"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System

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I. INTRODUCTION

Racial bias in the United States' criminal justice system is a serious problem,[1] and Washington State is no exception.[2] The groundbreaking *Preliminary Report on Race and Washington's Criminal Justice System* (*Task Force Report*) revealed striking evidence of racial and ethnic bias at various stages of criminal proceedings[3] and highlighted the need for an integrated strategy to combat its prevalence.

Among nine potential causes of racial disparity identified and addressed in the *Task Force Report*,[4] one attracted a great deal of public attention in 2011: prosecutorial decision-making.[5] While the *Task Force Report* focused on decision-making in the context of charging and sentencing recommendations,[6] decision-making also includes prosecutors' presentations to the jury and their general courtroom conduct. Specifically, one prosecutor's blatant use of racial stereotypes in the courtroom in

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** J.D. Candidate, Seattle University School of Law, 2012; B.A., Psychology, Western Washington University, 2002. I would like to thank the *Seattle University Law Review* for providing us an opportunity to discuss what will surely be a seminal case addressing an extremely pervasive problem. I also thank the Law Review staff for helping to ensure that our discussion of this important subject was both meaningful and successful.

1. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 627 (2012) [hereinafter *Task Force Report*].

2. *Id.* at 639–40.

3. *Id.* at 629.

4. *Id.* The *Task Force Report* identified and synthesized research on nine issues for which evidence exists regarding the causes of Washington's disproportionality: (1) Juvenile Justice; (2) Prosecutorial Decision-Making; (3) Confinement Sentencing Outcomes; (4) Legal Financial Obligations (LFO); (5) Pretrial Release; (6) Drug Enforcement; (7) Asset Forfeiture; (8) Traffic Stops; and (9) Driving While License Suspended (DWLS). *Id.* at 638.

5. *Id.* at 647.

6. *Id.*; *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 814 n.75 (2012).

State v. Monday[7]—in which the Washington State Supreme Court held that the injection of racial bias required reversal—brought prosecutors' conduct to the center of public debate.[8]

In April 2006, a man was shot four times following a confrontation between multiple individuals in downtown Seattle,[9] and he succumbed to his wounds upon arrival at a nearby hospital.[10] Two others shot during the attack survived.[11] A video camera close to the scene of the shooting captured an image of a man in a "distinctive, long red shirt" drawing a pistol and firing the gunshots that struck all three victims.[12] Though many witnesses gave inconsistent accounts of the incident and were reluctant to cooperate with police, two witnesses identified defendant Kevin L. Monday, Jr. as the shooter.[13] Police arrested Monday three weeks later while he was wearing a red shirt and hat that were "strikingly similar" to the clothing worn by the shooter in the video.[14] During subsequent police questioning, Monday confirmed that he was the man wearing the red shirt in the video, and he confessed shortly thereafter that he was the shooter.[15] Officers later recovered bullet cartridges from Monday's home that were identical to those used in the shooting.[16]

Prosecutors charged Monday with first-degree murder and two counts of first-degree assault, and the case proceeded to trial.[17] During the testimony of one witness who previously identified Monday as the shooter, the prosecutor frequently pronounced the word "police" as "po-leese."[18] The prosecutor also referenced a code of conduct that certain people do not talk to the police about criminal matters.[19] He returned to

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7. State v. Monday, 257 P.3d 551 (Wash. 2011).

8. *See, e.g.*, Jason A. Gilmer, *Guest Opinion: Washington High Court Deals Blow to Racial Bias*, SPOKESMAN-REVIEW, June 19, 2011, http://www.spokesman.com/stories/2011/jun/19/guest-opinion-washingtons-high-court-deals-blow/; Jennifer Sullivan, *Seattle Murder Conviction Tossed Out Over "Racist" Comments*, SEATTLE TIMES, June 9, 2011, http://seattletimes.nwsource.com/html/localnews/2015279772_overturned10m.html.

9. *Monday*, 257 P.3d at 552.

10. *Id.*

11. *Id.*

12. *Id.* The shooter fired a total of eleven gunshots before fleeing outside of the camera's vantage point. *Id.* at 561 (Johnson, J., dissenting).

13. *Id.* at 552 (majority opinion).

14. *Id.*

15. *Id.* When police told Monday that his DNA and fingerprints were found on shell casings from the shooting (which was not true), Monday replied, "I wasn't trying to kill that man, I didn't mean to take his life." *Id.* at 553.

16. State v. Monday, No. 60265-9, 2008 WL 5330824, at *10 (Wash. Ct. App. Dec. 22, 2008); *Monday*, 257 P.3d at 553. Police also recovered an empty gun holster from Monday's home. *Id.*

17. *Monday*, 257 P.3d at 553.

