No Harm, No Foul? A Critique of the Current Legal Framework Dealing with Impermissible Closing Appeals to Racial Bias

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Introduction

Two key principles guide the American legal system. The first is the need for zealous advocacy. Historically, this nation’s courts have relied upon an adversarial theory of adjudication: the most efficient manner by which to resolve a lawsuit is for each litigant to forcefully and completely present his or her case before a neutral fact-finder.¹ This approach, which has been codified by rules of professional responsibility² and endorsed by the U.S. Supreme Court,³ necessarily demands legal representation that is comprehensive as well as persuasive.⁴ Trial attorneys are expected to champion their clients in convincing fashion. The second driving principle is legal equality, the notion that no individual will be denied the “equal protection of the laws.”⁵ From an idealistic standpoint, the courts should be egalitarian, where certain parties will not be unjustly favored over others on the basis of race, sex, socio-economic status, citizenship, and other proxies. While significant steps have been taken to effectuate this

² See Model Rules of Prof’l Conduct R. 1.3 cmt. 1 (1983) (“A lawyer should pursue a matter on behalf of a client . . . and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf”) (citation omitted).
³ See, e.g., Faretta v. California, 422 U.S. 806, 818 (“[T]he [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.”) (alterations added); Landsman, supra note 1, at 1 (“While no such broad-ranging proposition has been stated with respect to civil matters, it is safe to say that under the rubric of Due Process much the same sort of procedure [as detailed in Faretta] is required.”) (alteration added).
⁴ See Landsman, supra note 1, at 170.
⁵ U.S. CONST. amend. XIV, § 1.
country’s promise of equal treatment, especially in the area of race relations,\(^6\) that promise is far from realized in the legal realm.\(^7\)

Zealous advocacy and legal equality are usually compatible concepts. Renowned legal philosopher Lon Fuller observed that the legal profession promotes “one of the highest goals of society . . . to achieve and maintain equality before the law” by providing equal access to representation to “those unable to pay the usual fees.”\(^8\) However, friction arises when a lawyer oversteps the bounds of proper advocacy and, in an attempt to gain any conceivable advantage in the client’s favor, appeals to racial bias. One such situation involves the closing argument of a jury trial, the last and perhaps most effective opportunity for an advocate to convey a lasting impression of his or her version of the case.\(^9\) Although the scope of the material that can be discussed during the summation is technically restricted to matters on the record,\(^10\) an enterprising lawyer may nonetheless inject an appeal to racial bias if he or she determines that the benefit, namely obtaining the desired verdict, outweighs the detriment of judicial reprimand.

The problem is that attorneys are not adequately deterred from making these kinds of emotional appeals. While appellate courts clearly acknowledge that the use of racially-inflammatory statements in the closing argument is improper, this use alone is usually found insufficient to warrant reversal or other corrective actions absent a showing that the statement adversely affected the outcome of the case.\(^11\) In addition to imposing this burden of demonstrating prejudicial effect on petitioners, appellate courts may also absolve offending


\(^11\) See infra Part B.1-2.
attorneys and their clients, in spite of findings of impropriety, if certain “curative” measures were taken at the trial level to mitigate the harm.\footnote{See infra Part B.2.} This legal framework undermines the tenets of zealous advocacy and legal equality and must be restructured so as to reconcile these core principles.

The remainder of this article is divided into four parts. Part A provides an overview of the closing argument and describes the extent to which an advocate may rely upon the emotional reactions of the jury. Part B narrows the inquiry to focus exclusively on appeals to racial bias and the current law regulating their use in the closing. Part C outlines the significant drawbacks of this legal framework. Finally, Part D will offer a possible model of an improved framework that rectifies these drawbacks.

A. Emotional Advocacy in the Closing Argument

In 2003, the American Film Institute named Atticus Finch, the attorney-protagonist in Harper Lee’s \textit{To Kill a Mockingbird}, as the “number one hero” in the history of cinema.\footnote{AFI’s 100 Years . . . 100 Heroes & Villains, \url{http://www.afi.com/tvevents/100years/handy.aspx} (last visited Nov. 18, 2008).} What perhaps cemented the legacy of this lawyer from Maycomb County, Alabama, as portrayed by the late Gregory Peck, was the poignant summation given near the end of the film. Representing an African-American man accused of raping a white woman in a courtroom full of bigots, Finch delivered an eloquent and timeless closing argument, condemning not only the lack of evidence furnished against his client but also the racism tainting the justice system:

\begin{quote}
To begin with, this case should never have come to trial. The State has not produced one iota of medical evidence that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross examination, but has been flatly contradicted by the defendant. Now there is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by
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someone who led, almost exclusively, with his left [hand]. And Tom Robinson now sits before you, having taken the oath with the only good hand he possesses – his right . . . . Now gentlemen, in this country our courts are the great levelers. In our courts, all men are created equal. I’m no idealist to believe firmly in the integrity of our courts and of our jury system. That’s no ideal to me. That is a living working reality!\footnote{TO KILL A MOCKINGBIRD (Universal Pictures 1962) (alteration added).}

In much the same manner that Atticus Finch’s speech represents the movie’s pivotal moment, the closing argument signifies the climax of the jury trial.\footnote{See MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 683 (2d ed. 2002).} It is not only the last chance for each side to directly communicate with the jurors prior to their deliberation,\footnote{Some argue that the closing argument, by virtue of its placement at the end of trial, is inherently persuasive. See H. Mitchell Caldwell, L. Timothy Perrin, & Christopher L. Frost, The Art and Architecture of Closing Argument, 76 Tul. L. Rev. 961, 1068-69 (2002). However, this recency effect is offset by evidence that jurors have already decided their vote by the time closing arguments ensue. See RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY 504 (2003).} but also the first overt opportunity for lawyers to argue the case.\footnote{FONTHAM, supra note 16, at 682-83; Listrom, supra note 9, at 19.} The courts grant lawyers considerable latitude to go beyond simply rehashing the events of trial.\footnote{See, e.g., United States v. Foppe, 993 F.2d 1444, 1450 (9th Cir. 1993).} Lawyers may, of course, rely on logic and rationale. They can make reasonable inferences from the admitted evidence and frame the facts and themes of the case to cast a sympathetic light upon the client\footnote{See Jennifer Kruse Hanrahan, Note & Comment, Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools, 2003 BYU Educ. & L.J. 299, 323 (2003). Hanrahan warns that a lawyer may lose an audience’s focus if the rational argument is too confusing. Id.} or implore members of the jury to use “common sense” in considering the evidence.\footnote{Caldwell et al., supra note 17, at 1039.} Moreover, advocates may try to evoke certain emotional responses while delivering their summation, either verbally\footnote{See, e.g., State v. Griffin, 570 P.2d 1067, 1070 (Ariz. 1977) (“Emotional language is an acceptable weapon in closing argument.”).} or physically.\footnote{See, e.g., Ferguson v. Moore, 39 S.W. 341, 343 (Tenn. 1896) (“Tears have always been considered legitimate arguments before a jury . . . .”) (citation omitted).} Long ago, classical rhetoricians identified the emotional appeal, or pathos, as one
of the three elements of persuasive discourse. Modern trial advocacy literature has followed suit, insisting that a successfully-crafted closing argument must “show the jury why the case matters, why the jury should care.” Thus, in order for a summation to “ascend[] to the highest peaks of human discourse,” it must capture both the hearts and minds of jurors.

