial judge can admonish the prosecutor during his closing argument, but the probability that the trial judge will chastise the

34. See, e.g., ARISTOTLE, THE RHETORIC, § 1390a (George. A. Kennedy trans., 1991) ("People always think well of speeches adapted to, and reflecting, their own character: and we can now see how to compose our speeches so as to adapt both them and ourselves to our audiences.")

35. Aristote spoke of the universals, CATEGORIES AND DE INTERPRETATIONE § 2a35-2b7 (J.L. Ackrill trans., 1963), while the Stoics described in more detail the preconceptions known as the koinai ennoia. See also DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS § 7.39 (Robert Drew Hicks, trans., 1938).

36. See section IV, infra.

prosecutor for an implicitly racist argument is very low, given that *sua sponte* reprimands for argumentative misconduct are very rare indeed; and because the defense bar is very wary of making any objections during prosecutors' summations:

Remember that interruptions of your opponent's argument are to be avoided unless he says something outrageous .... Nothing is so devastating as to have the court say, "Well, Mr. Geoghan, there is a certain leeway allowed in summation; your objection is overruled." 38

The advice not to object during a prosecutor's summation seems sound, given that the remedy for such objections is illusory. Empirical studies have shown that a detailed curative instruction from the trial judge to the jury only serves to emphasize the improper consideration in the jurors' minds, increasing the likelihood that they will consider what the judge has told them not to, owing to psychological reactance. 39 Since "[m]ost trial judges are leary [sic] of *sua sponte* interventions," the defense counsel's failure to object "usually precludes a curative instruction, a warning about further remarks, or some form of amelioration." 40

The only adequate forum for a defendant prejudiced by a racist summation to raise this claim is the court of appeal, since the defense at trial is unlikely to broach the issue of racist argumentation for fear of aggravating the injury. Should a defendant subjected to a prosecutor's prejudicial summation raise that issue in her appeal, she will discover that the risk of reversal is directly proportional to the transparency of the racist argumentation in the closing argument. This is because the courts have held that the Fourteenth Amendment is not implicated by summations where the courts find merely a logically irrelevant "negative characterization of the defendant," 41 rather than an appeal to the jurors' racial prejudice, and yields only a deferential standard of review using the *Darden* standard. 42

Even if the prosecutor's references to the defendant are held to be "abusive, opprobrious, or otherwise unflattering," the trial court's ruling on the negative characterization of the defendant is subject only to a deferential standard of review, as long as the references are deemed not to have a racial dimension, which is usually the finding when they are not

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40. Arrieta-Agressot v. United States, 3 F.3d 525, 528 (1st Cir. 1993).


42. See id. (*Darden* standard discussed infra, p. 23).
When asserting a claim of (presumptively non-racist) prosecutorial misconduct during summation, "the defendants-appellants face a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial." The appellant must then demonstrate that the abuse was so extreme as to constitute a violation of the guarantee of due process found in the Fifth and Fourteenth Amendments of the U.S. Constitution.

Under *Darden*, "The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process", a very difficult demonstration to make. Under the *Darden* standard, a court will not reverse a conviction unless the defendant shows a denial of due process, even if the court finds that the prosecutions' prejudicial arguments were deplorable and unprofessional. Although judges can voice criticism in censorious dictum, this is largely ineffective, "since prosecutors will gladly pay the small price of a ritualistic verbal spanking" in order to win their cases.

Conversely, when, as in *McCleskey*, the court determines that the argumentation is racist, rather than merely opprobrious, the relevant standard is based on the guarantee of the equal protection of the laws, rather than the right to due process—the former providing a far more

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45. *Darden*, 477 U.S. at 183 (holding that the appellant's "trial was not perfect—few are—but neither was it fundamentally unfair.").

46. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d. Cir. 1946) (Frank, J. dissenting). As Judge Jerome Frank noted, prosecutors are unfazed by even the stinging criticism from the appellate courts if the conviction is permitted to stand:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, "Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely 'ceremonial.'" Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.
generous amount of legal support to this claim of error. Following that decision, courts must consider racist argumentation prima facie evidence of a violation of the Equal Protection Clause. As such, the burden shifts to the government to demonstrate that the error was harmless beyond a reasonable doubt under the standard adopted by the Supreme Court in Chapman v. California. The McCleskey standard is the most searching standard of review applied to prosecutorial summations by appellate courts. The defendant who can point directly to the prosecutor’s use of racist argumentation at his trial can make a case for reversal that is far less complicated than that of the defendant who can only demonstrate that the prosecutor used an ostensibly race-neutral “characterization.”

Thus, the question of whether or not the courts have created an effective disincentive to prosecutors tempted to make racist summations depends on whether or not the appellate courts will take notice of implicitly racist argumentation. Should they consider the arguments racist, they are compelled to apply the Chapman standard of appellate review; conversely, if the courts turn a blind eye to racist allusions, the burden will be put on the defendant to make the near-impossible showing mandated in Darden. Appellate judges’ ability and willingness to recognize racism will determine whether the victims of racist argumentation will receive meaningful appellate review of this injustice.

III. A CASE STUDY ON WHETHER THE APPPELLATE COURTS CAN RECOGNIZE IMPLICIT RACISM: STATE V. ALLEN

Wanda Jean Allen’s case demonstrates not only the inability of the appellate courts to notice prosecutors’ use of implicitly racist arguments, but also shows that the damage inflicted upon the defendant lasts long after the trial, as the prosecutor’s definition of the defendant lessens the likelihood that any other body will exercise mercy. Allen’s trial was such a historic event—murder trials involving women defendants often are—but the salaciousness of the media coverage of her trial, appeals and

48. While McCleskey involved a regrettable analysis of the racial dimensions of the application of the death penalty, the Court reasoned on the issue of racism in society in a thoughtful manner.
49. See, e.g., Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000).
51. I learned of Wanda Jean Allen’s case as a result of attending the Ninth Annual Derrick Bell Lecture at New York University School of Law, Nov. 4, 2004, where Kendall Thomas discussed it extensively. I am indebted to him for hearing his thoughts on the case and its importance.
execution, stoked by homophobia and racism, was an extreme example. The saturation coverage of her trial meant that public consciousness of the prosecutor's theory of the case endured long after the trial, lasting until the point when a poor, Black lesbian, suffering from borderline mental retardation, was executed for a non-premeditated murder.

Allen's case demonstrates how the ultimate effect of racist argumentation lead to the ultimate penalty—capital punishment. Since a conviction in a capital trial can be a key personal victory for a prosecutor, the temptation to mobilize racism within the summation is particularly grave, as Allen's case (and many others described infra) point out. However, while Allen's case provides a particularly egregious example of the effect of racist argumentation, it allows for a case study that provides an excellent introduction into the methods of covertly "defining" a Black defendant with rhetorical figures, and why these figures of definition often evade meaningful appellate review.

A. The Context of Wanda Jean Allen's Case

Allen's failure to define herself in the eyes of her audience as a worthy object of compassion is impossible to explain without understanding how she had been previously defined, and how this enduring definition of Allen as unworthy and less than human had been accomplished. Wanda Jean Allen's clemency hearing, as captured on film, is a heart-rending scene. Allen appears on the screen, a Black woman handcuffed and wearing a prison jumpsuit, with only her face and hair (and the small cross hanging from her neck) to distinguish her from any other inmate. She leaned forward to the microphone to deliver her appeal for mercy, to ask to be spared. In her remarks, Allen identified herself as a repentant person whose life was worth sparing, interweaving a religiously inspired narrative of worthiness and stating that she was a "child of God." The stress of the moment bore heavily upon Allen, who in the end could only fall back on repeating the simplest and most personal supplication, delivered in a whisper: "Please let me live. Please let me live." Her attempt to persuade the clemency board to spare her life was not successful, and the state of Oklahoma executed Wanda Jean Allen on January 11, 2001.