18. *Id.* at 553–55.

19. *Id.* The following is an excerpt from the prosecutor's questioning of the witness, who was an African-American woman:

the theme during closing argument where he made the racial implications of his theme explicit:

> [T]he only thing that can explain to you the reasons why witness after witness after witness is called to this stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don't testify against black folk. You don't snitch to the police.[20]

The prosecutor revisited the theme several times and argued that "the code" was the reason witnesses gave testimony inconsistent with their own pretrial statements.[21] The jury returned guilty verdicts on all three counts,[22] and the appellate court affirmed the verdicts on appeal.[23] On the question of prosecutorial misconduct, the appellate court held that while the prosecutor improperly injected racial overtones into the proceedings, the error was harmless.[24]

The Washington State Supreme Court disagreed and held that the prosecutor's improper conduct constituted reversible error.[25] The court found that "[t]he prosecutor's misconduct tainted nearly every lay witness's testimony. It planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant."[26] Based on this improper conduct, the court determined that it could not "say beyond a reasonable doubt that the error did not contribute to the

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> Q. And would you agree or disagree with the notion that there is a code on the streets that you don't talk to the po-leese?
> A. I mean, that's what some people say. That's what some people go by.
> Q. Well, can you help us understand who these some people are?
> A. I'm saying—I'm just saying that's how some people is. Some people talk to the police, some don't.
> Q. And you're one of those that don't, right?
> A. I'm saying—well, I don't—police ain't my friends or nothing.
> . . . .
> Q. Does that mean that you're one of those people who don't talk to the police?
> A. No, sometimes I don't talk to the po-leese. I mean, they got a question or something to ask me, I answer. I don't talk to them.

Id. at 553. The prosecutor concluded this line of questioning when, in response to the witness noting that numerous witnesses to the shooting did not contact the police, he asked again whether there is "a code on the streets that you don't call the poleese." *Id.* at 554.

20. *Id.* at 555.

21. *Id.*

22. *Id.*

23. State v. Monday, No. 60265-9, 2008 WL 5330824, at *12 (Wash. Ct. App. Dec. 22, 2008).

24. The court found that "[t]he prosecutor's actions in Monday's trial were clearly improper when he invoked race in his closing argument and affected an accent when questioning Sykes." *Id.* at *10. But it held that the prosecutor's improper conduct constituted harmless error because of the large amount of evidence admitted against Monday. *Id.*

25. *Monday*, 257 P.3d at 558.

26. *Id.*

verdicts," and thus held that a new trial was required.[27] In so holding, the court radically reshaped the long-used analysis for prosecutorial misconduct and signaled a new intolerance toward racial bias in criminal proceedings.

But the court did not unanimously fashion a single test for use in cases of alleged prosecutorial misconduct involving racial bias, which prompted an ensuing debate within Washington's legal community.[28] The tests articulated in *Monday*'s majority, concurring, and dissenting opinions provide three different ways to address the complex problem of racial bias in Washington that continues to persist. All three tests acknowledge that racial bias during criminal trials is a serious problem that requires a strong judicial response. But the appropriate form of that response prompted separate opinions that highlight four distinct differences regarding how to best combat racial bias.

First, the opinions differ regarding the source of law that should be applied when an existing legal framework proves inadequate to address a social problem. Following *Monday*, an open question remains regarding whether it is best to draw upon existing legal precedent, even if attenuated, or whether it is better to combat old problems with new law. Second, the three opinions differ in the degree of racial bias required to trigger a reversal of a conviction. Thus, the opinions raise a question as to whether a showing of flagrant or apparent racial bias should be necessary for a court to vacate a conviction, or whether racial bias in the courtroom is so offensive that *any* showing of racial discrimination should be sufficient to vacate a conviction.

Third, the opinions differ in the amount of judicial discretion they afford courts to identify racial bias, which is of particular importance because many appeals to racial bias are subtle or unconscious.[29] But questions persist regarding the criteria that should be used to decide whether racial bias is present in the courtroom. Finally, the three opinions do not conclusively define how much weight courts should afford competing interests in determining an appropriate judicial response to racial bias. Whether victims' rights and the legitimacy of the criminal justice system as a whole should be considered remains unresolved.

Despite their differences, both the majority and concurring opinions in *Monday* present new ways to address prosecutorial misconduct, deter the injection of racial bias into courtroom proceedings, and create substantively similar outcomes. Part II of this Note discusses the traditional prosecutorial misconduct test in Washington State, as well as the rules

27. *Id.*

28. *See, e.g.*, Gilmer, *supra* note 8; Sullivan, *supra* note 8.