Nevertheless, although emotion plays an important function in the closing argument, it cannot be utilized independent of the record. While courts have given attorneys much leeway in deciding the manner of presenting the argument, they have also recognized that permitting such groundless appeals to jurors’ passions would deprive the other party of a trial decided on the merits of the case. Likewise, the same commentators who adamantly maintain that an attorney’s summation must somehow engage the jury’s sentiments understand that emotional arguments must be tempered by rationality.

Yet, despite these warnings, many American lawyers introduce matters unrelated to the dispute for no evident purpose other than to incite a bias emotional response. One such matter is race, a social construction still used as a proxy to attribute unflattering characteristics to minority groups, including criminal, lazy, depraved, hypersexual, terrorist, and foreign

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23 See generally William A. Covino, The Elements of Persuasion (1997); Hanrahan, supra note 20. These readings also describe logos (logical arguments) and ethos (perception of the speaker’s character and credibility).
24 Caldwell et al., supra note 17, at 1064.
25 Id. at 964 (alteration added).
27 See, e.g., Beyea, 38 Cal. App. 3d at 197.
28 See, e.g., Seaboard Air Line R.R. Co. v. Strickland, 88 So. 2d 519, 523 (Fla. 1956).
economic threat. While courts have generally held that statements arousing the racial animus of jurors are improper, attorneys use them in the summation anyway. This behavior may be partially explained by the prevalent belief within the bar that the closing argument makes a critical difference in a close contest. When no clear advantage materializes after both sides present their case, an attorney may be compelled to use any persuasive technique at his or her disposal, including the improper appeal to bias, to obtain a slight edge. This explanation, however, fails to account for those lawyers who choose to employ racially-inflammatory language in lopsided, “open-and-shut” proceedings. A more appropriate theory is found instead in the inadequate operation of the law regulating the use of racial speech.

B. **The Current State of the Law Governing Appeals to Racial Bias in Jury Trials**

In the absence of extensive statutory authority on the subject, federal and state case law developed a common, two-pronged analytical framework for the regulation of racial statements made during the course of trial, including summation, in criminal and civil actions. By and large, a statement pertaining to the race of a party, witness, counsel, or other groups

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36 See generally id.
34 See generally BENSON TONG, UNSUBMISSIVE WOMEN: CHINESE PROSTITUTES IN NINETEENTH-CENTURY SAN FRANCISCO (2000).
36 See id.
37 See infra Part B.
38 See FONTHAM, supra note 16, at 683 (“Convincing these ‘swing votes’ may make the difference between victory and defeat.”); BETTYRUTH WALTER, THE JURY SUMMATION AS SPEECH GENRE: AN ETHNOGRAPHIC STUDY OF WHAT IT MEANS TO THOSE WHO USE IT vii (1988) (seventy-five percent of lawyers interviewed believed that the summation could make a critical difference in a close case).
39 See, e.g., Herring v. State, 522 So. 2d 745 (Miss. 1988).
40 See MAUET, supra note 27, at 458.
involved in the litigated matter,\(^46\) may constitute grounds for remedial action on appeal\(^47\) if (1) the statement was improper,\(^48\) and (2) the statement prejudiced the outcome of the trial.\(^49\)

Whether such a statement is improper and prejudicial is decided on a case-by-case basis.\(^50\)

1. **“Improper” Statements of Race**

While the various jurisdictions look at the particular merits of the case in question to establish impropriety and may reach results that vary significantly from each other, they nevertheless identify some of the same dispositive factors to justify their rulings.\(^51\) First, courts customarily recognize that an attorney’s reference to race is dubious when race has no clearly legitimate bearing on the case.\(^52\) For instance, in Louisiana, a prosecutor’s comment that the defendant, an African-American accused of raping a white woman, wanted to “get even with the white people” was held improper because the assertion was not only irrelevant to prove any of the elements of the charge, but also unsupported by the trial record.\(^53\) Statements pertaining to an individual’s race are acceptable, however, when they are made for germane purposes, such as

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\(^{46}\) See, e.g., United Order of Good Samaritans v. Lomax, 172 Ark. 330, 333-34 (1926) (“These negro insurance companies always want to hold back, and never want to pay the claims against them. I have had several similar suits against other negro insurance companies, and I have had the same trouble with them.”).

\(^{47}\) Remedial actions on appeal include a grant of a mistrial, a grant of a new trial, or reversal. See Jacob A. Stein, Closing Arguments: The Art and the Law § 1:45 (2d ed. 2005).

\(^{48}\) See infra Part B.1.

\(^{49}\) See infra Part B.2.

\(^{50}\) This “totality” approach for each prong best explains inconsistencies in the case law decisions made by the different federal and state jurisdictions. See generally 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 (1991); C.R. McCorkle, Annotation, Statement By Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial, 99 A.L.R. 2d 1249 (1965).

\(^{51}\) See, e.g., United States v. Pena, 793 F.2d 486, 490 (2d Cir. 1986).