Even knowing that Allen had taken a life, it is difficult to imagine how anyone could harden his or her heart and ignore her plea for mercy. First, Allen's case involved circumstances that usually lead to a charge of manslaughter, since she was so emotionally disturbed that she attacked her

53. THE EXECUTION OF WANDA JEAN ALLEN (Moxie Firecracker Films 2002) [hereinafter "EXECUTION"].
former lover in the parking lot of a police station. Second, there was also ample evidence that Allen, whose limited education was never an issue at her trial, was of an intelligence level which many experts considered to be at the threshold of mental retardation. This mitigating evidence was repeatedly raised, but to no avail. Finally, Allen had formulated the rhetorical structure of her supplication well, in view of her mostly Christian audience, since she invoked themes such as forgiveness, redemption, and a personal relationship with the divinity.

Wanda Jean Allen's rhetoric was, in its own way, as sophisticated as any other example that this Article will discuss. It had the potential to be a successful communication because it was well suited to its audience. Allen's words seek to call to the minds of the Christian members of her audience numerous Bible passages, in particular those involving the duty of forgiveness and the divinity's concern for the lives of every being in creation. Since rhetorical theorists have long considered adaptation to the beliefs of one's audience a cornerstone of rhetorical success, it is difficult to imagine how Allen's appeal could have fallen so flat, especially given the degree to which Karla Faye Tucker's religious orations had struck a chord with the public. Nevertheless, she failed to secure either the support of her ostensible audience (the clemency board), or the vital moral support of the opinion leaders in Oklahoma's Black churches, who could have placed the governor under considerable pressure to, at the very least, delay the execution.

55. Execution, supra note 53.
56. Oklahomans are more likely than the citizens of any other state to profess the Christian faith. Furthermore, Christian Oklahomans are far more likely to be adherents of denominations that demand that their adherents consider the articles of their faith as central to every aspect of their lives, and not merely as a compartmentalized set of ideals that exist in parallel to one's secular values. See generally A. O. Turner, Religion, in The Encyclopedia of Oklahoma History and Culture, http://www.ok-history.mus.ok.us/enc/relig.htm.

Oklahoma's religious profile varies markedly from national norms. The state's residents identify themselves as Southern Baptist almost seven times more often than other Americans, while Churches of Christ, Methodist, Pentecostal, and Holiness groups are also much more common in Oklahoma than elsewhere. Correspondingly, Oklahomans are much less often associated with either mainstream Protestant churches, Roman Catholicism, or Judaism.

Id.

B. The Prosecutor's Use of Implicitly Racist Rhetoric to Define Wanda Jean Allen in his Summation

Wanda Jean Allen alluded to the source of the barriers to her successful redefinition of herself in the eyes of the public during her clemency hearing. When she said "What I want you to know is that I'm not a monster . . . I am not what the prosecution say I am," she recognized that her primary task in defining herself at that hearing was to overcome the way the prosecution had defined her at her trial. The prosecutor had seized upon the key opportunity at trial to use the rhetorical figures of definition to brand Wanda Jean Allen as a monster—during his summation.

In his closing argument at Allen's trial, the prosecutor twice drew parallels between Allen and animals: first, to a snake, and second, to an ape. The trial court overruled the defense's objections twice, after the prosecutor denied that he was comparing her to an animal. The second of these comparisons is especially troubling. The prosecution published to the jury a greeting card with a picture of a gorilla on the cover, with a caption that read "patience my ass, I'm going to kill something." While the text of the card, and what Allen had written within the card, was plainly relevant evidence of motive; showing the picture to the jury served no purpose other than to associate Allen in the minds of the jurors with a picture of an aggressive gorilla. While showing the card to the jury, "[t]he prosecutor said 'that's Wanda Jean Allen in a nutshell.'" The Oklahoma Court of Criminal Appeals found no error, and disavowed any racist intent on the part of the prosecutor: "Appellant's attorney objected to the comment, saying the prosecutor implied Appellant was an ape. The trial court overruled the objection, observing she did not take it that way. In light of the entire comment, neither do we."

58. EXECUTION, supra note 53.

59. It appears from the appellate opinions that the prosecution made reference to the folk parable of the possum and the snake: Once upon a time, a possum came upon a poisonous snake frozen in the snow. He took the snake home and nursed it back to health. One day the snake bit him on the cheek. As he lay dying, he asked the snake, "Why have you done this to me?" And the snake answered, "Don't complain, you knew I was a snake when you found me." This parable can be found in many forms in many media, but it is retold most memorably in Oliver Stone's NATURAL BORN KILLERS (Warner Bros. 1994).

60. Id.


62. Id.

63. Id. (emphasis added).

64. Id. (emphasis added).
C. Wanda Jean Allen's Case Illustrates the Appellate Courts' Failure to Recognize Even the Most Thinly Veiled Implicit Appeals to Racism

How could any court fail to note the racism inherent in comparing an African American woman to an ape, in claiming that her very essence was identical to that of a gorilla? An argument can be made that the failure of the trial and appellate courts to address this issue, which was preserved by a contemporaneous objection—or even to note any latent racism in a prosecutor's summation—illustrates that in practice there is no meaningful check on the use of implicit racism in closing arguments. This Article contains an extensive catalogue of similar failures, beginning with an analysis of the appellate review of Wanda Jean Allen's trial. Because they failed to take note of the racist dimension of the rhetoric that the prosecutor directed at her during his summation, the appellate court merely applied the Darden standard, which relates only to opprobrious language, and not the McCleskey standard that is appropriate to racist summations.

In the unpublished memorandum order affirming the district court's denial of Allen's request for a writ of habeas corpus, the panel of the Tenth Circuit Court of Appeals characterized the prosecution's comparison of Allen to an ape as "improper name calling." The court clearly noted that there was an improper purpose at work, namely that the prosecutor had intended to disparage Allen in the eyes of the jury. However, the court ignored the racism inherent in comparing a Black woman to a gorilla, despite the fact that the term "ape" (or "black ape,"—note that the gorilla in the photo was a black ape, since all gorillas have fur of this color) is a known racial slur.

Because of the failure to acknowledge the prosecutor's racist intent, the court was free to ignore its duty to engage in the searching review the Supreme Court mandated as required by the Fourteenth Amendment in McCleskey v. Kemp. Accordingly, the court applied the Darden standard, reasoning that: "[a] prosecutor's improper comment or argument, not implicating any specific constitutional right, [e.g. those of the equal protection clause] will require reversal of a state conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair and,

67. McCleskey, 481 U.S. at 279 (1987); See also United States v. Soto, 988 F.2d 1548, 1559 (10th Cir. 1993) ("It is beyond peradventure that the Constitution prohibits racially biased prosecutorial arguments.").
therefore, a denial of due process." 69 No court ever addressed the racist argumentation at Allen's trial in terms of equal protection. Therefore, the definition of Allen as a brutal beast undeserving of mercy persisted long after trial—until after her denial of clemency, when she died after lethal injection in the Oklahoma State Penitentiary.

Given the failure of the courts to learn how to recognize implicit racism, this Article addresses the challenge of demonstrating the racist dimension of these summations to appellate courts in a way that they cannot ignore, and that will help to build a jurisprudence that routinely subjects implicitly racist summations to the McCleskey standard of equal protection analysis. This endeavor has two main prongs. First, the Article must describe the preconceptions in the minds of jurors that allow for the prosecutors' implicit appeals to racism. This Article includes a demonstration of the fact that these stereotypes, based on racist caricatures, are common, current, and a strong motivator to action, so that even the subtlest appeals can succeed in awakening a powerful racist response from the jury. Second, the Article illustrates the rhetorical techniques that prosecutors can use to elicit a racist response from the jury, one that defines the defendant in the negative terms of the racial caricatures about African Americans, that create strong animosity towards Black defendants and foreclose a rational consideration of the evidence against them.

