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Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial

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SETTING THE RECORD STRAIGHT: A PROPOSAL FOR HANDLING PROSECUTORIAL APPEALS TO RACIAL, ETHNIC OR GENDER PREJUDICE DURING TRIAL

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> The United States Attorney is the representative 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. As such, . . . [h]e 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 calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[1]

INTRODUCTION

There are many instances where defendants in criminal trials suffer the (sometimes literally lethal) consequences of "foul blows" struck by prosecutors improperly injecting explicit or implicit references to race or gender bias into the jury's deliberations. Such improper use of race or gender violates the defendant's Sixth Amendment right to trial by an impartial jury,[2] the defendant's Fourteenth Amendment equal protection rights,[3] and the defendant's right to a fair, unbiased trial under the Due Process clause.[4] Despite the constitutional stature of these violations, state and federal courts are equivocal regarding the appropriate standard of review and the ultimate disposition of cases where prosecutorial appeals to prejudice are raised by the defendant on appeal.

This article proposes that direct or indirect references to the protected classes of race and/or gender should always be subject to the *Chapman v. California*[5] "harmless beyond a reasonable doubt" standard. Once the defendant has shown appeals to racial or gender bias in prosecutorial argument or other conduct during his trial, the burden must shift to the prosecution to show at an immediate hearing outside the presence of the jury, beyond a reasonable doubt, that this impermissible appeal to bias did not affect the fairness of the defendant's trial. Furthermore, courts must take the examination of the prosecution's proof seriously,

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1. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. XIV.

4. U.S. CONST. amend. V. *See* Steven D. DeBrota, Note, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine*, 64 IND. L.J. 375 (1989); *See also Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1588–95 (1988) [hereinafter *Developments in the Law*].

5. 386 U.S. 18 (1967).

and must recognize that even a single racially biased comment by a prosecutor may improperly influence the outcome of a trial.

Part I reviews the current standards applied to allegations of prosecutorial misconduct. The cases gathered in Part II illustrate the need for revising these standards. Part III suggests revisions of the doctrine and the remedies provided under it. Part IV makes the policy arguments in support of these revisions.

I. USUAL STANDARDS OF REVIEW FOR ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

A. *General Standard*

Prosecutors' improper comments during a trial divide into two types of error, constitutional and non-constitutional. On direct review in the federal courts, "[t]he standard for determining if a non-constitutional error is harmless . . . is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[6] As the Supreme Court described this standard in *Kotteakos v. United States*,[7] it was meant to deal with the perception that appellate courts "tower[ed] above the trials of criminal cases as impregnable citadels of technicality."[8]

Before 1967, the Supreme Court applied a straight forward rule of reversal when trial errors violated constitutional rights.[9] *Chapman v. California*[10] changed the standard of review applied to constitutional errors

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6. Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 399 (1997) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); *see also* Kotteakos v. United States, 328 U.S. 750 (1946) (discussing application of substantial prejudice standard).

7. 328 U.S. 750 (1946).

8. *Id.* at 759 (citation omitted).

9. *See* David M. Skoglind, *Harmless Constitutional Error: An Analysis of Its Current Application*, 33 BAYLOR L. REV. 961, 961 (1981).

10. 386 U.S. 18 (1967). At the time the *Chapman* defendants were tried, the California constitution allowed the prosecutor to comment on the defendants' post-arrest silence. The prosecutor took full advantage of this allowance at trial, "filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom." *Id.* at 19. The Court stated that the defendants had suffered a violation of the rights guaranteed to them by the Fifth and Fourteenth Amendments. *Id.* at 21. Although the defendants argued for a rule of automatic reversal, the Court declined. The Court did conclude "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. Such language suggests that the Court contemplated review of such cases occurring on a case-by-case basis, rather than by the formation of "blanket rules" to address certain kinds of constitutional errors. The Court recognized that "prior cases have indicated that there are some constitutional rights so

by holding that a conviction could be upheld, in spite of certain constitutional errors, under the "harmless error" doctrine.

> If the error is a constitutional error, the degree of certainty required on direct review before a court can declare it harmless is heightened. . . . [I]f such an error is to be deemed harmless 'the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'[11]

If the court finds that the error was harmless beyond a reasonable doubt, the court may then affirm the conviction. *Chapman* recognized exceptions to harmless error review for certain types of errors, the effects of which the Court felt could not be easily identified or isolated, including denial of counsel, judicial bias, or a coerced confession.[12] These fundamental errors (as opposed to mere constitutional errors), under *Chapman*, would continue to be treated under the pre-1967 automatic reversal rule. The *Chapman* Court reasoned that under no circumstances could these types of errors be harmless.[13]

Rule 52 of the Federal Rules of Criminal Procedure[14] also governs the review of trial errors on direct appeal in federal courts. Rule 52(a) applies to errors to which timely objection was made at trial, and under this rule the government bears the burden on direct review of showing the absence of prejudice, regardless of whether the error is constitu-

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basic to a fair trial that their infraction can never be treated as harmless error . . . ." *Id.* at 23. Importantly, the Court recognized (in dicta) that "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id.* at 24.

11. Walker, *supra* note 6, at 399 (citation omitted).

12. *See Chapman*, 386 U.S. at 23 n.8.

13. Breaking with precedent in 1991, the Supreme Court held in Arizona v. Fulminante, 499 U.S. 279 (1991), that harmless error analysis does in fact apply to the admission of coerced confessions at trial. *See id.* at 306–12 (demonstrating the trend of applying the harmless error analysis more frequently and less stringently).