29. *Task Force Report*, *supra* note 1, at 629.

articulated by the *Monday* majority and concurrence. Part III discusses the implications of both the majority and concurring opinions, the primary differences in their approaches to deterrence, the degree of racial bias they require to warrant reversal of a conviction, and the discretion they afford the judiciary. Part III also suggests that courts must consider both the rights of criminal defendants and the aggregate impacts of racial bias on society at large when fashioning a rule to combat racial bias.

II. WHEN THE EXISTING LEGAL FRAMEWORK FALLS SHORT: TRADITIONAL ANALYSIS FOR PROSECUTORIAL MISCONDUCT

The majority and concurring opinions in *Monday* were both groundbreaking due to their departure from Washington legal precedent. For nearly forty years, Washington courts have employed a prosecutorial misconduct test that requires reversal if the prosecuting attorney's conduct is both improper and prejudicial.[30] Under this test, courts consider the effect of the prosecutor's improper conduct in the context of the full trial, rather than in isolation.[31] Generally, the appellant must demonstrate a substantial likelihood that the misconduct affected the jury's verdict in order to warrant reversal.[32] If the defendant fails to object to a prosecutor's conduct during the trial, then the burden on the defendant is even higher. The prosecutor's conduct must then be so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.[33] Despite the longstanding history of the law, both the majority and concurrence in *Monday* found the traditional test for prosecutorial misconduct insufficient to address instances where a prosecutor injects racial bias into a criminal trial.

In contrast to the traditional prosecutorial misconduct analysis, courts apply a heightened harmless error standard in Washington when an error during trial implicates a constitutional right.[34] If the appellant shows that a constitutional error occurred, "the State bears the burden of proving that the error was harmless" because the error is presumptively prejudicial.[35] "A constitutional error is harmless if the appellate court is

30. *See, e.g.*, *Monday*, 257 P.3d at 555; State v. Fisher, 202 P.3d 937, 947 (Wash. 2009) (citing State v. Gregory, 147 P.3d 1201, 1253 (Wash. 2006)).

31. *See, e.g.*, State v. McKenzie, 134 P.3d 221, 226 (Wash. 2006).

32. State v. Yates, 168 P.3d 359, 392 (Wash. 2007) (citing State v. Brown, 940 P.2d 529, 564 (Wash. 1997)).

33. *Fisher*, 202 P.3d at 951.

34. State v. Guloy, 705 P.2d 1182, 1191 (Wash. 1985). This heightened standard is referred to as the constitutional harmless error standard. *See, e.g.*, State v. Moreno, 132 P.3d 1137, 1142 (Wash. Ct. App. 2006).

35. *Guloy*, 705 P.2d at 1191.

convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[36] Thus, the primary features of this constitutional harmless error standard are that it (1) shifts the burden of proof to the State and (2) requires a showing of harmless error beyond a reasonable doubt.

Courts traditionally apply constitutional harmless error to certain types of prosecutorial misconduct. When a prosecutor has been shown to have improperly implicated a constitutional right of a defendant, courts apply a constitutional harmless error analysis that requires reversal unless the State demonstrates "beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt."[37] Subsequent appellate court decisions have frequently relied on this formulation,[38] which is the functional equivalent of the constitutional harmless error standard. Courts apply this standard when constitutional rights other than the right to a fair trial are impacted by the prosecutor's actions.[39] For example, one court applied the constitutional harmless error standard when a prosecutor improperly referenced the defendant's choice to exercise his right to self-representation.[40]

Courts also apply burden-shifting when analyzing accusations of prosecutorial misconduct that arise from racial bias during jury selection.[41] If a defendant establishes a prima facie case for purposeful discrimination regarding how a prosecutor exercised a peremptory challenge,[42] then "the burden shifts to the one making the challenge to articulate a race-neutral explanation for each challenge."[43] The trial court then considers all relevant circumstances in order to determine whether a challenge was improperly motivated.[44] It is during the trial court's de-

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36. *Id.*

37. State v. Traweek, 715 P.2d 1148, 1153 (Wash. Ct. App. 1986), *overruled on other grounds*, State v. Blair, 816 P.2d 718 (Wash. 1991).

38. *See, e.g.*, *Moreno*, 132 P.3d at 1142; State v. Contreras, 788 P.2d 1114, 1115 (Wash. Ct. App. 1990), *rev. denied*, 797 P.2d 514 (Wash. 1990).