IV. UNDERSTANDING THE RAW MATERIAL FOR THE RACIST DEFINITION OF BLACK DEFENDANTS: THE BRUTE CARICATURE

Before discussing the specific rhetorical techniques that make it possible for a prosecutor to call up racist stereotypes in the minds of the jurors, it must be determined whether the preconditions for this type of rhetorical action exist. The preliminary question is whether there is a stereotype of Blacks already existing in the minds of most White jurors; one that would be useful to prosecutors should they evoke this mental model with the figures of definition. 70 The answer is an emphatic yes.


70. While it is beyond the scope of this Article, it is also indisputable that many racist and sexist stereotypes exist in the minds of jurors. That said, it cannot be asserted with certainty whether these prejudices would serve as a motivating force for conviction in the same way that the stereotypes of Blacks do, and thus whether there is a similarly powerful incentive for prosecutors to deploy argumentation that elicits these mental models of women and other minorities in the minds of jurors.
A. The Nature and Power of the Brute Caricature and its Ability to Elicit a Strong Racist Response

The image of the African American man as a "Black brute" was proliferated (by means of cartoons, yellow journalism and penny-dreadful novels, amongst other media) extensively from the time of Reconstruction through the Twentieth Century. "The brute caricature 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." The political purpose of the characterization was to invoke fear on the part of the White audience, and to justify repressive measures towards Black Americans. The contemporary existence and political utility of this stereotype is also beyond question, as studies have revealed that when a news story describes a violent crime without mentioning the race of the perpetrator, a statistically significant majority of White readers automatically infer that the criminal was Black.

When asked directly whether they believed that Blacks as a group were more prone to violence and hostility, one study shows that a majority of White respondents agree that Blacks are both hostile and aggressive. Further questioning of the respondents indicated that most had not themselves, nor had their acquaintances, been the victims of violent crime; it is clear that this association of Black people with violent criminality is founded upon a deeply rooted and persistent ideological belief. Since this stereotype is associated with fear and loathing, it is likely to be a strong motivating force, motivating a fear response when activated by external stimuli, such as a racist summation during a criminal trial. Furthermore, countless narratives volunteered by African Americans about how Whites respond to them fearfully—merely because a White

71. See Marlon Riggs, ETHNIC NOTIONS (California Newsreel 1987). ETHNIC NOTIONS was a groundbreaking and now classic documentary that traces the evolution of the archetypes of deeply-rooted racist stereotypes throughout American history.
73. See generally ETHNIC NOTIONS, supra note 71.
75. See the 1991 Race and Politics Study, undertaken by researchers from the University of California, available at http://sda.berkeley.edu/cgi-bin/hsda?harsrc+natrace.
77. For a description of the cognitive role played by ideological beliefs, see generally TEUN A. VAN DIJK, IDEOLOGY: A MULTIDISCIPLINARY APPROACH (1998).
person associates the Black person with a violent stereotype of African Americans—also support this empirical conclusion.\textsuperscript{78}

B. The Vitality of the Brute Stereotype in New Guises, and its Continuing Effect as a Strong Motivating Force

The recent history of race relations in America has also proven that the stereotype of the “Black brute” continues to have a powerful motivating effect. White residents who fled the Northern cities for the suburbs during the 1960s and 1970s, withdrawing their children from public schools in favor of private educational institutions were not, in the main, motivated by a fear of racial ‘pollution’, but largely by fear of violent crime.\textsuperscript{79} Most recently, hysteria about Black crime has been sparked by the depiction of what John Dilulio, the former White House Director of Faith Based and Community Initiatives had described as “thickening ranks of juvenile ‘superpredators’—radically impulsive, \textit{brutally remorseless} youngsters . . . [who] murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.”\textsuperscript{80} Dilulio’s theories revolutionized policing in the nation’s inner cities, and the ever-increasing number of minority youth arrests swelled the population of America’s prisons to a record-breaking degree.\textsuperscript{81} These social effects are not explained by any credible theory that does not contain the premise that irrational fear of Black criminality (and increasingly, by fear of Latino and other minority youth, the White vision of whom is constructed by use of stereotypes originally applied only to African Americans) is a strong motivator of White Americans’ social behavior.

On the basis of this evidence, it is possible to conclude that not only is the stereotype of the Black brute current within American society, but that in all its iterations, including those that serve to “racially construct” Latino and other minority youth, it has been proven to be one of the most enduring and powerful stereotypes in the nation’s history. It has catalyzed social transformation repeatedly, and served as a central premise for major social policy initiatives. No stereotype that motivated such wide-ranging action could be absent from the discursive and ideological

\textsuperscript{78} Patricia J. Williams, \textit{The Death of the Profane}, in \textit{The Alchemy of Race and Rights} 44–51 (1991).
\textsuperscript{80} \textit{William Bennett, John Dilulio & John Waters, Body Count: Moral Poverty... and How to Win the War on Crime and Drugs} (1996) (emphasis added).
frameworks of social meaning possessed by the majority of White Americans.82

Despite the prevalence and explanatory power of the brute caricature, it can rarely explain an unjust jury verdict in the absence of prosecutorial misconduct. In order for a stereotype to motivate a jury verdict, a speaker must elicit it; unless the audience possesses the prejudices at the conscious level, rather than predominantly at the subconscious level, as many studies suggest is far more common.83 Recent developments in cognitive theory (known as the data-delivery model of stereotypes) hold that 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; the existence of stereotypes or caricatures in the mind of the audience is often not enough to produce the motivating response.84 Rather, the speaker may need to shape his discourse to call forth these cognitive constructs in the minds of the listeners.

V. RHETORICAL THEORY DEMONSTRATES HOW THE BRUTE STEREOTYPE CAN BE INVOKED WITHOUT REFERENCE TO RACE

The question that this Article must answer is whether a prosecutor can covertly evoke the stereotype of the Black brute without directly referring to the race of the defendant, in order to escape searching appellate review. In addition to the evidence provided by the case study of Wanda Jean Allen, social science research suggests that this should be eminently possible, since most Whites associate violent criminality with Black people when the story does not identify the race of the perpetrator.85 However, here we are concerned not with a mere stereotype of Black criminality, but of Black brutality—and whether prosecutors can rhetorically associate the defendant with the particular stereotype of animalistic ferocity without making use of explicitly racist language. As this Article will show, classical rhetorical theory demonstrates how this is possible. Further, analysis of cases where Black defendants have been subjected to argumentative misconduct, such as the trial of Wanda Jean Allen, prove that numerous American prosecutors understand how to make the leap from theory to practice. There are many examples of summation misconduct, detailed extensively in this Article infra, which show that prosecutors

83. See Hurwitz, supra note 76.
84. See Patricia Devine, Stereotypes and prejudice: Their automatic and controlled components, 56 J. PERSONALITY & SOC. PSYCHOL. 15 (1989). It is for this reason that a racist political campaign must actively call forth the stereotype in order to motivate voting behavior, for instance by use of the “Willie Horton” television commercial, rather than merely relying on voters to vote on the basis of the latent stereotype.
85. See van Dijk, supra note 74. See also supra note 82.
know how to implicitly associate a Black defendant with the brute caricature in a subtle, yet highly effective, manner.