14. FED. R. CRIM. P. 52. The rule states:

Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Id. To clarify, Rule 52(a) applies to the error where the defendant timely objected at trial; Rule 52(b) applies to the error where the objection was forfeited. *See* United States v. Olano, 507 U.S. 725, 731–32 (1993) (stating that Federal Rule of Criminal Procedure 52(b) "governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," and "defines a single category of forfeited-but-reversible error").

tional.[15] Rule 52(b) governs forfeited errors and "the defendant bears the burden of proving that the error was not harmless."[16]

Errors cited on habeas review are subject to a different standard of review from errors challenged on direct appeal. On habeas review of a constitutional error, the Supreme Court has adopted a harmless error standard that one Second Circuit judge has stated is "less stringent than that of the *Chapman* test."[17]

> Before the court can utilize any harmless error analysis, the defendant must satisfy the "cause and actual prejudice" standard of *United States v. Frady*.[18] Under this test, defendants must show "cause" which would excuse their failure to appeal the error initially and "actual prejudice" which occurred as a result.[19] Once a defendant can satisfy the *Frady* standard, a reviewing court must apply the test, set out by the Supreme Court in *Brecht v. Abrahamson*,[20] of whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[21] This is the same, lesser standard the Court set forth in *Kotteakos* to be applied on direct review of non-constitutional errors. But, if the reviewing court is in "grave doubt as to the harmlessness" of a constitutional error, the petitioner wins.[22] "Grave doubt" occurs where "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error."[23]

State courts do not necessarily apply the harmless error doctrine's distinction between constitutional and non-constitutional errors.[24] For example, in Connecticut allegations of prosecutorial misconduct based on the prosecutor's conduct during closing arguments is judged under a *Kotteakos*-like standard. "In order to determine whether claims of prosecutorial misconduct amounted to a denial of due process, we must decide

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15. *See Olano*, 507 U.S. at 731; *see also* Walker, *supra* note 6, at 399 (citing O'Neal v. McAninch, 513 U.S. 432, 436–37 (1995); *Olano*, 507 U.S. at 734).

16. Walker, *supra* note 6, at 400.

17. *Id.* at 400 (citing Olano v. United States, 507 U.S. 725, 732 (1993)).

18. 456 U.S. 152, 167–168 (1982).

19. *Id.* at 168.

20. 507 U.S. 619.

21. *Id.* at 637 (1993) (quoting *Kotteakos*, 328 U.S. 750, 776 (1946)).

22. O'Neal v. McAninch, 513 U.S. 432, 445 (1995).

23. *Id.* at 435 (quotation from Walker, *supra* note 6, at 400–401 (alterations in original)).

24. *But see* State v. Rogan, 984 P.2d 1231, 1238 (Haw. 1999) (applying harmless beyond a reasonable doubt standard to allegations of racial remarks by prosecutor in prosecutor's rebuttal argument).

whether the challenged remarks were improper, and, if so, whether they caused substantial prejudice to the defendant."[25] Thus, in states where such a standard is applied, the defendant would have to show that the outcome would have been different absent the improper comments.[26] The application of a standard less stringent than *Chapman* by some state courts adds to the problem of prosecutorial misconduct including racial and gender bias. The lack of a clear constitutionally based standard means that state reviewing courts need not adhere to any particular standard, and thus are free to consider this sort of prosecutorial misconduct in any way that they choose. This contributes to the disparate treatment of such cases and absent clear guidelines, prosecutors may feel less constraint on their behavior at trial.

B. *The Standard of Review Specifically Governing Racial Bias*

The Supreme Court has made it clear that racial prejudice should never influence jury decisions.[27] In *Rose v. Mitchell*,[28] the Court declared that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[29] The United States Court of Appeals for the District of Columbia in *United States v. Doe*[30] subsequently equated references to nationality to references to race, asserting that distinctions based upon ancestry are as "odious" and "suspect" as those predicated on race; in practical terms, appeals to either threaten the fairness of a trial.[31] This prosecutorial conduct (which in *Doe*

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25. State v. Garrett, 681 A.2d 362, 367 (Conn. App. Ct. 1996) (discussing allegations of misconduct that included improper references to race) (citing State v. Oehman, 562 A.2d 493 (Conn. 1989)); *see also* People v. Johnston, 641 N.E.2d 898, 904 (Ill. App. Ct. 1994) ("Improper remarks generally do not constitute reversible error unless they result in *substantial prejudice* to the accused.") (emphasis added); Commonwealth v. Dixon, 680 N.E.2d 84, 89, 92 (Mass. 1997) (stating that in face of allegations of racially biased prosecutorial arguments, the court would "consider the prosecutor's argument as a whole" in determining whether the allegations undermined the court's "faith in the fairness of the jury's verdict").

26. *See Johnston*, 641 N.E.2d at 904–05.

27. *See* McCleskey v. Kemp, 481 U.S. 279, 308–10 (1987).

28. 443 U.S. 545 (1979).

29. *Id.* at 555; *see also* McFarland v. Smith 611 F.2d 414, 416–17 (2d Cir. 1979); Miller v. North Carolina, 583 F.2d 701, 706–07 (4th Cir. 1978); United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 156–59 (2d Cir. 1973).