39. *Traweek*, 715 P.2d at 1152–53.

40. *Moreno*, 132 P.3d at 1142. During closing arguments, the prosecutor stated, "The defendant is a picture perfect example of a domestic violence abuser. He has got to be in control. He is still trying to call the shots. So much so that he has exercised his constitutional rights to defend himself, because power is that important to him." *Id.* (emphasis omitted).

41. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).

42. "A defendant meets this burden if he or she establishes [that] peremptory challenges were exercised against a member of a protected class; and if so, when taken together with other relevant circumstances, an inference can be raised indicating the challenge was based on membership in the class." State v. Beliz, 15 P.3d 683, 687 (Wash. Ct. App. 2001). This step simply requires a defendant to produce sufficient evidence "to permit the trial judge to draw an inference that discrimination has occurred." Johnson v. California, 545 U.S. 162, 170 (2005).

43. *Beliz*, 15 P.3d at 687.

44. *Johnson*, 545 U.S. at 170. Specifically, the trial court may base its determination on both the prosecution's explanation and the juror's demeanor and credibility. *Beliz*, 15 P.3d at 687.

termination that the persuasiveness of the prosecution's justification becomes relevant.[45]

But the traditional prosecutorial misconduct analysis, absent any burden shift, is the test historically applied when a prosecutor injects racial bias into trial proceedings. The *Monday* dissent is demonstrative of this approach, as it applied traditional law to arrive at a result contrary to the outcome reached by the other two opinions.[46] In fact, the dissent expressly criticized the other opinions for their departure from Washington case law.[47] According to the dissent, the circumstances in *Monday* were not indications of systematic failure, and were thus insufficient to warrant departure from forty years of precedent.

The dissent applied the traditional prosecutorial misconduct test and found that the prosecutor's conduct did not warrant reversal. First, the dissent found that the prosecutor's use of the pronunciation "po-leese" was improper.[48] But it did not find any impropriety in the prosecutor's references to "the code," as it characterized such arguments as broad statements describing "a too common occurrence: the unwillingness of individuals (no matter their age or race) to identify by name others who may be involved in crime."[49] The dissent then found that the defendant's convictions did not warrant reversal after balancing the prosecutor's improper actions, the wealth of evidence admitted against the defendant, and the instructions given to the jury.[50] Under the traditional analysis, the persuasive value of the video evidence admitted against the defendant weighed heavily in favor of harmless error.[51] The dissent believed that "[e]ven if the prosecutor's comments arguably tainted the jury's impressions of some witnesses, this could not affect the jury's perception of the videotape and other evidence."[52] Thus, it found that the defendant did not demonstrate a substantial likelihood that the misconduct affected the jury's verdict.[53]

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45. *Johnson*, 545 U.S. at 171.

46. *See* State v. Monday, 257 P.3d 551, 564–65 (Wash. 2011) (Johnson, J., dissenting).

47. *Id.* at 565 ("[The court] never meddle[s] with such established constitutional protections, unless a compelling showing is made that the current test has failed and is causing harm.").

48. *Id.* at 564 (characterizing the prosecutor's use of the pronunciation "po-leese" as "inappropriate and unprofessional"). But the dissent felt that the court could not find, based solely on the trial transcript, that the pronunciation was de facto "racially derogatory language." *Id.*

49. *Id.* at 563. But to find that statements regarding "the code" were not improper, the dissent minimized the overt racial link included in the references. *See id.* (treating the statement "black folk don't testify against black folk" as a racially neutral condemnation of witnesses' unwillingness to testify).

50. *Id.* at 564.

51. *Id.* at 562–63 (viewing the videotape evidence as sufficient to prove that the defendant committed deliberate, premeditated murder).

52. *Id.* at 565.

53. *Id.*

Neither the majority nor the concurring opinion in *Monday* disputed whether the prosecutor's conduct constituted harmless error under the traditional analysis of prosecutorial misconduct. Indeed, the dissent stated that "[t]he majority's refusal to thoroughly engage in the second prong of [the traditional] analysis is tacit acknowledgment that the defendant" would not have been found to be prejudiced under the traditional standard.[54] But both the majority and concurring opinions acknowledged that the traditional analysis of prosecutorial misconduct was insufficient to address instances where the prosecutor intentionally injects racial bias into the proceedings. And in hopes of deterring future appeals to racial bias, both broke from tradition and applied novel legal analyses that would vacate convictions obtained under facts analogous to those in *Monday*.