A. Four Figures of Definition Used to Evoke the Brute Caricature

A prosecutor who wishes to implicitly define the defendant as a Black brute might use one or more of four distinct rhetorical figures to accomplish this goal. Systrophe, antonomasia, circumitio, and paralipsis are subtle techniques that are not widely known, and thus their deployment in summations is less likely to invite reversal by the appellate courts reviewing a claim of racist argumentation. However, both classical rhetoric and modern persuasion theory agree that indirect approaches to persuasion are as effective as the more direct methods.

Aristotle, the father of systematic rhetorical theory, argued that the central unit of rhetoric was not the syllogism (which was the basic element of logic and dialectic) but rather the enthymeme, which was a syllogism with an unstated premise, usually the conclusion. The reason for the omission of the conclusion is that when all the premises of the syllogism (e.g. Socrates is a man, all men are mortal) are stated, the audience does not have to engage with the speaker; when a premise is unstated, (e.g. the truism that men suffer from mortality) the audience has to become an active listener to participate in the construction of meaning, to retrace the logic that leads to the conclusion (that Socrates will die). This technique is an effective means of encouraging not only active listening, but also of promoting persuasion.

Drawing on recent research in persuasion theory, one trial advocacy text states that “the more alert or bright people are, the more they want to draw inferences rather than have them drawn by a speaker. Much more important, however, is the fact that when individuals draw the final inference (i.e., to the conclusion) they are more likely to be persuaded toward the general case or thesis.” Both ancient and contemporary rhetorical theory demonstrate that indirect appeals to racism are likely to be effective, especially those orations that connect the target of the racism with a virulent and powerful stereotype. The cases detailed below, in the four sections that explain particular rhetorical techniques of indirectness, provide ample evidence of the efficacy of these figures of definition.

1. Systrophe: Defining by Reference to Central Attributes

The first and most effective rhetorical figure that a prosecutor can use to surreptitiously define the defendant as a Black brute is systrophe. To

define someone by *systrophe* as being in the class of brutes, the speaker need only describe many of their actions in terms of the characteristic qualities of that caricature. For example, a prosecutor could describe the defendant’s actions as animalistic, brutal, and impulsive in order to invoke the Brute caricature. This will bring forth the caricature in the minds of the jurors whose mental models\(^88\) of Black people include this stereotype. There are also numerous examples of cases where prosecutors’ summations mobilized this figure of definition, yet the courts of appeal did not recognize the existence and function of this rhetorical device, which illustrate the need for systematic interdisciplinary study of this problem.

A comprehensive list of cases in which the prosecutor attempts to describe a defendant as having brutish characteristics, and thus attempts to establish that the defendant belongs to the class of those “marked by animal traits and by a lack of man’s dignity or refinement”,\(^99\) would be too long to attempt in this Article.\(^90\) This Article will instead describe some paradigmatic examples of the courts’ failure to recognize the prejudicial impact of *systrophe* that defines a Black defendant as a brute, thereby precluding searching appellate review of their claim of error.

Willie Jasper Darden’s case involves a prominent use of this figure. Darden was an African American man convicted of killing a White woman by an all-White jury, and subsequently executed in 1998, after the Supreme Court of the United States affirmed the denial of his habeas corpus petition. Darden’s appellate attorneys extensively detailed that “the prosecution’s calculated, unprofessional and inflammatory closing argument rob[bed] the determination of petitioner’s guilt of the fundamental fairness required by due process” in the brief they presented to the Supreme Court.\(^91\) The inflammatory remarks that Darden described correspond with what a rhetorician would identify as a completed *systrophe*, one that defined him as a brute. The prosecutor at his trial called Darden an “animal” who should not “be turned loose” by the jurors, and stated that during his imprisonment, he should “have a leash on” when allowed outside of his cell. He described Darden as deserving death, and indeed, that he relished that vision, hoping that he “could see [Darden] sitting here with no face, blown away by a shotgun.”\(^92\)

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\(^89\) The Merriam–Webster Collegiate Thesaurus, 99 (Ed. 1988).

\(^90\) See Thomas M. Fleming, *Negative Characterization or Description of Defendant, by Prosecutor During Summation of Criminal Trial, as Ground for Reversal, New Trial, or Mistrial—Modern Cases*, 88 A.L.R.4th 8, §§ 62–90 (collecting cases where defendants compared to various animals).


\(^92\) Id.
In an opinion that constitutes a dramatic failure of the courts to acknowledge the racist dimension of inflammatory prosecutorial argumentation, the Supreme Court held that “[t]he prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent.” Justice Blackmun wrote in his dissent that the majority opinion “reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe” and that the Court failed to confront the true issue raised by the summation, which was nothing “but a relentless and single-minded attempt to inflame the jury.” Unfortunately, not even the dissent took note of the fact that by describing Darden's actions in a way that defined him as a savage, unthinking animal deserving death, the prosecution was calling to the jurors' minds the brute caricature. No Justice noted that this was an attempt to inject racism into the trial, in violation of the defendant's rights under the equal protection clause.

There are also numerous examples of prosecutors accomplishing the systrophe more economically, to better persuade any reviewing court that they should consider any slur against a Black defendant a harmless “passing remark.” One telling example was exposed when Johnny Johnson appealed to the Supreme Court of Georgia for habeas corpus relief, pointing out that among other errors committed at his trial, he was denied due process and equal protection when a prosecutor at trial described him, among other inflammatory comparisons, as “a mad dog.” This characterization implicated all three of the key definitions of the brute: a mad dog is an animal that is also brutally violent, incapable of thought, and acts completely on impulse.

The Supreme Court of Georgia, the Federal District Court for the Southern District of Georgia and the Court of Appeals for the Eleventh Circuit failed to take note of the racial significance in these remarks. Nor did they recognize how the prosecution provided the cognitive basis

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93. Darden, 477 U.S. at 182.  
94. Id. at 189 (Blackmun, J.) (dissenting).  
95. Id. at 191.  
96. The Supreme Court created the prototype for this type of dismissive harmless error analysis in Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) (holding that the inflammatory statement was “but one moment of an extended trial.”).  
97. It is impossible to tell from the appellate record that Johnson is African American; however, his mug shot establishes that he is Black. See Bill Torpy, Georgia's Death Row: Waiting to Die, ATLANTA J. AND CONST., Nov. 17, 1996, at G8.  
98. Johnson v. Zandt, 295 S.E.2d 63, 69 (Ga. 1982) (“Petitioner charges that the prosecutor made improper and inflammatory remarks in his closing argument—among them an assertion comparing Johnson's behavior to that of a mad dog . . . .”).  
99. Id.  
for the jurors’ connection between the defendant and the brute caricature with the *systrophe*. Since there was ample evidence that Johnson had not killed the victim, but rather that his accomplice had shot the decedent, the prosecutor had made his case by rhetorically linking Johnson (via the *systrophe*) to a class of Black brutes, who, like mad dogs, *deserve* to be put down. The jury subsequently sentenced Johnson to death. If the courts fail to recognize the utility of this rhetorical figure to define defendants by association to the caricature, it is likely that this technique will continue to be used to a racist effect in prosecutors’ summations.

2. *Antonomasia*: Defining by Reference to a Paradigmatic Example

The second rhetorical figure that prosecutors can use to define the defendant in a surreptitious manner by association with the brute caricature is *antonomasia*. This rhetorical figure involves a substitution of a proper name into a phrase that the speaker uses to define the subject’s actions, in order to associate the qualities of the person who bears that name with the subject of definition. In this manner, the speaker can link the person she is trying to define with the class of people represented by the substituted proper name. An example demonstrates how this figure operates: by saying “there is much of Cicero in this letter” one defines the writer as an eloquent person, as many consider Cicero to be the paragon of elegant Latin. Prosecutors have used this figure in their summations to define criminal defendants, in terms that are as derogatory as the comparison to Cicero is laudatory.