30. 903 F.2d 16 (D.C. Cir. 1990).

31. *Id.* at 21–22 (citations omitted). Several other courts have also reversed on the grounds that references to race or ethnicity may be prejudicial. *See* United States v. Rodriguez Cortes, 949 F.2d 532, 540–43 (1st Cir. 1991) (using identification card to suggest that defendant was Colombian, and thus was likely to participate in conspiracy with another Colombian, could be taken as an appeal to find defendant guilty by reason of his national origin; court reversed on ground that the trial court's admission of Co-

included presentation of prejudicial testimony as well as argument)[32] violates a defendant's due process and equal protection rights. Since it is constitutional error, the burden of showing it harmless beyond a reasonable doubt should fall on the prosecution under the rule in *Chapman*.

If previous cases established that injecting prejudice into a trial resulted in a miscarriage of justice, *Doe* clarified how the court should determine when prosecutorial references to race or nationality have prejudiced a jury decision. In *Doe*, the court held that prosecutorial references to the Jamaican birth/citizenship of a defendant were not harmless beyond a reasonable doubt for two reasons: first, the other evidence against the defendant was hardly overwhelming (in fact, the first jury was hung—this was a second trial). Second, while it is difficult to weigh the impact of racial remarks, their harm may be extreme.[33] Before coming to this conclusion, the court also responded to an argument in the prosecutor's brief that the remarks were "fleeting" or "insignificant" by noting a total of three references to race or nationality in the summation.[34]

The *Doe* court's analysis has been fashioned by other courts into a standard to determine if racial or nationalist comments are harmless beyond a reasonable doubt. These courts have interpreted *Doe* to weigh the frequency of prosecutorial references to race or nationality; the emphasis placed on these remarks by the prosecutor, or their overall significance to her argument; and the weight of all the other evidence

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lombian ID card was abuse of discretion, but found that prosecutor's use of card, though exploitative of prejudice, was not prosecutorial misconduct, given that the trial court had admitted the card as evidence); People v. Bahoda, 202 Mich. App. 214, 216–17 (1993) (finding that reference to defendant's Iraqi nationality, and "Arab connection" during the Persian Gulf war was improper as part of reversible error); Guerra v. Collins, 916 F. Supp 620, 629–30 (S.D. Tex. 1995) (discussing among several prejudicial factors witness's use of "wetbacks" and statement that "Mexicans only come to the United States to commit crimes and take jobs away from United States citizens" illustrated her prejudice). *But see* United States v. Hernandez, 865 F.2d 925, 927–28 (7th Cir. 1989) (holding that stating "send a message to Cuban drug dealers" is not harmful); United States v. Horne, 423 F.2d 630, 631–32 (9th Cir. 1970) (finding question by prosecutor asking if defense was "trying to let these people hide behind their race" unobjectionable).

32. *Doe*, 903 F.2d at 18–20.

33. "Appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality." *Doe*, 903 F.2d at 25. In *Doe*, the court also excluded references to an expert witness's testimony that local drug dealers were in many cases being replaced by Jamaicans, and "strongly suggested that appellants were guilty because two of them are Jamaican." *Id.* at 20. The evidence was deemed irrelevant under Federal Rule of Evidence 402. *See id.* The court also found these statements more prejudicial than probative under Federal Rule of Evidence 403. *Id.* at 21.

34. *Id.* at 26. The court made these observations in the course of its exposition and analysis of the prosecutor's summation, not in the section in which it evaluated the prejudicial effect of the prosecutor's statements.

presented against the defendant at trial.[35] Almost no courts reference the *Doe* court's concern for the uncertain but overwhelming prejudice such remarks inject into the trial.[36] Most courts have therefore refused to find these comments prejudicial, because they identify the comments as "isolated."

C. *The Standard of Review Specifically Governing Gender Bias*

Commentators suggest that gender bias permeates the trial structure and process.[37] Courts include gender or sex in their lists of impermissible biases,[38] yet cases where female defendants have raised prosecutorial misconduct claims based on gender bias are a null set. In one case, *Ballard v. United States*,[39] the Court addressed gender discrimination at trial in the context of selecting grand and petit juries.[40] The Court held that "[t]he systematic and intentional exclusion of women, like the exclusion of a racial group, . . . or an economic or social class, . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society."[41] The Court broadly stated that the gender-based exclusion considered in this case causes an injury that "is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected

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35. *See, e.g.*, Smith v. Farley, 59 F.3d 659, 663–64 (7th Cir. 1995); United States v. Rodriguez, 949 F.2d 532, 540–43 (1st Cir. 1991).

36. *But see* Commonwealth v. Kines, 640 N.E.2d 1117, 1118–19 (Mass. App. Ct. 1994). The prosecutor's suggestion that the Black defendant resisted arrest because of contempt for the White police officer was reversible error, even though the prosecutor only made one mention of race. Even though the judge gave a corrective instruction, in light of the fact that there was another prosecutorial error in the case, the injection of a racial issue into the case was not harmless.

37. *See, e.g.*, Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1996); Judge Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues from Initial Law Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153 (1994).

38. *See, e.g.*, United States v. Hernandez, 865 F.2d 925, 928 n.2 (1989). The court's instruction states that the jury "should not be influenced [in its deliberations] by a person's race, color, religion, national ancestry or sex." *Id.*

39. 329 U.S. 187 (1946).