\(^{53}\) State v. Jones, 283 So. 2d 476, 477 (La. 1973). By contrast, courts will not find a statement improper when the “record is replete” with observations of a person’s race. State v. Sheard, 276 S.W.2d 191, 195 (Mo. 1955).
referring to a witness’s identification of the alleged perpetrator,\textsuperscript{54} pinpointing a party’s possible motive,\textsuperscript{55} explaining a fraudulent scheme,\textsuperscript{56} providing factual background,\textsuperscript{57} or even developing an analogy.\textsuperscript{58} In addition, some jurisdictions may still refuse to grant relief to a petitioner who claims that the respondent made an improper racial remark if the petitioner initially introduced the issue of race at the trial.\textsuperscript{59}

Second, courts also maintain that an improper statement should have a tendency to incite racial prejudice or feeling by emphasizing some kind of objectionable difference. Direct invocations of stereotypes are prime examples of inflammatory remarks warranting corrective relief.\textsuperscript{60} In United States v. Cruz-Padilla, a federal drug possession and conspiracy action, the Eighth Circuit ruled that the prosecutor made an improper remark during the summation linking

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\textsuperscript{54} See Turner v. State, 429 So. 2d 645, 647 (Ala. Crim. App.1982); State v. Kirk, 472 P.2d 237, 239-40 (Kan. 1970); Patterson v. Commonwealth, 555 S.W.2d 607, 610 (Ky. Ct. App. 1977) (prosecutor’s statement in rape trial that “it’s hard for me to tell people of the Negro race apart” was merely an attempt to explain a witness’s difficulty in identifying one of her assailants). Even if an attorney purports that he or she refers to race for the ostensible purpose of identification, such a reference may still be made in an inflammatory manner, a reality that courts discount. In State v. Mayhue, appellant contended that the following prosecutorial comment was improper and prejudicial: “I suggest to you ladies and gentlemen, that no person in their right mind would want to remember three black men getting on her naked body, dumping their seed in her vagina . . . .” 653 S.W.2d 227, 237 (Mo. Ct. App.1983). Nonetheless, the Mayhue court ruled that the prosecutor committed no misconduct, citing among other things that “it was evident to everyone associated with this trial that appellant is black and the victims are white, so the racial relationship was of no surprise to anyone, including the jury.” Id.


\textsuperscript{56} See People v. Rideaux, 61 Cal 2d 537, 540 (1964) (“Jamaican switch”); People v. Tai, 711 N.Y.S.2d 379, 380 (App. Div. 2000) (references to race in summation not improper since references went no further than what was necessary to reveal facts involving the importation of drugs from Asia).


\textsuperscript{59} See State v. New Chue Her, 510 N.W.2d 218, 221 (Minn. Ct. App. 1994) (prosecution’s invitation to jury to distinguish Hmong defendant’s culture from American culture made in response to defendant’s claim that rape does not exist in Hmong culture rather than as a xenophobic plea to convict based solely on defendant’s race).

\textsuperscript{60} Indirect appeals to racial prejudice are theoretically actionable as well. See STEIN, supra note 47, § 1:45. Many courts, however, have difficulty deducing the presence of racial animus in a challenged statement when race is not explicitly mentioned. See infra notes 64-71.
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the defendant’s ability to lie to his illegal alien status.\textsuperscript{61} Unmoved by the prosecution’s insistence that it merely drew a permissible inference between the defendant’s pattern of deception and his use of a false identity, the court observed that the prosecution went beyond the scope of proper advocacy by repeatedly bringing up the defendant’s Hispanic ethnicity and foreign origin while concurrently portraying the defendant’s “way of life” as naturally deceptive.\textsuperscript{62} Similarly, the Florida District Court of Appeal, in reversing a manslaughter conviction, found that the prosecution improperly attributed criminal conduct to the defendant because of his Mexican ethnicity.\textsuperscript{63}

On the other hand, courts are reluctant to find a statement as having the penchant to arouse racial animus when the statement does not facially address race. Degrading, undignified, and racially-tinged descriptions presented by attorneys about the opposing party, including “primitive beast of the jungle,”\textsuperscript{64} “mad dog,”\textsuperscript{65} “inhuman,”\textsuperscript{66} “that,”\textsuperscript{67} and “children,”\textsuperscript{68} often escape judicial scrutiny.\textsuperscript{69} Likewise, geographical allusions, including comparisons involving

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  \item \textsuperscript{61} 227 F.3d 1064, 1069 (8th Cir. 2000).
  \item \textsuperscript{62} See id. at 1068, 1069. \textit{But see State v. Mitchell}, 620 S.W.2d 347, 349 (Mo. 1981) (comment that defendant is “not like us” refers to defendant’s criminal record instead of racial background).
  \item \textsuperscript{63} \textit{Terrazas v. State}, 696 So. 2d 1309, 1310 (Fla. Dist. Ct. App. 1997).
  \item \textsuperscript{64} \textit{State v. Hills}, 129 So. 2d 12, 27 (La. 1960).
  \item \textsuperscript{65} \textit{People v. Mayfield}, 14 Cal. 4th 668, 789 (1997).
  \item \textsuperscript{66} \textit{Nguyen v. Reynolds}, 131 F.3d 1340, 1358 (10th Cir. 1997).
  \item \textsuperscript{67} \textit{Thomas v. State}, 419 So. 2d 634, 635 (Fla. 1982).
  \item \textsuperscript{68} \textit{Flowers v. State}, 113 So. 2d 344, 346 (Ala. 1959).
  \item \textsuperscript{69} \textit{But see State v. Wilson}, 404 So. 2d 968, 971 (La. 1981) (“[T]he repeated references to . . . ‘animals’ as a description of the defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact.”) (alteration added) (citation omitted).
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areas and locations with prominent minority populations, are not usually judged to involve an appeal to racial bias since race, though implicated, is unspoken.

Moreover, courts will not consider inflammatory any statements made by counsel that outwardly plead for the equal treatment of the litigants. Unlike stereotypes such as the one employed in *Cruz-Padilla*, these “Atticus Finch” leveling arguments attempt to discourage jurors from relying on racial biases in arriving at their verdict. Hence, statements that parties “[b]lack and white, young and old . . . are all equal when they walk into this courtroom,” that jurors should “not be harder on the defendant because he was a black man and the victim a white boy,” that the jury should not use “defendants’ foreign birth and resulting unfamiliarity with [American] law and language” as an excuse for unacceptable behavior, and that the attorney was “confident . . . that twelve white jurors are going to sit in judgment on a black man no differently than they would on a white man . . . red, oriental or any other color” were all held to be proper.

Third, federal and state cases indicate that the contested racial remark must have been made for the express purpose of appealing to the jury’s racial bias. Unless the accused attorney openly admits that his or her statement was calculated to inflame the passion of the jurors, courts

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70 See *State v. Deas*, 212 S.E.2d 693, 694 (N.C. Ct. App.1975) (“If [the motel operator] had seen a white woman in the car and [the African-American defendant] was registering as man and wife, he would have remembered it because it don’t happen in Transylvania County; it may happen in Charlotte, but it don’t happen in Transylvania County.”) (alteration added).