During a death penalty trial, a Marion County (Indiana) Assistant District Attorney used *antonomasia* to define Tommie Smith as a brute, saying in his closing argument that Smith had decided “to play Superfly and shoot [the victim] where he lay.” (Superfly is one of the most widely known cinematic exemplars of this racist caricature—a cocaine dealer with “a plan to stick it to the man.”) By describing the fatal assault as something Superfly would do, the prosecutor defined Smith as having a

102. *Id.* at 1505.
104. *See* Quintilian, The Orator's Education § 8.6.29-30 (Donald A. Russell trans., 2002).
108. Superfly is an example of “blaxploitation” films in which filmmakers often made use of racist images to challenge prejudicial notions, although not always successfully.
violent and impulsive character, along with all the other hallmarks of the brutes that the jurors might have thought Superfly exemplified.

The Supreme Court of Indiana failed to notice that the comparison drawn between Smith and Superfly elicited a racist response, thereby showing how successful this rhetorical figure can be, both in defining the defendant and in avoiding any meaningful appellate review. Despite Smith’s forcefully raised claim on appeal that “the State’s final argument was calculated to inflame the passions of the jury through appeals to racial prejudice,” the court did not find the reference to Superfly to be racist, since “[t]hese remarks are not inherently racial comments.” Alternatively, prosecutors have chosen other figures (both historical and fictional) to serve as the paragon of brutality used to define the defendant by use of antonomasia. Lately, prosecutors have cast O.J. Simpson in this role, since Simpson has become an avatar of the Brute caricature in the White community. Antonomasia using Simpson’s name in prosecutors’ summations is likely to continue to be a particularly effective means of creating an association in jurors’ minds between Black defendants with the Brute caricature.

3. Circumitio: Defining by Reference to Shared Characteristics

While Greek rhetorical theorists like Aristotle had given names only to rhetorical figures that were capable of clear definition, more practically oriented Roman rhetorical theorists created names for more general categories of effective rhetorical strategies, which were later also included in the lists of the figures which they compiled. One of these general techniques, first described in the anonymously written *Rhetorica ad Herenium*, was *circumitio*. This figure involves “talking around something . . . [so as]

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109. Smith, 516 N.E.2d at 1064. (emphasis added). Of course, the real issue was whether in this context the comparison was designed to elicit a racist response, not whether every comparison to Superfly would be racist across all contexts.

110. See State v. Taylor, 650 N.W.2d 190, 208 (Minn. 2002)

[A]ppellant now argues that by mentioning O. J. Simpson, the prosecutor may have caused the jury to associate appellant with the Simpson case and that the reference may have influenced a juror who perhaps felt Simpson had escaped liability for his alleged crimes . . . we cannot conclude that the comment warrants a new trial.

See also United States v. Papajohn, 212 F.3d 1112, 1121 (8th Cir. 2000) (holding that “the prosecutor’s comparison of Ms. Papajohn’s defense to the defense used in the O. J. Simpson case, although it might better have been left unexpressed, was inflammatory to a degree that would require a mistrial.”)

111. CICERO (sic.) (but really AUCTOR AD HERENNIUM), RHETORICA AD HERENNIUM, § 4.32.43 (Harry Caplan trans., 1954.) This text was the first systematic compilation of rhetorical techniques in Latin, it was written in the First Century of the Common Era. The authorship of the treatise was formerly attributed to Cicero, erroneously.
to hint at something without stating it."\textsuperscript{112} This figure allows prosecutors to make an issue of the defendant's race in the mind of the jurors without naming it explicitly, by means of mentioning certain characteristics of the defendant that effectively communicate his or her racial identity, such as certain physical attributes or his or her residence in Black neighborhoods.

Courts have noted that when the race of the defendant is brought up in order to highlight the racial difference between him or her and the jurors, it encourages jurors to view "'colored people' as an entity separate and apart from themselves, with the natural concomitant that the defendants would be viewed by the jury members as coming from a distinct, a different community from themselves."\textsuperscript{113} As a result, jurors are less likely to view the defendant as deserving of sympathy, or of the benefit of the doubt that is crucial to the proper determination of guilt under the reasonable doubt standard. Nevertheless, the sheer range and variety of arguments that make use of this figure demonstrates the near-infinite number of ways that prosecutors can attempt to surreptitiously inject the issue of the defendant's race into the trial\textsuperscript{114} without ever referring to it explicitly, and thus evading the \textit{McCleskey} standard. Prosecutors have called attention to the Blackness of the defendant by making extraneous references to African American hairstyles\textsuperscript{115} as a coded proxy for pointing out a person's race,\textsuperscript{116} the fact that a defendant lives in a segregated Black neighborhood,\textsuperscript{117} or to the fact that he or she professes a faith limited to African American adherents.\textsuperscript{118}

The use of \textit{circumlocutio} is far more inflammatory when speakers yoke this figure to an identification of the Black community with a racial caricature. To do this, the prosecutor must identify the African Americans in a locality as being brutes (often by defining the entire community by \textit{systrophe}), and then by indirectly highlighting the Blackness of the defendant. The prosecutor then hopes that the jury will draw the conclusion to the \textit{enthymeme} that the defendant is an animalistic, unthinking monster underserving of pity. Prosecutors have frequently attempted to make use of

\begin{footnotesize}
\begin{enumerate}
\item[113.] United States ex rel. Haynes v McKendrick, 481 F2d 152, 160 (2nd Cir. 1973) (holding that "repeated references to 'colored people' as a group trying to straighten their hair, or wearing 'exotic hairdos,'" warranted reversal on Fourteenth Amendment grounds)(emphasis in original).
\item[114.] See United States v. Doe, 903 F2d 16 (D.C. Cir. 1990).
\item[115.] McKendrick, 481 F2d at 160.
\item[117.] People v. Brown, 229 N.E.2d 922, 926 (Ill. App. 1967) (holding that "[t]he reference of the prosecutrix to a 'colored neighborhood' was not prejudicial.")
\item[118.] I.e., the Nation of Islam or other Black Muslim faiths. See, e.g., People v. Foster, 367 N.W.2d 349 (Mich. App. 1994).
\end{enumerate}
\end{footnotesize}
In his closing argument at the trial of Clarence Kirk (a Black defendant charged with murder), a Cook County prosecutor urged the jury to show the Black residents of Chicago’s South Side (a de facto segregated community where Kirk lived) that Whites would not tolerate Black crime, arguing:

The citizens of Chicago scream, we want justice. They scream, don’t let these defendants go. They ask for law and order. Fortunately you ladies and gentlemen of the jury have a chance that many citizens don’t have. You have a chance to show a community on the south side of Chicago that citizens who sit as jurors, don’t tolerate senseless killing.

In this argument, the prosecutor set up a dichotomy between Chicago’s White and Black communities, defining the African Americans who live on the South Side of the city as brutes who commit senseless killing, and defining Whites as citizens, with all the connotations of civic rectitude this term implies. Then, the prosecutor amplified the negative characterization of the defendant’s race by emphasizing his connection to that community. The jury convicted Kirk of murder because of a confession which he contended was false and involuntary, and despite his calling to the stand numerous African American alibi witnesses. Of course, the rhetorical figures the prosecutor employed had already served to draw a distinction between these witnesses and the jury, so their testimony was of little use. Additionally, the use of circumitio allowed the prosecutor to insulate his racially inflammatory arguments from effective appellate review.

Both the Illinois Supreme Court and the Federal District Court for the Northern District of Illinois held that the prosecutor’s remarks had no racial dimension, the latter court reasoning that “[t]he alleged racial slur is at best ambiguous and is not so prejudicial as to deprive the petitioner of a constitutionally fair trial.”