40. The Court did not find the exclusion of women to be a due process violation affecting the trial process, but rather simply a misunderstanding of the applicable legal standards. *See id.* at 199–200. The Court held that, based on the state law of California making women eligible for jury duty, and on the federal policy of juries reflecting a cross-section of the community, excluding women from the juries in this case was improper and reversible error. *See id.* at 193.

41. *Id.* at 195; *see also* J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (intentional discrimination on the basis of gender by state actors in use of peremptory challenges during jury selection violated the Equal Protection Clause).

in the processes of our courts."[42] While *Ballard* and subsequent cases do not clarify exactly which standards apply to claims of gender bias at trial, they do suggest that standards similar or equivalent to those applied to race should prevail.

II. WHY THE STANDARDS NEED TO CHANGE: DEPLORABLE INSTANCES OF PROSECUTORIAL APPEALS TO BIAS[43]

It may be the "new millennium," but that might not be apparent when looking at the following cases as examples of current social consciousness regarding racism in America. One of the challenges of remedying prosecutorial racism at trial is dealing with a "cold record" at the appellate stage that often fails to provide detail, not to mention context, regarding the circumstances of the claim. These cases are shocking enough on the cold record, however, to raise serious doubts about what actually occurs in trial courts across the country. Yet courts rarely overturn on grounds of racial bias, instead they weigh the statements against other evidence; simply count the number of racial references; attempt to assert the relevance of the remarks; or explain away their racism.

A. *Explaining Away Remarks*

Some courts go to great lengths to justify the racial remarks of prosecutors as relevant or not clearly racial.[44] In *Smith v Farley*,[45] the Seventh Circuit, finding no racism in the prosecutor's comments, said that it was not clear the prosecutor's references to "shucking and jiving" regarding a Black witness on the stand, and to "Superfly" regarding the Black defendant, would have been significant to a White jury. In fact, the court held, these references could have been based on "cross-over terms," like "badmouth," accepted as a natural and racially neutral part of

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42. *Ballard*, 329 U.S. at 195.

43. The following case discussion highlights some of the more shocking instances of prosecutorial racial bias that is available in the case law. For a very useful survey of case law in this area, see Debra T. Landis, Annotation, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence—Modern Cases*, 70 A.L.R.4th 664 (1989 & Supp. 2000).

44. *See, e.g.*, United States v. Hoyte, 51 F.3d 1239, 1243–44 (4th Cir. 1995) (finding no error in referring to defendants by street name "Jamaicans" because it linked defendants as members of drug conspiracy; also noting that "the court had difficulty understanding several witnesses, including Beckford, who were Jamaican and spoke Jamaican patois which Beckford described as 'broken' English"); United States v. Santiago, 46 F.3d 885, 890–91 (9th Cir. 1995) (finding reference to the Mexican mafia acceptable under plain error review as long as the argument was a "dispassionate and intelligent presentation of the evidence").

45. 59 F.3d 659 (7th Cir. 1995).

speech.[46] Even more troubling, the court engaged in case counting, and concluded that while race is a very important issue, only one case had been overturned on these grounds in the last 15 years.[47]

In *People v. Johnson*,[48] the Black defendant stood trial for robbing a White man of a gold necklace by ripping it off the man's neck on the sidewalk in North Lincoln Park, in front of the victim's family. The Illinois appeals court considering the case described the alleged bias:

> Defendant contends that the prosecutor attempted to arouse the jury's antagonism and to incite racial prejudice against him by pointing out that defendant, who is African American, lived on the south side of Chicago and that the crime occurred a substantial distance away from defendant's home, in North Lincoln Park; and by stating that there was "no reason for him to be there except to cause trouble, to look for some victim." The prosecutor concluded with the statement, "you decide whether to protect your streets, your community from [the defendant]."[49]

The defendant in *Johnson* objected to such statements in his appeal, arguing that the prosecutor was at least implying that " 'a public park on the north side of Chicago is or should be off limits to a black man from the south side of Chicago,' and that urging the jury to protect 'their' community was an appeal to the juror's racial bias."[50] The court failed, however, to find that this bias was an improper appeal to racial prejudice at all. The court held that it was "not improper for the State to comment unfavorably upon the defendant or to urge the fearless administration of the law."[51]

In *State v. Richmond*,[52] the Kansas Supreme Court attempted to assert the relevancy of racial statements at the same time that it found them improper. Richmond—a Black man—was convicted of a brutal assault and rape committed during a home invasion robbery.[53] The victim, a wife and mother, was White. During his closing remarks, the prosecutor stated to the jury, " '[t]hink about having to divulge to your husband that you were raped *by a black male*. Think about having to divulge that information to law enforcement officers.' 'Both of the females are white—Both of the

46. *Id.* at 664.
47. *Id.* at 663 (citing United States v. Doe, 903 F.2d 16, 24–25 (D.C. Cir. 1990)).
48. 581 N.E.2d 118 (Ill. App. Ct. 1991).
49. *Id.* at 126.
50. *Id.*
51. *Id.* at 127.
52. 904 P.2d 974 (Kan. 1995).
53. *Id.* at 976, 977.

victims [of two separate crimes discussed at trial were] white females . . . .' "[54] The court's evaluation of these comments strains credulity:

> The prosecutor's point was that [the victim] may have understated the circumstances when speaking to her husband and law enforcement officers, from concern for her husband's feelings about his wife's being sexually assaulted by another man . . . . Because the prosecutor named the race of the rapist in connection with the victim's telling her husband, there is the further suggestion that his wife's being raped by a black man likely would provoke a more negative reaction from the husband than her being raped by a white man.[55]