III. NEW APPROACHES TO AN OLD PROBLEM: COMBATING RACIAL BIAS IN *STATE V. MONDAY*

Both the majority and the concurrence departed from traditional legal precedent in *State v. Monday*, implicitly suggesting that the existing law on prosecutorial misconduct was insufficient to address prosecutors' use of racial bias in the courtroom. Section A outlines the tests proffered by both the majority and the concurrence in *Monday*, while section B highlights the similarities and differences in the practical application of the two tests.

A. Departure from Tradition: The Rules Articulated by the Monday *Majority and Concurrence*

Both opinions acknowledge that racial bias is a problem, and although their approaches to combating its prevalence appear to markedly differ, they are, in practice, substantively similar.

1. The Majority Rule: Flagrant or Apparent Appeals to Racial Bias May Warrant a New Trial

In *Monday*, the Washington State Supreme Court departed from convention[55] and applied the constitutional harmless error standard to prosecutorial misconduct inquiries arising from racial bias.[56] A five-justice majority held "that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defend-

54. *Id.*

55. *Id.* at 558 (majority opinion) ("If our past efforts to address prosecutorial misconduct have proved insufficient to deter [intentional appeals to racial bias], then we must apply other tested and proven tests.").

56. *Id.*

ant's credibility or the presumption of innocence, [the court] will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict."[57] The majority also expressly stated that when the defendant demonstrates that such misconduct occurred, the burden is on the State to demonstrate beyond a reasonable doubt that the misconduct was harmless.[58] The court then applied this new standard to the facts of *Monday* and held that, due to the pervasiveness of the "taint" caused by the prosecutor's misconduct, it "[could not] say beyond a reasonable doubt that the [misconduct] did not contribute to the verdicts."[59]

While the majority opinion departed from the existing law on prosecutorial misconduct, its application of a constitutional harmless error standard has some basis in Washington law. As previously described,[60] courts apply the constitutional harmless error standard when a prosecutor improperly implicates a defendant's constitutional right.[61] Although not historically applied to conduct that impacts a defendant's right to a fair trial,[62] the majority's application of constitutional harmless error to prosecutorial misconduct involving racial bias can be viewed as a modest extension of prior law to a narrow subset of instances in which the right to a fair trial is affected. Additionally, courts use burden-shifting to analyze claims of racial bias in the selection of a jury.[63] While the standard applied differs from constitutional harmless error, the use of burden-shifting indicates that courts recognize that once racial bias is demonstrated, the party who engaged in the improper conduct should bear the burden of justification. Nonetheless, the majority's rule still represents a novel application of these principles.

2. The Concurrence: Zero Tolerance for Racial Bias

The *Monday* concurrence fashioned a new rule never before applied in Washington State. It proposed that any degree of racial discrimination is sufficient to vacate a conviction, regardless of whether the bias had an impact on the outcome of the trial.[64] The concurring opinion stated that "[a] criminal conviction must not be allowed to stand when it is obtained

57. *Id.*

58. *Id.*

59. *Id.*

60. *See supra* Part II.

61. *See, e.g.*, State v. Moreno, 132 P.3d 1137, 1142 (Wash. Ct. App. 2006); State v. Contreras, 788 P.2d 1114, 1115 (Wash. Ct. App. 1990).

62. *See* State v. Traweek, 715 P.2d 1148, 1152–53 (Wash. Ct. App. 1986), *overruled on other grounds*, State v. Blair, 816 P.2d 718 (Wash. 1991).

63. *See, e.g.*, State v. Beliz, 15 P.3d 683, 687 (Wash. Ct. App. 2001).

64. *Monday*, 257 P.3d at 559 (Madsen, C.J., concurring).

in a trial permeated by racial bias deliberately introduced by the prosecution."[65] Thus, "regardless of the evidence of . . . guilt, the injection of insidious discrimination into [a] case is so repugnant to the core principles of integrity and justice upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint."[66] The concurrence's proposed rule takes a hard stance on any racial discrimination employed by prosecutors in the courtroom, and is the most extreme of the three *Monday* opinions.

The concurrence based its proffered rule on the "core principles of integrity and justice upon which a fundamentally fair criminal justice system must rest."[67] As indicated by the concurrence's reliance on case law from outside jurisdictions, those core principles of integrity and justice are grounded in the Due Process and Equal Protection Clauses.[68] While no other Washington case has expressly held that a prosecutor's injection of racial bias impeded the right to a fair trial, the Washington State Supreme Court previously made clear that the presence of racial bias in jury members amounts to a violation of due process.[69] But outside Washington, ample authority exists for the premise that a prosecutor's injection of racial considerations into a case undermines a defendant's fundamental right to a fair trial.[70] Thus, while the concurrence in *Monday* proposed the creation of a new rule and the expansion of due process in Washington, that proposal rested on the foundations of due process already recognized in other jurisdictions.