Another way to use circumitio to set up a racist dichotomy between the defendant and the jury can be to refer to Blacks as “them” or “they”, a technique that is so blatant as to call into question whether it is really circumlocutory at all. However, prosecutors have used these pronouns to

119. The opinion of the Illinois Supreme Court offers strong circumstantial evidence of this reading of the facts of the case, since it recounts how an eyewitness was able to identify the defendant owing to his being a “Negro boy” over three months after the murder, and because of the degree of police brutality to which the defendant had been subjected in the course of obtaining a confession. See People v. Kirk, 36 Ill. 2d 292 (1967).


121. Kirk, 36 Ill. 2d at 292.


123. Id.
take the first step in linking *circumitio* to *systrophe*, as seen in Clarence Kirk's case, and still evade appellate review, despite the transparency of the reference to the Black community.

A Morgan County Alabama prosecutor made the following argument during his summation when James Gurley, a Black man, was on trial for murder: "How do you know that *they* won't get up their nerve and shoot up Second Avenue? How do you know *they* won't put a weapon under their belt and shoot up an officer when he asks for their driver's license?"124 The Alabama Court of Appeal reasoned that they could not determine whether "they" was being used to refer to "Negroes," despite the race of the defendant, but reasoned that "[h]ad the instant reference been direct, that is, had the solicitor here used an unmistakable noun such as 'Negroes' instead of the undefined they, we should have an altogether different case before us."125 The fig-leaf of ambiguity provided by the prosecutor's use of *circumitio* supplied the rationale for affirming Gurley's conviction.

The use of *circumitio* can also be particularly inflammatory when the exposure of the proxy for the defendant's race raised by the defendant is a quality that can, in itself, spark a racist response from the jurors. For example, the prosecutor might point to the fact that the defendant purportedly hates White people as a way to highlight his or her Blackness, and to cast her as unsympathetic with one solitary rhetorical stroke, by saying: "Ladies and Gentlemen, was she so venomous because of what I stood for? *Was she so venomous because I was white? Was she so venomous because she didn't like cops?*"126 This remark was deemed ambiguous enough to pass muster at the Court of Appeals for the Third Circuit in 2003, at which time the court found that the statement "was not unduly prejudicial."127 The Court ignored the fact that the dichotomy that the prosecutor set up between himself and the defendant had injected the issue of race into the trial.

Another highly inflammatory technique used to highlight a Black defendant's race indirectly with *circumitio* is to point out that his domestic, romantic or sexual partners are White, or that his victim is White, which of course would not bear mentioning unless the defendant is of a different race. As Critical Race Theorists have pointed out, a 'default' condition is rarely mentioned, since it is not even noticeable, owing to its purported normality.128 An Assistant United States Attorney made the following argument at a Black defendant's trial for rape to support the conclusion that

125. Id. (emphasis added).
127. Id. at 574.
he had chosen a White woman to rape because of his preference for sexual partners of that race:

Race has nothing whatsoever to do with this case, right? Right. We all know that the race of the people involved does not at all dictate whether he's guilty or anything like that. I mean, let's hope that we all feel that way, whether we are [W]hite or [B]lack or anything. Okay? So let's clear the air that the statement that I'm about to make has nothing whatsoever to do—and I hope this machine hears this—has nothing whatsoever to do with race. What did we learn when we found out that Cheryl Moore was the wife of the defendant? I suggest to you in a non-racist way that what we found out was that Clarence McKinley Moore made a choice to be with a Caucasian woman . . .

Clearly, the prosecution's protests are excessive. While the trial court overruled the defendant's motion for a mistrial, the Court of Appeals for the Third Circuit ultimately overturned the denial of the writ of habeas corpus on these and other grounds.

That court's decision illustrates that some appellate panels have recognized the tremendous potential the technique of mentioning the race of the defendant's partner has for injecting the issue of their race into the trial in an inflammatory way. Some courts have also recognized that pointing out the defendant's race by means of an argument that is purportedly race-neutral but obviously inflammatory—such as an argument that sexual intercourse between a White woman and Black man was rape, since a White woman would not have consented to sexual intercourse with a Black man—is too prejudicial to be harmless error. However, arguments of this type are still tolerated in some courts, both state and federal, as numerous opinions have contained the holding that this allusion is too subtle to be considered racially prejudicial, or otherwise harmless. Of all the rhetorical techniques catalogued in this Article, this

129. Moore v. Morton, 255 F.3d 95, 99 (3d. Cir. 2001)
130. Id. at 119–20.
132. See, e.g., Miller v. North Carolina, 583 F.2d 701, 707 (4th Cir. 1978) (prosecutor's statement that "I argue to you that the average white woman abhors anything of this type . . . with a black man" in a rape case involving African American defendants was due process violation where no curative instructions were given).
133. See, e.g., Thomas v. Gilmore, 144 F.3d 513 (7th Cir. 1998) (holding that prosecutor's isolated remark, in opening argument of capital murder trial, that detective would testify that one or both of defendant's prior sexual offenses involved young White women and knives, which allegedly appealed to racial prejudice, did not prevent defendant from
use of *circumitio* is the most dangerous, and should be the first that the federal Circuit Courts of Appeal specifically proscribe. Since it allows for the presentation of a racist argument in a way that is only partially veiled, it is apt to evoke a strong response. Even more egregious than *circumitio* in this respect is the next rhetorical figure to be discussed in this Article, since it involves an even more bold and daring method of both establishing a racist premise and denying any intent to evoke a racist response.

4. *Paralipsis*: Presenting an Assertion by Way of Denial

*Paralipsis* \(^{134}\) is a method of stating a proposition while asserting that one is passing over the subject; \(^{135}\) for example, “I would never stoop so low as to repeat the accusations being lodged against my opponent that he is a child molester.” Naturally, by merely mentioning the assertion while purportedly disavowing its propositional content, one brings it to the attention of one’s audience. Prosecutors have used this technique (although less frequently than the three figures discussed above) to inject the issue of the defendant’s race into the summation at trial. Prosecutors’ uses of this figure have been successful in evading meaningful appellate review, despite the obvious reference to the defendant’s race. Courts have nevertheless ignored the fact that by denying that they are making a particular assertion; the prosecution in fact places the propositional content of that statement before the jury. An opinion of the Kentucky Court of Appeal upholding the conviction of a Black defendant who claimed he was subjected to racist arguments during the prosecutor’s summation illustrates this point well:

Dixon, an adult Negro, was convicted of indulging in indecent or immoral practices . . . [his] argument that the Commonwealth’s attorney deliberately sought in his closing argument to prejudice the jury by asking the jury not to be harder on the

having a fair trial, and thus did not deny defendant due process of law); State v. Weaver, 386 S.E.2d 496, 498 & n.3 (W.Va. 1989) (holding that prosecutor’s question to defendant, “I believe your wife is white, isn’t she?” did not require mistrial where counsel objected to question, and court sustained objection and instructed jury to disregard question, then later instructed jury to disregard question to which objections had been sustained); State v. Mayhue, 653 S.W2d 227 (Mo. App. 1983) (holding that the defendant’s contention that certain comments by the prosecutor were an attempt to derogate him because of his race was unavailing, since it was evident to everyone associated with the trial that the defendant was Black and the victims were White, so the racial relationship was of no surprise to anyone).