In short, the court failed to overturn Richmond's conviction, finding the remarks "improper" while noting that Richmond's attorney did not object to them at trial.[56]

Compare *Richmond* to *State v. Reynolds*.[57] In *Reynolds*, the Florida District Court of Appeals reversed the defendant's conviction for sexual battery on the basis of the prosecutor's improper racial comments. The defendant, a Black man, was accused of sexually assaulting a White woman in her apartment. The prosecutor said things throughout the trial that "suggest[ed] that white women are not safe from Reynolds and that consensual relations between a white woman and a black man are not allowed . . . ."[58] The court quoted the prosecutor in its opinion regarding voir dire when the prosecutor asked the White jurors, " '[a]re there any of you who have either dated, married, had any kind of relationship with a person of the black race? . . . Are there any of you who have a child or relation who has been or is in those circumstances?' "[59]; in the prosecutor's opening statement, he said "this black man standing in her apartment when she came down the hall, he told her he had a gun . . . ."[60]; while examining the victim, and cross-examining the defendant, the prosecutor asked whether either of them had ever dated or had consensual relations with "a black boy or black man" or a "white girl"[61]; and finally, during closing arguments, the prosecutor said,

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54. *Id.* at 983 (emphasis added).
55. *Id.* at 984.
56. *Id.*
57. 580 So.2d 254 (Fla. Dist. Ct. App. 1991).
58. *Id.* at 255.
59. *Id.*
60. *Id.*
61. *Id.* at 256.

> "Ladies and gentlemen, the question is not whether he had a gun, but whether [the victim] feared John Reynolds, whether she feared a black man who had appeared in her apartment without her invitation . . . . I want you to think about how embarrassing it is for an 18-year-old white girl from Crestview to admit she was raped by a black man. It is humiliating."[62]

These comments are very similar to the comments made by the prosecutor in *Richmond* (although there were fewer of them); yet in *Reynolds* the court reversed Reynolds' conviction and remanded for a new trial.

In *State v. Blanks*[63] the Iowa Court of Appeals also reversed a finding of guilt based on the prosecutor's racial statements. The prosecutor used the movie *Gorillas in the Mist* as an analogy in his closing argument, in reference to the defendant's alleged crime and the surrounding events. The prosecutor later asserted that he "was trying to suggest only humans, unlike gorillas, must be subject to a rule of law."[64] The state charged the Black defendant with attacking and beating his White girlfriend during a party with a group of the defendant's Black friends. The court identified two problems with the analogy: the parallels between the case at hand and the fact that in the movie the lead character, a White woman, is brutally murdered by a group of Black poachers.[65] The second problem was the prosecutor's reference to the defendant and his friends as apes and animals.[66] The court recognized that the jury could have interpreted these references as racial slurs, and thus reversed the defendant's conviction and remanded the case for a new trial.[67]

B. *Weighing Evidence of Guilt Against Evidence of Bias*

Courts are more reluctant to find racial remarks have prejudiced a trial when the court believes other evidence weighs heavily against the defendant. In *Darden v. Wainwright*,[68] the Court refused to reverse, even though at every level of appeal, courts recognized the racism of the prosecutor's statements. Darden, a Black man, was tried, sentenced to death, and ultimately executed for the murder of a furniture store owner in an armed robbery. The crime was brutal; the perpetrator shot and killed the store owner, and then shot a 16-year-old part time store em-

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62. *Id.*
63. 479 N.W.2d 601 (Iowa Ct. App. 1991).
64. *Id.* at 602.
65. *Id.* at 604, 605.
66. *Id.* at 603.
67. *Id.* at 605.
68. 477 U.S. 168 (1986).

ployee three times. The assailant also ordered the store owner's wife to perform oral sex on him, after he had shot her husband who lay dying in the rain. While thwarted in his attempted sexual assault, the assailant left the crime scene and crashed his green Chevy into a telephone pole.[69]

Darden's appeals, ending in the United States Supreme Court, argued that the prosecutor's improper comments during the closing argument of the guilt phase of the trial rendered his conviction fundamentally unfair and his death sentence constitutionally unsound under the Eighth Amendment.[70] The Supreme Court's opinion acknowledges that the prosecutor had been widely lambasted for the content of his argument: "That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair."[71] The dissenting opinion of Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, fleshes out the details of the prosecutor's comments. The prosecutor repeatedly referred to Darden as a "prisoner on furlough who 'shouldn't be out of his cell unless he has a leash on him.' "[72] The prosecutor coupled these references with the comment that "[a]s far as [the prosecutor himself is] concerned . . . this man this person, as an animal, this animal was on the public for one reason."[73] The dissenters' views on the effects of these comments is demonstrated by their agreement with the Magistrate Judge in the case, who wrote that the remarks in question arose " '[i]n the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman."[74] Nevertheless, the majority, arguing the totality of the evidence and circumstances, held that the prosecutor's arguments did not unfairly bias Darden's conviction and sentence. This case in many ways highlights the pressures faced by a court when issues of race or gender bias arise. The Court noted that "[t]he weight of the evidence against the petitioner was heavy; [there was] 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges' . . . ."[75] The facts of the crime were exceedingly brutal, and the Court declined to find that the prosecutor's comments made the trial or its outcome "fundamentally unfair."[76]

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69. *Id.* at 171–173.