B. Tackling Subtle Discrimination: The Deterrence of Racial Bias and the Role of Judicial Discretion

Deterring prosecutors' use of racial bias in the courtroom was of central importance in both the majority and concurring opinions. But the two opinions differ in their view of how courts should deter racist conduct. The majority deters prosecutors' injection of racial bias into trial proceedings by imposing a high burden on the State to show that the appeal to race did not impact the outcome of the case. In contrast, the con-

65. *Id.* at 558.

66. *Id.* at 558–59.

67. *Id.* at 558.

68. *Id.* at 559 ("[S]uch cases involve the 'point where the due process and equal protection clauses overlap or at least meet.'" (quoting United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 159 (2d Cir. 1973))).

69. State v. Davis, 10 P.3d 977, 994 (Wash. 2000) ("Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. 'The failure to accord an accused a fair hearing violates the minimal standards of due process.'" (citing State v. Parnell, 463 P.2d 134, 137 (Wash. 1969))).

70. *See*, *e.g.*, Hamilton v. Alabama, 376 U.S. 650 (1964).

curring opinion imposes a per se ban on any resort to racial discrimination. Additionally, the opinions differ on the degree of racial bias necessary to warrant reversal, as well as the discretion that should be afforded courts to determine whether reversal is warranted.

1. Practical Effect of the Rules Articulated by the *Monday* Majority and Concurrence

The majority imposed its new standard as a deterrent measure against the use of racist arguments and other appeals to racial bias, which it viewed as "fundamentally opposed to our founding principles, values, and fabric of our justice system."[71] As the opinion explained, "When the government resorts to appeals to racial bias to achieve its ends, all of society suffers . . . ."[72] The majority noted that a prosecutor's intentional appeals to racial bias violate a defendant's right to a fair and impartial trial:[73]

> Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct.[74]

As the majority eloquently stated, "If justice is not equal for all, it is not justice."[75] Having recognized that the "highly improper" conduct of the prosecutor in *Monday* would essentially be rewarded under a traditional harmless error analysis, the majority deemed that analysis to be "insufficient to deter such conduct" and thus expanded the use of the constitutional harmless error standard.[76] The majority thus achieved its goal of deterring racial bias by placing a high burden on the State to show that an appeal to race did not impact the outcome of the case.

But the majority's approach has been criticized for minimizing the evidence admitted against the defendant in order to find that the State did not meet its burden under the constitutional harmless error standard.[77]

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71. *Monday*, 257 P.3d at 557.

72. *Id.* at 558 n.5.

73. *Id.* at 557–58. The court clarified that "[t]he constitutional promise of an 'impartial jury trial' commands jury indifference to race." *Id.* at 557. "'[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial.'" *Id.* at 557 (quoting State v. Dhaliwal, 79 P.3d 432, 444 (Wash. 2003) (Chambers, J., concurring)).

74. *Id.* at 558.

75. *Id.* at 557.

76. *Id.* at 557–58.

77. *See* Michael Callahan, Note, *"If Justice Is Not Equal For All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in* State v. Monday, 35 SEATTLE U. L. REV. 827, 836 (2012) (arguing that the majority minimized the strength of the State's case in order

For instance, the concurring opinion expressly recognized that the defendant confessed to the murder,[78] and both the concurrence and dissent discussed the persuasiveness of the video evidence, with the dissent addressing the matter at length.[79] The majority opinion did not mention the defendant's confession outside of its recitation of the facts,[80] and it relegated all discussion of the video evidence to a footnote in which it admitted that "the videotape clearly establishes that Monday was the shooter."[81] While the majority argued that the video did not establish premeditation or rule out some defenses,[82] it also did not recognize the additional evidence admitted against the defendant, such as the casings found at his home, the out-of-court identifications of him as the shooter, and above all, the confession he made to police.[83]

Regardless of whether the majority downplayed the evidence in order to reach a specific result, the precedential value of its treatment of the evidence, when combined with the constitutional harmless error standard, creates an extremely difficult burden for the State to satisfy. In order for the State to carry its burden, it must demonstrate "beyond a reasonable doubt, that the misconduct did not affect the [jury's] verdict."[84] In *Monday*, the evidence admitted against the defendant was very strong: (1) the defendant was caught on video scuffling with and shooting the victims; (2) two witnesses provided out-of-court statements identifying the defendant as the shooter; (3) the defendant was arrested wearing a shirt and hat that were "strikingly similar" to those he wore the night of the shooting; (4) bullet cartridges matching those used in the shooting were found in the defendant's home; and (5) the defendant confessed to both the shooting and the murder.[85] Under the harmless error analysis, the evidence must be weighed against the prosecutorial misconduct, which included numerous references to a purported African-American antisnitching code and four uses of the pronunciation "po-leese."[86]