71 But see *Guerra v. Collins*, 916 F. Supp 620, 636 (S.D. Tex.1995) (“[Prosecutor’s statement] went beyond arguments seeking law enforcement to improperly play to the jury’s prejudice by painting all residents at 4907 Rusk with the broad brush of shared responsibility for the death of [victim]. . . . This ‘us’ against ‘them’ argument is nothing more than an appeal to ethnic of national origin prejudice which is constitutionally impermissible.”) (alterations added) (citation omitted).

72 See supra Part A.


76 *State v. Stamps*, 569 S.W.2d 762, 767 (Mo. Ct. App. 1978) (citations omitted).

77 See *Earle*, supra note 52, at 1224-27 (intent-based inquiry).
must make inferences of inflammatory intent after reviewing the evidence, trial record, and overall circumstances. Cases indicate that courts often predicate a finding of intent on the total absence of relevancy or probative value. It is unclear whether intent may still be established even though the statement bears some appearance of relevance. Interestingly, courts sometimes deduce a lack of sinister intent when an allegedly biased remark is made to a racially-integrated jury or when the offending attorney’s case rests on the testimony of witnesses who are of the same race as the petitioner.

2. “Prejudicial” Statements of Race

If the appellate court determines that a statement constitutes an improper appeal to racial bias, the analysis proceeds to the second prong: whether the statement prejudiced the final verdict. In other words, the harm satisfying this requirement is derived not from the improper appeal itself, but from the effect that the appeal had on the jury deliberation process. Thus, racial statements are deemed prejudicial if they “prevent[] [the jury] from giving fair and impartial consideration” or “deprive the defendant of a fair trial.” Whether a statement reaches this

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78 See Tierco Maryland, Inc. v. Williams, 849 A.2d 504, 523 (Md. 2004); State v. Belgarde, 755 P.2d 174, 176 (Wash. 1988); Schotis v. N. Coast Stevedoring Co., 1 P.2d 221, 226-27 (Wash. 1931) (counsel’s statement that Japanese people are nonbelievers in God and not bound by the witness oath found purposefully inflammatory).
79 One possible scenario involves an advocate’s provocative manner of expressing the race-based remark. Even if the reference to race is somehow relevant to the proceedings, a lawyer’s voice, attitude, or demeanor may nonetheless divulge a sinister motivation. See, e.g., Maxwell v. Stephens, 348 F.2d 325, 331 (8th Cir. 1965). In such instances, courts should be encouraged to adapt a more flexible response. One possible approach is to implement a balancing test, similar to the Federal Rule of Evidence 403, to find improper any statement whose legitimate significance to the case is overshadowed by an inflammatory purpose. See Carter v. Rafferty, 621 F. Supp. 533, 545 (D.N.J. 1985) (citing Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978)).
81 See, e.g., Pena, 793 F.2d at 491.
82 Kolaric, 261 Cal. App. 2d at 23 (alterations added).
point depends on the jurisdiction. Most courts, however, follow a lenient, totality-of-the-circumstances inquiry.  

a. **Harmless Error Principle**

The first approach follows the harmless error principle. Under this standard, a racist comment will not be grounds for corrective action if, in light of the evidence and the circumstances, the decision would have remained the same. In order for an impermissible racial remark to be prejudicial, it must have manipulated the verdict to a substantial likelihood. Although it is not impossible for an appellant to prevail under this harmless error principle, courts have considerable freedom to raise a number of different factors that either diminish the substantial likelihood of a racial appeal’s prejudicial influence over the jury’s decision or waive the appellant’s opportunity to seek redress for the prejudice.

One of the chief factors upon which appellate courts rely is the strength of the case made against the petitioner at trial. In *Herring v. State*, a rape case, the prosecutor articulated in his summation, “No matter if you’ve got [defendant’s] fingerprints all over the house. No matter if [the victim is] beaten. No matter if her vagina is bruised and torn. No matter if her room is torn up. No matter if her door is forced open. You just can’t get any black people who are gonna vote for life against a black defendant who does that to a white person . . .” Although the Mississippi Supreme Court recognized that the remark was a highly-improper attack on the credibility of the African-American jurors, the evidence of the appellant’s guilt was so overwhelming that “no jury, no matter its makeup, could have reached any other result but that

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84 See generally Landis, *supra* note 50; McCorkle, *supra* note 50.
85 See Earle, *supra* note 52, at 1213 n.9.
86 Belgarde, 755 P.2d at 176.
87 See, e.g., id.
88 522 So. 2d at 746 (alterations added).
89 Id. at 747.
the defendant [Herring] was guilty beyond a reasonable doubt of the forcible rape of [victim] N.K.". Whether evidence is so strong or overwhelming as to justify a denial of relief is subject to the contours of the particular case.®

Another factor taken into account is the number of times the improper racial remark was made during the closing argument or the trial in general. Courts are likely to find that isolated and incidental statements do not constitute improper appeals to racial prejudice, reasoning that the “ardor of advocacy” and the “excitement of trial” may cause even the most experienced counsel to go astray. In contrast, in reversing an award for compensatory and punitive damages in a civil lawsuit, one court found a significant probability of influence over the jury by citing the fact that the respondent injected the issue of race, which was irrelevant to the claim, at least sixty-three times over the course of a short three-day trial.

Perhaps the strongest mitigating factor that harmless error jurisdictions frequently bring into play is the curative instruction issued by the judge. These courts view these instructions positively as measures that significantly offset the prejudicial impact of improper racial remarks and preserve the semblance of judicial impartiality. Curative instructions to the jury may be