70. *Id.* at 178–79.

71. *Id.* at 179; *see also id.* at 189–90 (listing other sources of condemnation for the prosecutors actions, including the Florida Supreme Court's opinion, the opinion of the Middle District of Florida, and the opinion of the Eleventh Circuit).

72. *Id.* at 192.

73. *Id.* at 182.

74. *Id.* at 190 n.2.

75. *Id.* at 182.

76. *Id.* at 183.

C. *Finding Racial Remarks Isolated*

In countless cases, courts contend that "isolated" racial references are not grounds for reversal.[77] For instance, in *People v. Cudjo*,[78] the defendant's attorney presented a consent defense to the charge of rape against his client. The prosecutor, in his closing argument, made the following rebuttal of that defense:

> And what [defendant] wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that this woman who, from all appearances is a happily married mother of three trying to make ends meet living out there where they can have a house they can afford, taking in sewing to help meet the family budget, keeping that kind of a house, that this woman is going to have intercourse with a strange man—frankly any man—*a black man*, on her living room couch with her five-year-old in the house.[79]

The California Supreme Court, despite recognizing that prosecutorial argument appealing to racial prejudice "violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution,"[80] refused to find that this statement prejudiced the defendant.[81]

Cases where courts have failed to overturn convictions in the face of prosecutorial misconduct based on racial bias vastly outnumber cases

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77. *See, e.g.*, Russell v. Collins, 944 F.2d 202, 204 n.1 (5th Cir. 1991). The *Collins* court probed the prosecutor's statement that civil rights of victims should be given more weight and civil rights of defendants less weight in criminal cases. The court also discussed the prosecutor asking the jury to imagine the fear of the victim (who was White) as the prisoner of three Black strangers, one of whom had a gun. The court refused the appellant's habeas petition in part because one improper reference to race in the prosecutor's argument is "isolated". *Id.* at 204, n.1. *See also, e.g.*, People v. Espinal, 572 N.Y.S.2d 334 (App. Div. 1991) (discussing prosecutor's reference to fact that store where defendant was employed was owned by persons from Dominican Republic, and holding that these references were not numerous, did not urge jury to judge credibility of witness based on nationality, and were therefore harmless); State v. Poole, 688 N.E.2d 591, 598 (Ohio Ct. App. 1996) (discussing prosecutor's use of different method of cross examining Black witness and other witnesses, specifically, referring to the Black witness's drug habit and talking in a mocking tone of voice, but disagreeing with the defense that this was racially demeaning or discriminatory, in the context of the entire trial).

78. 863 P.2d 635 (Cal. 1993).

79. *Id.* at 661 (emphasis added).

80. *Id.* (citing United States v. Doe, 903 F.2d 16, 24–25 (D.C. Cir. 1990)).

81. *Id.*

where convictions have been overturned.[82] Cases with extremely similar fact patterns fall into both categories, highlighting the judiciary's confusion as to how the harmless error doctrine should apply to prejudicial prosecutorial misconduct.

III. A REMEDY FOR PREJUDICIAL REMARKS

The commonly employed current standard, like that enunciated in *Doe*, does not adequately address racial, gender, or ethnic prejudice injected into trials by prosecutorial misconduct. Instead of evaluating prejudicial statements in light of all other evidence in a trial, courts could fashion a *Batson*-style remedy that permits a court to respond immediately to such remarks, upon an objection of counsel, if the court finds them to be prejudicial.[83] Defense attorneys should be able to offer the objection that a remark is prejudicial under *Doe*, then be able to immediately argue a prima facie case for prejudice. In response, the judge should hold an immediate hearing outside the presence of the jury to decide whether or not a comment was prejudicial. At this hearing, the judge may inquire of the prosecutor his justification for the remark, request clarification of the nature of the objection from the defense, or accept any other evidence it finds helpful. Should the judge find the remark prejudicial, she should decide on the necessary remedy: to strike the remark and offer a curative instruction, or to declare an immediate

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82. The discussion in Part II is limited to claims of racial bias, as a thorough search of case law has failed to turn up claims brought by female defendants of explicit gender bias by prosecutors. A small number of male defendants have raised claims of gender bias in the exercise of prosecutors' discretion whether to bring charges against particular offenders. *See, e.g.*, Carruthers v. State, No. S99P1418, 2000 WL 257773 (Ga. Mar. 6, 2000).

83. *See* Batson v. Kentucky, 476 U.S. 79 (1986). The court stated that in order to establish a prima facie case of purposeful discrimination in jury selection,

> [a] defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96. This combination of factors "raises the necessary inference of purposeful discrimination." *Id.* (citations omitted). *See also* Holland v. Illinois, 493 U.S. 474, 476 (1990) (finding that White defendants had standing to challenge the exclusion of Black jurors through peremptory challenges under *Batson*).

mistrial. While many have criticized the remedy,[84] absent any opportunity to make a full record, a reviewing court is left with a remark, propounded question, or elicited testimony that can later be garnished with an "innocent" explanation. The fact that reviewing courts do not have a stringent standard for *Batson* challenges does not mean that they should not.

