

To: Attendees of California Appellate Projects MCLE

From: Mary Nicol Bowman, Clinical Professor of Law

Date: November 30, 2023

RE: Useful articles re. Racially Biased Language (and Visual Rhetoric)

My Articles on Prosecutorial Rhetoric

Mary Nicol Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions*, 32 Southern Cal. Interdisciplinary L.J. 49 (2023), available at <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/32-3-Bowman.pdf> (written to prosecutors, incorporates Racial Justice Act).

Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 Case W. Res. L. Rev. 39 (2020), available at <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4893&context=caselrev> (focus on trial level issues, written to trial court judges in particular but useful for trial counsel, longest discussion of underlying social science).

Mary Bowman, *Mitigating Foul Blows*, 49 Ga. L. Rev. 309 (2015), available at <https://digitalcommons.law.seattleu.edu/faculty/649/> (focuses on prosecutorial misconduct generally rather than racially biased language, has an extended discussion of harmless error analysis and an appellate focus).

Good Foundational Articles about Implicit Bias, Prosecutorial Rhetoric, Advocacy

Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243 (2018), available at <https://hcommons.org/deposits/item/hc:36195/> (discussing, among other things, stereotypes of different racial groups).

Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663 (2017) (Repeated use of coded language that triggers stereotypes entrench these neural pathways, making it easier to trigger the association and creating more certainty in the associated belief).

L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 862 (2017).

Isabel Bilotta et al., *How Subtle Bias Infects the Law*, 15 Ann. Rev. L. & Soc. Sci. 227 (2019), available at <https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-101518-042602>.

Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 420 (2007), available at <https://scholarship.law.duke.edu/dlj/vol57/iss2/2/> (re. how implicit bias affects memory).

Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 Fordham L. Rev. 3091 (2018) (“The fact that some courts find subtle racial arguments plausible suggests that the jurors might find them persuasive.”).

Ryan P. Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 Mich. J. Race & L. 325 (2006).

Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=627381.

Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002).

Anders Kay, *Schematic Psychology and Criminal Responsibility*, 83 St. Johns L. Rev. 565 (2009) (summarizing priming studies).

Dehumanization and animal imagery

Shana Heller, *Duhumanization and Implicit Bias: Why Courts Should Preclude References to Animal Imagery in Criminal Trials*, 51 Crim. L. Bull. 870 (2015).

Also see Jewel, *Neurorhetoric*

Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. Davis L. Rev. 839 (2019) discussing the study and discussing in more detail the link between dehumanization and reduction in empathy), available at https://lawreview.law.ucdavis.edu/issues/53/2/articles/files/53-2_Levinson.pdf.

Carroll Bogert and Lynnell Hancock, *Superpredator: The Media Myth that Demonized a Generation of Black Youth*, <https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth>.

Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and A Clockwork Orange*, 51 DePaul L. Rev. 715, 720–21 (2002) (internal citations omitted), available at <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1563&context=law-review>.

David Pilgrim, *The Brute Caricature*, Ferris State Univ. (Nov. 2000) <http://www.ferris.edu/news/jimcrow/brute/>

Latino/a Stereotypes

Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 Wis. L. Rev. 369, 389–90 (2018) (“Stereotypes about Latinos are that they are ‘illegal’ immigrants--which indicates both a law-breaking nature and foreignness--untrustworthy, gang members, drug traffickers, and the men sexist and oppressive towards women.”).

Cynthia Willis-Esqueda, Ph.D., *Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias*, 67 UCLA L. Rev. 1204, 1213 (2020)

Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081, 1096 (2001)

Justin D. Levinson et. al., *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 Ga. L. Rev. 225, 270–71 (2021) (summarizing studies showing anti-Latino bias).

Rap Related Sources

Kelly McGlynn, Jacob Schriener-Briggs & Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, 38 Communications Lawyer 10 (2023), available at https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/.

Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 Psychol. Pub. Pol’y & L. 280 (2016), available on Westlaw.

Andrea L. Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Clum. J.L. & Arts 1 (2007,), available at available at https://digitalcommons.law.uga.edu/fac_artchop/962/.

Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 Group Processes & Intergroup Relations 133 (2002), available at <https://nccred.org/wp-content/uploads/2015/09/RudmanLee-GPIR-2002.pdf>.

Visual Rhetoric/Imagery

Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S.Cal. Interdisc. L.J. 237 (2010).

Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307 (2010), available at <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1315&context=wvlr>.

Procedural Issues

Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843 (2015).

Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555 (2013), available at https://scholarship.law.gwu.edu/faculty_publications/728/.

Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149 (2010).

Elisabeth Ingriselli, *Mitigating Jurors Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 Yale L. J. 1690 (2015).

Decision-Making by Judges and Juries

Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 271 (2015), available at <https://cesj.as.uky.edu/sites/default/files/Hunt%202015%20ARLSS%20race%20in%20JDM%20%282%29.pdf>.

Hon. Bernice B. Donald, *Implicit Bias: The Science, Influence, and Impact on Justice*, 22 Sedona Conf. J. 583, 587 (2021)

Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1221 (2009), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>.

Use of the N Word

See Darin Flynn, *White People Should Never Rap the N-Word: A Linguist Breaks it Down*, (University of Calgary, October 2017) (<https://ucalgary.ca/news/white-people-should-never-rap-n-word-linguist-breaks-it-down>) (noting that when used in an out-group context, this racial slur includes stereotypical attributes such as being prone to laziness and violence).

Jody Armour, *N[***]a Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 Ohio St. J. Crim. L. 9 (2014), available at <https://core.ac.uk/download/pdf/159558278.pdf>

Sheri Lynn Johnson, John H. Blume, and Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 Mich. St. L. Rev. 755, 783 (2011) (internal footnote omitted), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2255&context=facpub>.