Despite the substantial evidence entered against the defendant, the majority still did not find that the State met its burden to demonstrate

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to hold that the error warranted a new trial); *see also Monday*, 257 P.3d at 559 (Madsen, C.J., concurring) (characterizing the majority's harmless error analysis as "illusory").

78. *Monday*, 257 P.3d at 559 n.1 (Madsen, C.J., concurring). The same footnote also references the dissent's recognition of the confession, *id.*, though it appears that any once-made references by the dissent to that particular statement were removed prior to publication of the opinion.

79. *See id.*; *id.* at 560–63 (Johnson, J., dissenting).

80. *Id.* at 553 (majority opinion).

81. *Id.* at 558 n.4.

82. *Id.*

83. *Id.* at 553.

84. *Id.* at 558.

85. *Id.* at 553.

86. *Id.* at 553–55.

harmless error. Again, the defendant was clearly caught on video shooting the victims, and he later confessed, in no uncertain terms, that he was the shooter. Both of these pieces of evidence were admitted at trial, and the state supreme court still did not find harmless error. The practical effect of the majority's holding is that when future courts look to apply constitutional harmless error to facts that are analogous to those in *Monday*, they will note that even near-overwhelming evidence against the defendant is insufficient to overcome an intentional injection of racial bias into the proceedings.

The concurring opinion took a different approach to deterring racial bias in the courtroom by proposing a per se ban on any resort to racial discrimination. The opinion stated that "[r]egardless of the evidence against this defendant, a criminal conviction must not be permitted to stand on such a foundation. The appeals to racism here by an officer of the court are so repugnant to the fairness, integrity, and justness of the criminal justice system that reversal is required."[87] Thus, the concurrence suggested that Monday's conviction should be reversed because "the integrity of our justice system demands it."[88]

Legal scholars have questioned whether the *Monday* majority opinion created such a high burden for the State that it effectively serves as an illusory harmless error standard.[89] Indeed, it is difficult to imagine a circumstance in which the state could meet its burden, considering the overwhelming evidence of guilt accumulated against the defendant in *Monday*. "Rather than engage in an unconvincing attempt to show the error here was not harmless,"[90] the concurrence would have held that *any* resort to racial bias is enough to warrant reversal, even if it had no impact on the outcome of the case. The proffered rule would have a strong deterring effect, and prosecutors would likely think twice before resorting to any conduct that could be perceived as racially biased.

Ultimately, regardless of whether courts apply the constitutional harmless error standard's heavy burden of proof or the concurrence's per se reversal of convictions tainted with racial discrimination, a strong deterrence against prosecutorial appeals to racial bias will be realized.

2. The Degree of Racial Bias Necessary to Warrant Reversal

While both the majority and concurring opinions agree that racial bias in the courtroom is a serious concern and should not be tolerated, the

87. *Id.* at 560 (Madsen, C.J., concurring).

88. *Id.*

89. Callahan, *supra* note 77, at 839; *see also Monday*, 257 P.3d at 559 (Madsen, C.J., concurring) (characterizing the majority's harmless error analysis as "illusory").

90. *Monday*, 257 P.3d at 559 (Madsen, C.J., concurring).

question that remains following *Monday* is whether a verdict tainted by racial bias should ever be permitted to stand. In some instances—albeit rare—the majority opinion would allow for a verdict to stand even if the prosecutor exhibited racial bias during the course of the trial. So long as the State produced sufficient evidence to demonstrate beyond a reasonable doubt that the appeal did not affect either the credibility of the defendant or the presumption of innocence, the court could deem the racial bias harmless. But under the concurrence's proffered rule, a verdict could never stand if racial discrimination was deliberately introduced during the trial proceedings, even if the evidence accumulated against the defendant was substantial and the appeal to race had no impact.[91] While the level of tolerance for racial bias raises questions regarding from whose perspective one should measure resulting harm, an application of either test will likely produce substantially similar outcomes.