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® Id. at 748 (alterations added). The court did not find it unnecessary to give a “detailed recital of the facts of this case” to clarify what evidence proved overwhelming. Id.
®1 See United States v. Burks, 508 F.2d 672, 672-73 (5th Cir. 1975); People v. Cabaltero, (1939) 31 Cal. App. 2d 52, 62 (1939) (deputy district attorney’s remarks about percentage of crime committed in county by Filipinos improper, but did not require reversal of first-degree murder of a co-conspirator convictions because admissions, confessions, and other witness testimony showed that one of the defendants unequivocally shot the victim).
®3 See Earle, supra note 52, at 1221.
®4 Tierco Maryland, 849 A.2d at 520, 523.
®5 A variation of this curative instruction may be offered by the violating attorney in the form of an apology or a disclaimer of intent. See, e.g., Henderson v. Louisiana Downs, Inc., 566 So. 2d 1059, 1064 (La. Ct. App. 1990).
issued preemptively\textsuperscript{97} or immediately after an attorney’s impermissible appeal to racial bias.\textsuperscript{98} If the trial court fails to issue a satisfactory instruction, or any instruction, the appellate court weighs this deficiency or absence heavily in favor of appellant.\textsuperscript{99} Whether an instruction is satisfactory varies by the case. \textit{Moore v. Morton},\textsuperscript{100} a recent Third Circuit decision, illustrates an insufficient admonition. After the prosecutor suggested that the accused rapist, an African-American defendant, by virtue of his Caucasian wife’s testimony, preferred white women and likely selected the victim because of her race,\textsuperscript{101} defense counsel immediately objected and the district judge promptly issued the following statement:

\begin{quote}
Ladies and gentlemen of the jury, I am ordering you to disregard what the prosecutor said in reference to the testimony, the appearance of [defendant’s wife], she being a white person, a Caucasian, and [defendant] being a black person, and that the reason, the selective process, was that he did this aggravated assault because he selected a white or Caucasian person. Disregard that. That’s an unfair and unreasonable inference to be drawn from the testimony and I’m convinced that it’s not proper argument to the jury.\textsuperscript{102}
\end{quote}

Despite the strong, forthright content of this curative instruction, the Third Circuit ruled that this instruction alone could not nullify the prejudicial effect of the statement.\textsuperscript{103} Specifically, the court held that the evidence against the defendant “was not sufficiently strong to ensure that the jury disregarded the prosecutor’s inflammatory and highly prejudicial arguments and decided the case solely on the evidence.”\textsuperscript{104}

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\textsuperscript{97} See, e.g., \textit{Honda v. People}, 141 P.2d 178, 186 (Colo. 1943).
\textsuperscript{98} See \textit{Lomax}, 172 Ark. at 334; \textit{Kirk}, 472 P.2d at 240; \textit{Knight v. State}, 854 So. 2d 17, 20 (Miss. Ct. App. 2003); \textit{Int’l Lumber Exp. Co. v. M. Furuya Co.}, 209 P. 858, 860 (1922) (“Alleged misconduct for respondent in his argument to the jury concerning the credibility and integrity of Japanese was probably cured by the prompt instruction of the court.”).
\textsuperscript{100} 255 F.3d 95 (3d Cir. 2001).
\textsuperscript{101} Id. at 99-100.
\textsuperscript{102} Id. at 113-14 (alterations added).
\textsuperscript{103} Id. at 119-20.
\textsuperscript{104} Id. at 120.
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In addition, appellate courts have rejected claims of prejudicial influence on the grounds that the petitioner’s trial counsel failed to complain to the trial judge.\footnote{105} When counsel fails to make an objection to an improper racial appeal\footnote{106} or, alternatively, fails to request curative action by the judge following a sustained objection,\footnote{107} courts will regard these omissions as waivers.\footnote{108} Unlike the aforementioned justifications for denying relief based on the overwhelming strength of the evidence, the incidental nature of the improper remark, or the issuance of curative instructions, all of which purport to reduce the prejudicial effect of the racial appeal, this waiver rationale prevents petitioners from pursuing appellate action, even if their claim is otherwise meritorious.\footnote{109}

b. **Fundamental Error Principle**

The second approach that fewer courts have outright adopted, called the fundamental error principle, operates on the idea that improper racial remarks are harmful *per se* and cannot be easily rendered innocuous by the circumstances.\footnote{110} Some confusion abounds when attempting to figure out which jurisdictions follow this fundamental error principle due to the language of the decisions. For instance, the *Herring* court, which used a harmless error analysis, nevertheless commented that a defendant’s “fundamental liberty” was at stake.\footnote{111} The distinguishing feature of a fundamental error jurisdiction is the presumption of harm that a racial remark, once uttered, once counsel protests, via an objection or the like, the judge may have a responsibility to rectify. See, e.g., *Brown v. State*, 138 S.E.2d 741, 745 (Ga. Ct. App. 1964) ("[The] law places an affirmative duty upon the trial judge to prevent on his own motion argument by counsel calculated to invoke prejudice against the adverse party.") (alteration added).

\footnote{106} See, e.g., *State v. Neal*, 93 So. 2d 554, 557 (La. 1957).


\footnote{108} See also Earle, *supra* note 52, at 1223 n.78.

\footnote{109} Id.

\footnote{110} Cf. Earle, *supra* note 52, at 1213 n.9 ("Some courts have analogized prosecutorial racism to judicial partiality, denial of counsel or coerced self-incrimination, exceptions to *Chapman v. California* [386 U.S. 18 (1967)] all considered harmful per se and thus mandating automatic reversal.").

\footnote{111} *Herring*, 522 So. 2d at 747.
has on the impartiality of the proceedings.\footnote{See Terrazas, 696 So. 2d at 1310 (“The burden is on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict.”) (emphasis added).} The strength of such a presumption withstands the force of the counterarguments used by harmless error courts to deny relief such as overwhelming evidence of liability,\footnote{See, e.g., id.} petitioner’s trial counsel’s failure to object,\footnote{See Liggett Group Inc. v. Engle, 853 So. 2d 434, 462 (Fla. Ct. App. 2003) (“An appeal to race so fundamentally damages the fairness of a trial, that even in the absence of an objection, a new trial is required in order to maintain the public trust in our system of justice.”); Terrazas, 696 So. 2d at 1310.} or the delivery of a curative instruction by the trial judge.\footnote{See Reynolds v. State, 580 So. 2d 254, 255 (Fla Dist Ct App 1st Dist 1991) (“[T]he controlling issue is whether the subject statements injecting the race issue were so egregious and pervasive that they constitute fundamental error, i.e., that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection or even in the presence of a rebuke by the trial judge.”) (alteration added); Wilson, 404 So. 2d at 970.}