134. Alternatively transliterated (from the classical Greek παραλεψις) as *paralepsis* or *paraleipsis*.

defendant because he was a black man and the victim was a white boy [is unavailing] . . . Dixon's counsel argues that the Commonwealth’s attorney actually intended to influence the jury to do just what his words asked them not to do. We are not so persuaded. We have read the argument and find no indications of any lack of sincerity or lack of honest intent to avoid racial prejudice. 136

The fact that Louis Dixon received the maximum sentence of ten years on the basis of the complainant's uncorroborated testimony alone seems to suggest that race did play some role at his trial. The court, however, ignored the prosecutor's use of a rhetorical figure that served to summon up the jury's latent prejudices.

The California Court of Appeals likewise failed to note the use of paralipsis when ruling that this section of a prosecutor's summation was not an intentional attempt to inject the issue of the defendant Willie Jones' race into the trial:

We should not be forced to be in a position where we cannot enjoy ourselves, where our children—we have to be in fear that something might happen to our children. I am not saying this for the fact that there might be a number of Negroes there. 137

A jury found Jones guilty of resisting arrest following a riot at a public amusement park. The alleged riot ensued when two hundred Black residents of Los Angeles intervened into an arrest to prevent what they perceived as police brutality. In his summation, the prosecutor explicitly drew a line between the city's White citizens ("ourselves," "our children") and Black residents (the "rioters," "the defendant.") He then attempted to disavow the inference that those who threaten "us" are the "Negroes", a class of which Jones was a member.

The California Court of Appeals ignored the use of paralipsis, and held that "any reasonably minded juror would interpret this statement to mean that defendants of every race or color should be treated equally under the law. That being so, no prejudice could possibly have resulted." 138 This reasoning misses the point entirely; the jury had been inflamed past all reason by the statement that "we have to be in fear that something might happen to our children" because of the frightening Negro 'brutes' that might run amok in the city's amusement parks. In this context, they could not have failed to take note of the real reason why the prosecutor raised the issue of the continuing presence of Black people in the parks by

138. Id.
paralipsis: that since there are still a number of "Negroes there" they needed to be kept under control, so that "we" and "our children" can enjoy that space.

When one considers the principles of rhetoric, it is obvious that the prosecutor used paralipsis to define the defendant as a member of the racial "other", and in the process has constructed a bridge between herself and the jury on the basis of their racial in-group status, thus establishing her own credibility and ethos. The Courts should not tolerate the use of this figure to accomplish these illicit rhetorical goals.

VI. ADDRESSING IMPLICITLY RACIST SUMMATIONS: EXPOSING AND PROSCRIBING THE FIGURES OF SURREPTITIOUS DEFINITION

The foregoing analysis has demonstrated how the creation of the McCleskey standard of review has created an incentive for prosecutors to rely upon more subtle techniques to evoke jurors' racial prejudices by means of the four key figures of definition illustrated above. On this basis, it is possible to conclude that the crux of the problems related to the deployment of covertly racist argumentation in prosecutorial summations is the failure of the appellate courts to recognize the role the key rhetorical figures of definition used in closing arguments play in injecting racism into the trial. Rather than recognizing the use of rhetorical techniques to hide racist argumentation, courts have continued to apply the lenient Darden standard, rather than the more rights-protective McCleskey standard.

Given that the only effective method of sanctioning this practice is to reverse the convictions of those defendants whose trials the prosecutors infected with racism, 139 the practical problem that confronts those who would seek to eradicate racism from closing arguments is how to secure holdings that recognize prosecutorial summations as racist, and thus apply the McCleskey equal protection standard, and not as merely inflammatory or otherwise opprobrious or damaging, and calling only for the application of the Darden level of review. The emergence of jurisprudence that recognizes particular rhetorical techniques as evidence of intent to inject race into a criminal trial is central to this enterprise.

It is unlikely that a brief addressing indirect racism in the summation of a criminal trial will lead to a comprehensive holding that would eliminate all forms racist argumentation. Rather, the problem will probably be addressed in a piecemeal manner; by exposing and foreclosing each of the rhetorical techniques that prosecutors rely upon to disguise racist argumentation, which encompass and surpass the four figures discussed above.

This approach fits well with the desire of the appellate courts to address instances of prosecutorial misconduct in the narrowest manner possible. Any holding on the subject of implicit racism that exposes the prejudicial effect of a particular rhetorical figure would lay the basis for further extension of the jurisprudence by providing the analytic blueprint for each succeeding opinion: this in itself would be a substantial achievement.

A. Crafting an Argument that the Prosecution Has Used a Rhetorical Figure to Surreptitiously Inject the Defendant's Race into a Summation

The tasks of the appellate lawyer advancing the claim that the prosecutor injected the issue of the defendant's race into the trial are twofold. The first goal is to differentiate the jurisprudence that pertains only to the use of inflammatory argument in general (as a violation of due process) from the cases discussing racist argumentation in particular (as a violation of the equal protection clause). This is vital: if the court finds the argumentation to be racist, then the summation implicates the constitutional rights of the defendant, and therefore the burden shifts to the prosecution to demonstrate that the racist argumentation was harmless beyond a reasonable doubt, following Chapman v. California.

Second, the appellant should try to show that the injection of racism into the trial, despite being accomplished by implicit means, was intentional. The key to demonstrating the implicit racism in a prosecutorial summation is the demonstration of the intent to raise the issue of race. While the test of whether the defendant's Fourteenth Amendment right to a trial free of racial prejudice does not formally require a showing of intent, courts have been far more likely to reverse convictions on the basis of summation misconduct when they believe that the prosecutor intentionally attempted to influence the jury by making use of improper argumentation. Therefore, it is important that the lawyer perfecting an

140. Courts have imposed narrowly tailored limits on prosecutorial summations in the past, addressing such particular rhetorical techniques as excessive use of the pronoun "I": see, e.g., United States v. Nersesian, 824 F.2d 1294, 1328 (2d Cir. 1987); the prosecutor's appeal to the prestige of their office, see, e.g., Floyd v. Meachum, 907 F.2d 347 (2d Cir. 1990); courts have also found the argument that the jury must do their duty in the war against crime to be improper, see, e.g., Brooks v. Kemp, 762 F.2d 1383, 1414-15 (11th Cir. 1985) (en banc).

141. Chapman, 386 U.S. at 18.

142. See Paul J. Spiegelman, Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review, 1 J. APP. PRAC. & PROCESS 115, 140-43 (1999): Despite the widespread perception that the prosecutor's intent is essentially irrelevant to the decision to reverse, twenty-eight of the forty-five federal opinions and Hill use language suggesting that the prosecutor knew that the conduct was improper; in thirteen other opinions the conduct was such that the prosecutor knew or should have known it was wrong.
appeal alleging racist argumentation not only raises the claim that the prosecutor injected the issue of race in such a way that it deprived the defendant of his or her right to a fair trial, but also that the prosecution intended to do so, in order to foreclose all possibility of a rational and fair determination of the defendant's guilt.

The appellant's brief should center on an exposition of the rhetorical figures employed by the prosecutor in his summation. The brief should illustrate how the argument advanced by the government at trial corresponds with a rhetorical figure explicitly developed by rhetoricians as a means of raising an issue implicitly, such as antonomasia, systrophe, circumitio, and/or paralipsis. The brief should focus on the symmetry between the advice of the rhetoricians on how to execute the strategy of raising an illicit issue implicitly and the disputed section of the prosecutor's summation. The closer the resemblance between the examples in the classical rhetorical texts and the prosecutor's use of the rhetorical figure, the more the appellant should argue that it is likely that the prosecutor intended to make use of these rhetorical figures to craft an argument with implicitly racist elements.