Also, while the *Batson*-type remedy suggested here invites comparisons to the lack of efficacy of *Batson* challenges, it is important to remember that *Batson* looks to an act which is of necessity a subjective and discretionary one—the exercise of peremptory challenges. Using the same tool in this context should be quite different. When, for example, like in the *Doe* case, a prosecutor prosecuting against a Jamaican defendant charged with drug trafficking chooses to elicit testimony about how "Jamaicans" have taken over the city with drug gangs in the wake of much publicity about that very subject, and then emphasizes the same appeal to prejudice in his or her argument to the jury, this remedy would require much more of the prosecutor. He or she would have to explain how the testimony was relevant[85] and how it met the more probative than prejudicial standard,[86] not merely satisfy the judge that he or she had *some* articulable reason, other than racism, for making the remark or eliciting the testimony.

In deciding whether to declare a mistrial, courts should be mindful of the *Doe* court's observation that prejudice may be difficult to measure.[87] Although many courts have subsequently relied on the number of prejudicial references made by a prosecutor, the *Doe* court did not identify this or any other easy resolution to the uncertainty of prejudice. Because prosecutors are in the best position to avoid such prejudice, they should bear the burden of the uncertainty he or she has injected into the trial. The courts can place this burden on prosecutors by ordering a mistrial. Better that the prosecutor should bear the burden of his or her

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84. *See, e.g.*, Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 WASH.U. L.Q. 713 (1999).

> If the Supreme Court permits questioning of prosecutors about subjective intent, it will be difficult for lower courts to reject responses as untrue, regardless of whether they appear contrived or as a *post hoc* rationalization. Indeed, the exception to this analysis, *Batson*, proves the folly of permitting judicial inquiry into the prosecutor's reasons for acting. In evaluating the proffered justification for a peremptory challenge, the Court stated that assessing the constitutionality of the attorney's conduct "does not demand an explanation that is persuasive, or even plausible."

Id. at 724 (citation omitted).

85. *See* Fed. R. Evid. 402.

86. *See* Fed. R. Evid. 401, 403.

87. United States v. Doe, 903 F.2d 16, 28 (D.C. Cir. 1990).

own actions, than that the defendant should bear it via a conviction tainted by prejudice.

IV. POLICY REASONS FOR REFORM

A prosecutor's role is symbolic: she serves not just as an adversary, but as a representative of the people. Her influence over the jury is certainly significant, though it is difficult to measure, just as it is difficult to measure the impact of prejudice injected by her into a trial. Prosecutors may make permissible references to race, particularly as they pertain to motive in, for example, hate crimes. As a result, courts face a tremendous challenge in their attempts to discern and evaluate the impact of particular instances of prosecutorial prejudice. Nonetheless, the Supreme Court is clear that there is no place for race, ethnicity, or gender prejudice in the criminal justice system.[88] The credibility of the justice system is on the line, and thus courts need to identify procedures for determining whether the argument appeals to improper prejudice and then determine what to do about it.

As a representative of the state, the prosecutor's primary responsibility is to the administration of justice, not just winning cases.[89] The prosecutor decides when to pursue and when to drop cases, and presumably is uniquely privy to information about the merits of a case. Because of her unique position, juries invest the prosecutor with authority beyond that of an advocate, and the prosecutor must be accountable for that authority.[90] Unfortunately, such accountability is not exacted via the prosecutor's supervisors or bar associations; one author noted that such organizations took no measures in response to any of the hundreds of instances of misconduct he documented.[91] The courts provide the

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88. *See, e.g.*, *Batson*, 476 U.S. at 84–85; McKlesky v. Kemp, 481 U.S. 279, 310 (citing Strauder v. West Virginia, 100 U.S. 303, 309 (1880)); *see also* Rose v. Mitchell, 443 U.S. 545, 555 (1979); 18 U.S.C. § 243 (1994).

89. *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198 (1988).

90. The *Doe* court observed that there exists "'the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with his office, but also because of the fact-finding facilities presumably available to him[sic].' Just how much influence the prosecutor's summation exerted upon the jury is, of course, incapable of precise measurement, but its portent for harm is ominous." *Doe*, 903 F.2d at 28.

91. *See* Bennett L. Gershman, PROSECUTORIAL MISCONDUCT, 13–2 n.4 (6th ed. 1991); *see also* Steve Mills & Ken Armstrong, *Death Row Justice Derailed; Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment into its Least Credible* (pt. 1), CHI. TRIB., Nov. 14, 1999, at A1; Steve Mills & Kenn Armstrong, *Inept Defenses Cloud Verdicts; With Theirs Lives at Stake, Defendants in Illinois Capital Trials Need the Best Attorneys Available, but They Often Get Some of the Worst* (pt. 2), CHI. TRIB., Nov. 15, 1999, at A1; Steve Mills & Ken Armstrong, *The Inside Informant* (pt. 3), CHI. TRIB., Nov.

primary restraint on prosecutorial misconduct. Courts therefor must be equipped with the tools to identify, record, and remedy the injection of prejudice by the prosecutor into criminal proceedings.[92]

Providing a hearing at the moment a comment is introduced is one means of assisting courts in the identification of prejudice, a task that is becoming increasingly difficult as prejudice becomes more subtle.[93] According to one observer, "[a]s American society has matured, blatant forms of racism have increasingly been replaced by newer, more elusive, but equally injurious forms of derision . . . 'modern prejudice is subtle, [and] modern forms of racial discrimination are typically indirect and ostensibly non-racial.'"[94] While case transcripts from the 1990's show that blatant racism has hardly disappeared,[95] in many cases a court's scrutiny of potentially prejudicial remarks must be more refined than it once was.[96] Analyzing suspect comments at the time they are made enables counsel to provide not only context but also perspective on the potential implications of such statements. In cases where the prosecutor herself is unaware of the implications of her statements, or careless about their

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16, 1999, at A1; Steve Mills & Ken Armstrong, *A Tortured Path to Death Row* (pt. 4), CHI. TRIB., Nov. 17, 1999, at A1; Steve Mills & Ken Armstrong, *Convicted by a Hair* (pt. 5), CHICAGO TRIB., Nov. 18, 1999, at A1.