Other cases indicate that some courts may come to identify an even stronger version of the fundamental error principle. This adaptation rose to prominence in United States ex rel. Haynes v. McKendrick, in which the state appealed the district court’s grant of a conditional writ of habeas corpus on the basis that the prosecution’s remarks about “colored people” and their habits, mannerisms, and appearances prejudiced the defendant’s conviction.\footnote{481 F.2d 152 (2d Cir. 1973).} In rejecting the state’s assertion of harmless error due to overwhelming evidence, the Second Circuit, though falling short of denouncing the harmless error principle, observed that “[r]acially prejudicial remarks are, however, so likely to prevent the jury from deciding a case in an impartial manner and so difficult, if not impossible, to correct once introduced, that a good argument for applying a more absolute standard may be made.”\footnote{Id. at 161 (alteration added). See also Steven D. DeBrota, Note, Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine, 64 IND. L.J. 375, 383 (1989) (Haynes case as first case since Chapman that harmless error analysis might be inappropriate when applied to racially prejudicial statements by the prosecution).}
A subsequent Fourth Circuit decision, *Miller v. North Carolina*, facilitated this movement.118 In the summation of a rape trial, the prosecutor in *Miller* attempted to disprove the African-American defendants’ consent defense by arguing that such a theory was “inherently untenable” due to the fact that “the average white woman abhors anything . . . that had to do with a black man. It is innate . . . .”119 In reversing the district court’s denial of the defendants’ petition for a writ of habeas corpus, the Fourth Circuit held that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.”120 The *Miller* court also highlighted the tremendous difficulty of ascertaining the precise effect of a racial remark on the verdict as a justification for an automatic reversal standard.121

C. **Deficiencies in the Current Framework**

1. **The Scope of the Impropriety Inquiry Does Not Reach Implicit Appeals to Racial Bias**

   The first drawback of the current framework is the limited scale of the impropriety inquiry. Given this country’s overall hostility against overt forms of racism,122 recurring and blatant appeals to racial animus are unlikely to escape disapproval in modern courtrooms.123 Under this prong, however, an attorney who made racial remarks in closing arguments or sometime during the trial can successfully defend his or her use of the words on multiple grounds, including (1) a relevant purpose in the matter, (2) an absence of express, racially-

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119 *Id.* at 704 (citations omitted).
120 *Id.* at 707. In addition to the Sixth Amendment, the *Miller* court also identified that “an appeal to racial prejudice impugns the concept of equal protection of the laws.” *Id.*
121 See *Miller*, 583 F.2d at 708.
122 See *supra* note 6.
123 See, e.g., *Cruz-Padilla*, 227 F.3d 1064. One commentator rightly points out that the “crux of the problem is that even now, the courts only take exception to blatant racist appeals . . . .” Alford, *supra* note 31, at 326.
inflammatory meaning, and/or 3) an absence of any discriminatory intent on the part of the advocate.\textsuperscript{124} Each of these excuses has loopholes that an enterprising lawyer may exploit.

Though courts have clearly established that a reference to race is legitimately allowed in order to establish identification, motive, routine facts, and so forth, they evidently fail to account for content “tinged with racial content” that may nevertheless incite jurors.\textsuperscript{125} This is exemplified in \textit{People v. Mayhue}, another rape case.\textsuperscript{126} Despite provocative phrasing by the prosecutor, namely “three black men getting on her naked body, dumping their seed in her vagina,”\textsuperscript{127} the court did not find such statements improper, relying on a relevance rationale to offset the palpable inflammatory effect.\textsuperscript{128} Appellate courts are at a particular disadvantage since, in examining the written record, they do not have the benefit to perceive any “tone, a sense of timing, or juror reaction”\textsuperscript{129} that may betray an attorney’s motivation for offering the racial reference.

Next, statements that do not explicitly touch on race are not necessarily devoid of any appeal to racial bias. Racial prejudice can be “subtle, . . . typically indirect and ostensibly nonracial.”\textsuperscript{130} Yet, judges have not consistently detected and responded to this contemporary form of racism, perhaps due to the predominantly-Caucasian composition of the judiciary\textsuperscript{131} and either conscious or subconscious adherence to antiquated notions of race relations.\textsuperscript{132} Because

\textsuperscript{124} \textit{See supra} Part B.
\textsuperscript{125} \textit{State v. Sexton}, 444 S.E.2d 879, 902 (N.C. 1994).
\textsuperscript{126} 653 S.W.2d 227 (Mo. Ct. App.1983).
\textsuperscript{127} \textit{Id.} at 237.
\textsuperscript{128} \textit{See id.}
\textsuperscript{129} \textit{See} Earle, \textit{supra} note 52, at 1229.
\textsuperscript{130} \textit{See id.} at 1222.
\textsuperscript{131} \textit{See id.} at 1225 n.82 (“[J]udges, most of whom are white, may have trouble grasping the subtle content of racial remarks.”) (alteration added).
\textsuperscript{132} The fact that some courts still write opinions containing pejorative racial slurs displays ignorance and insensitivity, even if the message was supposed to be benign. \textit{See, e.g.}, \textit{Herring}, 522 So. 2d at 747 (“Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exact equal footing. All must be tried on facts, and not on abuse.”).
courts struggle to find the connection between a facially-neutral remark and racial animus. Some of the more common techniques include describing an individual in terms of a racial stereotype, substituting a proper name into a phrase to define the subject’s action in order to associate the qualities of the person who bears that proper name with the subject of definition, hinting at race without stating race, such as through geographical references, and implanting race into the minds of jurors by actually stating race, though concurrently purporting to disavow racial considerations.

Lastly, the requirement that the offending attorney must have intended to incite jurors’ prejudices may preclude statements that would ordinarily constitute improper appeals to racial animus on the grounds of mistake or good faith. Even if an attorney did not mean to arouse the passion of the jury, the racial statement, once made, could still profoundly impact the proceedings. Moreover, ascertaining intent is highly speculative and arbitrary. Barring any admission of such intent by the attorney, the inquiry is entirely circumstantial. On the one hand, a prudent and enlightened bench officer may logically infer racist intent when a questionable statement is introduced for the first time in summation in a close case. On the other hand,

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133 See Earle, supra note 52, at 1223.
134 See, e.g., Alford, supra note 31, at 347-359 (discussing rhetorical techniques that prosecuting attorneys may utilize to indirectly invoke racially-charged stereotypes).
135 Id. at 348-49 (systrophe). See also supra Part B.1.
136 Id. at 351 (antonomasia). For an example of an antonomasia that succeeded on appeal, see Smith, 516 N.E.2d 1055.
137 Id. at 352-53 (circumitio). For an example of a circumitio that succeeded on appeal, see Deas, 212 S.E.2d 693.
138 Id. at 357 (paralipsis). “Atticus Finch” arguments, discussed earlier, fall within this category. See supra Part A.
139 See McFarland v. Smith, 611 F.2d 414, 417 (2d Cir. 1979).
140 See DeBrota, supra note 117, at 386 (“[A] n individual displaying prejudice against blacks may cue negative schemata concerning blacks.”). Schemata are groups of concepts and perceptions and the systems human beings use to organize them. WATIES, supra note 16, at 16. They are formed primarily by perceptions and ideas that have been related to via socialization. Id. at 17.
141 See Earle, supra note 52, at 1213.
because many judges are probably ill-equipped to deal effectively with racial questions, courts have reached ridiculous conclusions in finding the absence of a prejudicial motive.