Put simply, the more persuasively a parallel can be drawn by the appellant between the language used in the prosecutor's summation and the examples of the figures detailed in this Article, the more apparent it will be that the prosecutor intentionally attempted to raise the issue of the defendant's race without mentioning it directly on the record. The argument can be loosely built around an analogy: Just as if a prosecutor who claimed he accidentally struck the defendant in the courtroom could be rebutted with evidence that his blow corresponds closely to an advanced martial arts technique, the prosecutor's well-executed use of the rhetorical figure should stand as indirect evidence of a calculated intent to make an implicitly racist reference to the jury.

This approach sets up the second stage of the strategy. If the appellant's brief focuses on the intentions of the prosecutor, they may thereby provoke the appellee into placing their counterargument about the lack of intent at the center of their response brief. If the government's response brief focuses on the lack of intent, the appellant should note in their reply brief that the lack of intention is not fatal to their constitutional claim. The appellant can argue in response that even if the injection of racism into the trial was unintentional, the test for whether or not the court should reverse the conviction does not (theoretically) rest upon intent. Instead, it is the symmetry between the suspect elements in the prosecutor's argument and the classic and modern examples of the figure described above that demonstrates that the effect on the jury was likely to have been significant. Furthermore, the appellant can argue that any

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demonstration of a lack of intent is not adequate, since the appellee must demonstrate that the error (Which was not the introduction of the racist argumentation but rather the trial court's tolerance of the racism within the summation) was harmless beyond a reasonable doubt.

B. Managing the Interdisciplinary Aspects of the Argument Drawing Upon Rhetorical and Race Theory: The Uses of Amicus Briefs

The approach advocated in this Article to exposing implicitly racist prosecutorial argumentation is necessarily interdisciplinary, and it raises the question of how scholars both in the discipline of law and the discipline of rhetoric might effectively coordinate their efforts when appellate attorneys present claims of racist prosecutorial misconduct in summation to the appellate courts. Since it is unlikely that an active member of the bar would have the time to research the techniques of rhetoric, she should request help from scholars who specialize in the rhetorical dimensions of legal argumentation. It is also possible that legal academics, working alongside rhetorical theorists, could file amicus briefs that focus exclusively on drawing the parallel between the classical figure and the prosecutor's summation, which might then be cross-cited extensively in the appellant's brief.

Another effective tactic might be to procure additional amicus briefs from legal academics within the Critical Race Theory movement. The point of these briefs would be to argue that the appellate judges should not commence their evaluation of the effect of implicitly racist arguments while assuming that the jurors were inclined to reject racist argumentation. Rather, judges should begin with the assumption that stereotypes can be so powerful that it might only take the slightest cue by a prosecutor to provoke a racist response, and that this is likely to have been one of the rhetorical dynamics at work. These briefs should also cite the social science studies discussed above, which reveal the predominance of racist attitudes in society, as well as the incendiary effect of invoking racist ideas that correspond to the racial caricatures discussed in this Article.

Finally, if the centerpiece of the attack on implicitly racist argumentation is the claim that the injection of the issue of the defendant's race was intentional, the appellant's counsel should pay close attention to the record of the peremptory challenges, and the races of the venirepersons and the jury. If there is any evidence that the prosecution attempted to exclude African Americans from the jury, even if this does not rise to the

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144. Rhetoric, although an ancient subject, continues to be studied in the modern university, largely within departments of speech communication.
level of a *Batson* violation, this fact could be central to the appeal. The exclusion of Black jurors is excellent circumstantial evidence that the prosecution intended to provoke racial animus against the defendant, since it prepares the field for the use of covert racist allusions.

Wanda Jean Allen's counsel on her first Oklahoma appeal argued that the prosecution had exercised a peremptory challenge against an African American venireperson because of her race. The Oklahoma Court of Criminal Appeal found that flimsy, yet purportedly race-neutral reasons for striking this juror (including "she made a facial expression by raising her eyebrows when she said she could consider the death penalty") were sufficient. And yet, appellate counsel never exploited the potential for linking this issue with the prosecutor's racist remarks. Counsel for the appellant alleging the prosecution's use of implicit racism within his or her summation should make extensive use of this fact as circumstantial evidence of intent to inject the race of the defendant into the trial, just as the prosecution did in Wanda Jean Allen's case.

**CONCLUSION**

The problem of racist argumentation contained in prosecutors' summations is serious. There is a great incentive for the government to incite racism from jurors to secure convictions; however, no countervailing disincentive has emerged as yet, since the appellate courts are either unwilling or unable to recognize implicitly racist argumentation. In particular, summations containing a variety of rhetorical techniques that associate a Black criminal defendant with the brute caricature have survived appellate review, despite implicit appeals to one of the most racist images circulated about African Americans.

Despite the failure of the courts to address the problem of implicitly racist arguments, possibilities remain for appellants' counsel to address the prejudice to their clients induced by the use of these rhetorical figures during the defendants' trials. However, an effective strategy demands more than a brief that cites the right jurisprudence and quotes the prosecutors' implicitly racist argumentation. The appellant's brief requires a detailed analysis of the prosecutors' rhetorical strategy, one that exposes the intent to define the defendant by reference to the brute caricature, and to inject the issue of the defendants' race into the trial.

Mapping the rhetorical strategy begins with a consideration of the ways in which implicit allusions to the defendant's race were made in

146. See *Allen*, 871 P.2d at 89–90.
147. *Id.*
order to define the defendant in such a way as to evoke a racist response from jurors, and particular attention should be paid to the figures of definition employed in the summation. Based on the analysis of the case law, the four most likely possibilities are the use of *systrophe, antonomasia, cirummitio,* and *paralipsis.* Since the courts almost invariably consider the intent of the prosecution when considering an appeal alleging misconduct, counsel for the appellant should attempt to work backwards from the use of racist figures of definition to demonstrate the prosecutor's prejudicial intent.

Demonstrating how the prosecutor's argument conforms to what rhetoricians have described as an effective way of defining the defendant in the mind of the jurors is excellent, if circumstantial, evidence of that malicious intent.

Illustrating how the prosecutors' judicious use of rhetorical figures elicited a racist response is not a simple process. Attorneys should attempt to secure advice and assistance from rhetoricians, who can collaborate on cases and file *amicus* briefs that can be cross-referenced in the appellant's brief. In addition, social scientists and scholars from the Critical Race Studies movement could also play an important part in this litigation strategy. These scholars can provide evidence that an implicit allusion to a racist caricature is likely to produce the desired effect, given the context of race relations and the stereotypes about African Americans that exist because of the history of the oppression of Black Americans.

This attempt to frame the issues to highlight the racism inherent within a prosecutorial summation may not initially prove successful. Even if appellate counsel can secure reversals of convictions in this manner, they will likely only lead to narrowly tailored holdings, which will not address the systematic problem of implicit racism being deployed in closing arguments. However, even one successful attempt could create a template for other appellants, and in this manner, each of the rhetorical figures identified above would be exposed as a method of promoting racially biased deliberations. Ultimately, it is the revelation of the prevalence and power of the range of rhetorical devices that prosecutors use to inject the issue of the defendant's race into the trial that will force the courts to address this problem.

Despite the inherent difficulties of this approach and the uncertainty of a positive result, appellant attorneys must address this problem. When a prosecutor can compare a Black woman to a gorilla in his summation, and the appellate courts dismiss this racial slur as "name-calling", this imperils not only the integrity of the courts but also the pursuit of justice. Those who continue to believe in the possibility of equal justice under the law cannot allow these arguments to pass by unimpeded by vigorous advocacy, which adopts any weapon with which to assail injustice. Rhetorical analysis is not a silver bullet for any problem involving prosecutorial misconduct in summation, but it is an arrow that should be
in the quiver of every appellate attorney who encounters issues of this type. In combination with other techniques and methods of analysis, it can be part of a successful attack on implicitly racist discourse, which is a crucial battle in the fight for fairness and against racism in the criminal justice system today.