92. *See* Commonwealth v. Kines, 640 N.E. 2d 1117, 1118–20 n.1 (Mass. App. Ct. 1994) (Brown, J. concurring) (1994).

> If prosecutors do not see the *light*, they must be made to feel the heat. . . . [T]he only way to bring about carefully prepared and proper closing arguments and to stop the abuse is to reverse summarily. . . . It still is my hope that ultimately a prosecutor whose misconduct is flagrant will be required personally to reimburse the Commonwealth for the costs of any resultant retrial.

Id.

93. *See* V.A. Richelle, *Racism as a Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct*, 67 TUL. L. REV. 2357 (1993). One commentator suggests that racism resides in the unconscious, thus increasing the subtlety and unawareness with which people practice racism. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323–24 (1987) (arguing that the law must come to grips with "unconscious racism" in order to fully meet the goals of the Fourteenth Amendment's equal protection guarantees).

94. Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222 (1992) (quoting Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 694 (1985)).

95. *See supra* Part II.

96. One example of indirect, though hardly subtle, racial statements are those employed by Officer Koon, when testifying about his beating of Rodney King. Koon stated that King "gave out a bear-like yell" and "groaned like a wounded animal," dehumanizing King, as Blacks have historically been dehumanized and animalized in order to justify their subjugation to brutality. *Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Mar. 20, 1992, at A20.

impact on the jury, it is even more important to employ procedures to illuminate the harmful nature of her remarks and to enable the court to articulate what would otherwise remain latent prejudice.

Once courts have identified a remark as prejudicial, they must still weigh the impact of the remark on the jury. Jury members themselves may not be conscious of the prejudices they hold and the statements that trigger those prejudices.[97] Understanding the force of such statements becomes even more difficult on review, when the appellate court cannot hear the inflections of the prosecutor or take in the influence of such remarks at the juncture in the trial at which they are offered.[98]

These complexities suggest that observation of the jury or simple counting of prosecutorial trial statements that may spark prejudice is not sufficient. In these cases the court's analysis is necessarily speculative, and should encompass the range of potential effects such statements may have on the jury. This analysis must be facilitated by an immediate hearing, in order to ensure that all available considerations are raised for and considered by the court. Defense counsel will have the opportunity to articulate the nature of the case at the moment the statement is made and to make clear likely effects of such statements on the jury. Immediate hearings will also preserve a record for review more extensive than the statements themselves, permitting appellate courts to consider the substance of the remarks more fully and provide further checks against prejudice.

Allowing for an immediate hearing is in fact a fairly conservative solution, in light of the severity of the error. One commentator contends that assessing the impact of racial statements on a jury is so difficult that once a racial statement is identified, the court can never determine that its impact was harmless beyond a reasonable doubt. Instead, a court should grant an automatic mistrial due to the uncertainty injected into the proceedings.[99] As another commentator puts it, "there is no such thing as a harmless constitutional error."[100] Courts should be careful not to underestimate the weight of prejudicial statements. This is particularly possible when courts attempt to balance the weight of these statements against all the other evidence presented at a trial.

This balancing may shift the emphasis of the examination from the fairness of the proceeding to the guilt of defendant.[101] While contextualizing the potentially prejudicial statement is important, the uncertainty of

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97. *See* Lawrence, *supra* note 93, at 323–24.

98. *See* Earle, *supra* note 94, at 1229.

99. *See* DeBrota, *supra* note 4, at 378.

100. James Edward Wicht III, *There is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73 (1997).

101. Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L REV. 1298, 1321 (1988).

any evaluation and the significance of the rights at stake suggest that courts should err on the side of caution in their choice of remedy.

This is not to say that prosecutors may never resort to racially-based arguments. When prosecuting racially-motivated hate crimes, for instance, the motive of the perpetrator is an essential component of the crime.[102] Moreover, critical race theorists like Derrick Bell and Patricia Williams argue that accounts of racial experience and viewpoint must be explicitly injected into legal proceedings, because these accounts are implicit in how Americans view their world.[103] Such devices must obviously be handled with care, however, and requiring an immediate hearing to determine when and how racial statements may be invoked in the courtroom will help ensure that the courts take such care.

CONCLUSION

The costs of prosecutorial appeals to race and or gender bias are enormous; in a society as deeply divided over the effects of bias in our criminal justice system as this one is, failure to address this sort of prosecutorial misconduct will allow confidence in the criminal justice system to continue to erode. Many minorities feel that there is one system for the majority and another more onerous one for them. Requiring a prosecutor to state—immediately at the time of the comment or elicitation of evidence which appeals to race or gender bias—his or her reasons, will force a consciousness on the court, the prosecution and the defense that is sorely needed.

"If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means."[104]

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102. *See* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999).

103. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

104. State v. Torres, 554 P.2d 1069, 1075 (Wash. Ct. App. 1976).