2. The Prejudicial Effect Prong is Unwarranted and Futile

The second drawback is the condition found in the majority of jurisdictions that the improper racial remark must prejudicially affect the final outcome. That an improper appeal to racial prejudice is not sufficiently prejudicial by itself is perplexing considering that such appeals violate the Sixth Amendment right to an impartial jury and equal protection. Moreover, in *McCleskey v. Kemp*, the U.S. Supreme Court accepted the view that the judiciary has a solemn responsibility to eradicate racial animus from the legal process. *McCleskey* further instructed that “the Constitution requires questioning as to such [racial] bias.” In light of this recognition that the “mere existence of racial arguments is a threat to the integrity of the judicial system” and the Supreme Court’s mandate to affirmatively stamp out racism, imposing an additional showing of prejudicial effect is excessive. Yet, such a showing is usually required under the harmless error principle and, as a result, many petitioners with legitimate claims of unequal treatment are denied relief and an allegedly egalitarian society suffers.

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142 See *supra* note 131. One commentator is hesitant to trust these judges’ intuition about what constitutes racist intent. See Earle, *supra* note 52, at 1225.
143 See cases cited *supra* notes 80-81. Also, an attorney might rationalize that a racial reference is relevant to the matter being litigated. See *supra* Part B.1.
144 See Earle, *supra* note 52, at 1213. See also id. at 1218 n.38 (“[P]rosecutorial racism marks the point where the due process and equal protection clauses overlap . . . .”) (internal quotations omitted). Although the right to an impartial jury is guaranteed in criminal prosecutions, due process likely requires something analogous in civil cases. Cf. *supra* note 3.
145 See 481 U.S. 279, 309 (1987) (“Because of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”).
146 481 U.S. at 309 n.30 (alteration added).
147 See, e.g., DeBrotta, *supra* note 117, at 388. “Where the prosecution resorts to racial prejudice in order to secure a conviction, highly prized constitutional values are profoundly defeated.” *Id.*
148 Proponents of the harmless error principle may argue that an individual is “entitled to a fair trial not a perfect one.” *Burks*, 508 F.2d at 673. Yet, when an attorney makes a plea to the jury to place the opponent
In addition, the harmless error principle is premised on “an underlying assumption that minor errors and those errors which affect a defendant’s substantial rights can be successfully distinguished” with some certainty. So long as these errors are identifiable, judicial resources that would have gone to retrials are conserved. However, racial remarks, which deny an individual his or her fundamental right to trial by an impartial adjudicator, are invariably prejudicial. In other words, the reviewing court “will never be able to determine, beyond a reasonable doubt, that [these errors] did not contribute” to the adverse verdict. Because judicial scrutiny will never yield a satisfactory level of certainty of a statement’s innocuousness, the harmless error principle actually squanders judicial resources on a fruitless search and even creates the possibility that a reviewing court might inaccurately certify such an error as non-prejudicial.

Assuming for the sake of argument that the harmless error principle is sound in theory, the common factors that courts invoke under this standard as negating the prejudicial effects of racial speech and justifying denial of corrective action are far from convincing. Even if flagrant racist comments are made in strong, “open-and-shut” cases, legal proceedings still lose their appearance of impartiality. The same may also be said about isolated and incidental remarks on unequal footing because of the opponent’s race, trial fairness is compromised. Since harmless error frequently allows this result to occur, the standard fails to give these individuals the constitutional minimum of a fair trial.

149 See Earle, supra note 52, at 1214 (citing Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 325 (1987)).
150 See DeBrota, supra note 117, at 379.
151 Id. at 378.
153 See DeBrota, supra note 117, at 387-88 (alteration added).
155 See Earle, supra note 52, at 1229.
that go unpunished. Psychoanalysis may even expose the insidious nature of these racial slips,\(^{156}\) which could also implicate intent.\(^ {157}\)

3. **Curative Instructions May Actually Be Lethal**

A discussion on the curative instruction warrants a special section. Unlike the explanations for denial of relief based on strength of the argument or the isolated nature of the racial remark, the curative instruction involves direct judicial intervention. It is intuitively desirable for judges to respond to any improper appeals to racial prejudice, “act firmly and . . . send a message that the behavior will not be tolerated.”\(^ {158}\) Otherwise, courts risk placing a “stamp of imprimatur”\(^ {159}\) on or ratifying misconduct.\(^ {160}\) Although the underlying policy is commendable, social science casts considerable doubt on the curative effect of these judicial admonitions.\(^ {161}\) Instead, studies have revealed a “backfire effect”: jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all.\(^ {162}\)

\(^{156}\) See Shannon Sullivan, *The Unconscious Life of Race: Freudian Resources for Critical Race Theory, in REREADING FREUD: PSYCHOANALYSIS THROUGH PHILOSOPHY* 195, 196 (Jon Mills ed., 2004) (“I find it implausible that my European colleagues’ slips of the tongue [referring to Gypsies as Jews] were insignificant mistakes. More probable is that there were reasons for their slips of which they were not consciously aware. It is as if, in each case, the speaker’s unconscious played a trick on him by betraying his real intentions, and an idea that he wished to keep in his unconscious pushed its way out by means of a verbal mistake.”) (alteration added). Psychoanalysis might provide an adequate, racially-grounded explanation for otherwise nonsensical judicial statements. See, e.g., *State v. Brown*, 636 S.W.2d 929, 937 (Mo. 1982) (“We can all do it ‘til we’re *black* in the face.”).

\(^{157}\) See * supra* Part B.1.


\(^{159}\) United States v. Perlaza, 439 F.3d 1149, 1171 n.25 (9th Cir. 2006).

\(^{160}\) Cf. Pagano, 218 F. Supp. 2d at 35.


Two theories work in tandem to explain why these instructions to disregard actually heighten jurors’ attention to racial remarks. The first, labeled the “ironic processes of mental control theory,” posits that “any effort at mental control involves a combination of an active, conscious operating process that searches for thoughts indicative of the desired mental state and a more unconscious monitoring process that searches for indicators of unsuccessful mental control.” The irony of the theory is that the “the very processes that are engaged to distract the individual from the thought also monitor the possible recurrence of that thought, which in turn may lead to a subsequent identification and increase of the accessibility of that construct.”

Failed suppression is exacerbated by a number of factors, including exposure in the courtroom to the individuals associated with the racial remark, innate trust of emotionally-based information, and “rebound” resulting from the juror’s efforts to suppress.

The second theory is called reactance. In contrast to ironic processes, reactance maintains that individuals “become psychologically aroused” when their ability to process information is threatened. Thus, while ironic processes accounts for jurors who take the judicial admonition to heart, this theory explains the behavior of jurors on the other end of the cooperation spectrum. Moreover, reactance posits that “the greater the threat jurors perceive to exist [against their freedom to process], the greater the likelihood that they will be influenced by inadmissible evidence.” According to this proposition, vigorous judicial admonitions may actually produce a jury that is increasingly receptive to the impermissible remark. These

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163 Arndt et al., supra note 161, at 697.
164 Id.
165 See id. at 698-99.
166 Id. at 693.
167 See Arndt et al., supra note 161, at 693.
168 Id. at 695 (alteration added).
169 Id.
theories, bolstered by empirical data, lead to a fascinating yet disturbing conclusion: the stronger the content of a curative instruction, the stronger the need for relief.

D. Proposing a Simplified Legal Paradigm to Evaluate Racial Appeals

Because the current legal framework does not impose any significant penalty on overzealous lawyers who make racially-biased appeals in summation, essentially encouraging such misconduct to continue unabated, it must be overhauled. Otherwise, the American system of justice, at its best, secures some verdicts possibly tainted by racial considerations or, at its worst, punishes the innocent.170 The rest of this section outlines the modifications necessary to create a viable new paradigm.

1. Eliminate the Prejudicial Effect Showing & Follow the Fundamental Error Principle

Removing the second prong of the traditional harmless error test properly shifts the focus of harm back to the compromise of a tribunal’s impartiality,171 more akin to the fundamental error principle. Elimination of the prejudicial effect showing also facilitates the judiciary’s compliance with the constitutional directive to affirmatively eradicate racial animus by removing a needless buffer that has allowed many attorneys and their clients to evade reversals, mistrials, and similar corrective actions. Moreover, in the absence of such a showing, courts avoid the problems that normally accompany harmless error analysis, including the speculative nature of identifying harmless remarks with certainty.

2. Cast a Wider Net By Implementing a Bifurcated Impropriety Inquiry

170 See DeBrota, supra note 117, at 388.
171 See Earle, supra note 52, at 1229 (“Whether the conviction is upheld, however, should be a different inquiry from whether the prosecutor has compromised jury impartiality.”).
Without the prejudicial effect prong, the entire analysis will be devoted to ascertaining the impropriety of the racial reference. Whether the attorney actually intended to inflame the jurors is irrelevant. The impropriety inquiry is bifurcated into two separate schemes: (1) racial references that are presented as relevant to the proceeding; and (2) racial remarks that have no identifiable basis in the evidence.

For statements that fall into the first category, courts will determine impropriety by weighing the inflammatory impact of the statement against its purported relevance, similar to the balancing test found in Federal Rule of Evidence 403. If the statement is deemed more inflammatory than relevant, it is not only improper but also grounds for automatic corrective action. As a benchmark, the remark made in the *Mayhue* decision would have been judged too incendiary. For statements that fall into the second category, the courts will apply strict scrutiny. Barring a compelling interest, racial references that have no evidentiary support are banned as improper and grounds for automatic corrective action. An “Atticus Finch” leveling argument may constitute a compelling interest since such an argument presumably exhibits a commitment to uphold judicial impartiality and eradicate racism by imploring the fact-finders to rely solely on the facts of the case.

Two limitations affect this bifurcated impropriety inquiry. First, appellate courts’ are unable to visually and aurally perceive an attorney’s delivery, which hinders their opportunity to detect subtle cues to racial bias. Heavy reliance by these courts on the trial records, though, rationalizes this inquiry’s own emphasis on whether or not the racial remark is supported by the facts. Second, most judges are presumed to be inadequately trained to distinguish covert forms of racially-biased appeals. As a result, even under this improved standard, some cases that involve

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172 *See supra* text accompanying note 79.

173 *See McFarland*, 611 F.2d at 417.
these implicit appeals will escape scrutiny. The basic structure of this inquiry need not change, however. Once judges become more and more sophisticated in uncovering subtle racial remarks, they can seamlessly turn to the bifurcated impropriety inquiry to determine the proper level of scrutiny based on whether the subtle remarks are corroborated by the record.

3. **If Used, Diminish the Detrimental Effects of the Curative Instruction**

The notion that judges should admonish misbehaving counsel appeals to common sense and fairness. However, in light of evidence that such instructions may actually increase the likelihood that improper racial appeals are given weight in jury deliberations, a judge must be wary if he or she decides to issue an admonition. Avoiding these curative statements altogether may be the ideal solution. Alternatively, one way to deliver an instruction that exhibits the judiciary’s commitment to legal equality, but does not as negatively impact the jurors’ consciousness, is to do so at the beginning of the trial. Some studies have demonstrated that forewarning jurors that they will be exposed to prejudicial information is more effective at creating resistance to that persuasive message. Though reactance is still of concern, that effect may be alleviated by softening the obligatory language of the instructions.

**Conclusion**

Although the American legal system encourages and even mandates zealous advocacy in the courtroom, this zealousness should not go unchecked. Unfortunately, attorneys have often overstepped these bounds, especially in the summation, “the moment where the persuasive powers . . . are strained to their fullest, and also the moment at which the impact of any foul blows inflicted . . . have the greatest effect.”174 One such foul blow, the appeal to racial bias,

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though widely regarded as inappropriate, has been featured prominently in trials throughout this nation, contrary to legal and social policies denouncing racism.

The current majority’s two-pronged legal framework, which is based on the harmless error principle, not only fails to punish offenders but also gives them the incentive to continue their misconduct, undercutting core values of judicial impartiality and equal treatment before the law. In order to maintain these core values, the legal framework must be restructured to remove this incentive to appeal to racial prejudice, such eliminating the unnecessary prejudicial effect showing, expanding the scope of the impropriety inquiry, and scrutinizing the once-infallible nature of the curative instruction. Such measures, if achieved, will help to reaffirm that the courtroom is an egalitarian arena for merit-based advocacy.