Some scholars express concern that, similar to the traditional harmless error standard employed in the dissent, the majority's rule still allows for instances of racial bias.[92] Under the majority rule, if racial bias is introduced into the trial proceedings but the State satisfies its burden under constitutional harmless error, then no new trial is warranted. This allowance of racial bias is in stark contrast with the concurrence's proposed rule, which would essentially create a per se ban against the injection of racial bias.[93]

But this criticism ignores the fact that the majority in *Monday* granted a new trial even when faced with very substantial evidence supporting the defendant's guilt. As the concurrence stated in *Monday*, "a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless,"[94] and the manner in which the majority applied its rule demonstrates just how difficult it will be for the State to show harmlessness under that rule. Courts currently have only the facts of *Monday* to analogize or distinguish when ruling on prosecutorial misconduct that involves racial bias. And an appellate court seeking to uphold such misconduct as harmless will have to provide a strong justification for its decision, lest it later be reversed by the state supreme court.

The concurrence's proffered rule minimizes the impact that racial bias must have on the outcome of the case to warrant reversal. According to the concurrence, racial discrimination need not have a definitive impact on any one aspect of the case to reverse a conviction, for the "injection of such discrimination is 'antithetical to the purposes of the four-

91. *Id.*
92. *See* Callahan, *supra* note 77, at 841–42.
93. *Id.* at 843.
94. *Monday*, 257 P.3d at 558 (Madsen, C.J., concurring).

teenth amendment . . . whether in a procedure underlying, the atmosphere surrounding, or the actual conduct, of a trial.'"[95] Thus, the concurring opinion seems to suggest that any improper appeal to race, not just blatant racial discrimination, is enough to affect a defendant's right to a fair trial.[96]

Under the concurrence's proposed rule, "the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that *an infringement upon that right can never be treated as harmless error*."[97] Because the concurrence's proposed rule would treat any improper resort to race as harmful to the core principles of the criminal justice system, it evaluates the resulting error not solely from the perspective of the criminal defendant, but also from the perspective of society at large. The rule recognizes that while racial prejudice may not influence the outcome of a case if there is sufficient evidence to convict the defendant, the use of racial bias has an impact beyond the courtroom—it undermines faith in the judiciary, facilitates the continued use of racial stereotypes, and perpetuates racial disparities in the criminal justice system.[98]

3. Judicial Discretion in Reversing a Conviction: Do Victims' Rights and Efficiency Matter?

The primary difference between the analyses of prosecutorial misconduct articulated by the majority and concurring opinions is the amount of discretion afforded appellate courts in determining whether a verdict should be reversed. Considering the high burden established in *Monday*, the application of either test will likely result in the same outcome. Thus, the future state of the law will largely depend on how favorably courts regard the continued existence of some, albeit limited, discretion to find harmless error when a prosecutor injects racial bias into trial proceedings.

The discretion allowed by the *Monday* majority opinion provides courts with the ability to address the dissent's concerns of justice and efficiency.[99] Under the majority, courts may find harmless error in instances where the prosecutor's injection of racial bias did not affect the

95. *Id.* (citing United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 159 (2d Cir. 1973)).

96. *Id.* (citing Weddington v. State, 545 A.2d 607, 610 (Del. 1988)).

97. *Id.* (emphasis added).

98. *Task Force Report*, *supra* note 1, at 663.

99. The dissent felt that the rule articulated by the majority "delays or denies justice for the victim, disregarding the constitutional rights of Francisco Green and his family as victims under article I, section 35 of the Washington State Constitution. It is possible to deter any problematic trial conduct without denying justice for Francisco Green and his family." *Monday*, 257 P.3d at 561 (Johnson, J., dissenting).

proceedings. The court may thereby ensure speedy justice for the victims and efficient use of the court's limited resources when the ordering of a new trial would be needless. Given the weight of the evidence against the defendant, if the prosecutor in *Monday* never made any reference to "the code" but used the pronunciation "po-leese" four times, would a new trial have been warranted? What if he had said "po-leese" only once? At some point, the need for deterrence may be outweighed by other concerns of the court, and the majority's opinion provides courts with the tools to address that possibility.

The concurrence allows appellate courts no discretion in deciding whether racial bias warrants a reversal. If racial discrimination is present, reversal is required per se. The opinion makes no mention of efficiency,[100] seemingly prioritizing the right to a fair trial over any concerns of judicial economy. There is a preexisting basis in Washington law for minimizing efficiency in favor of protecting defendants' rights to be free from racial bias. The Washington State Supreme Court previously stated that "more important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it."[101]

But defendants in criminal proceedings are entitled to only a fair trial, not an error-free trial.[102] Thus, one's view of the rules articulated by the majority and concurrence will depend largely on whether one believes it possible, under any circumstances, for a trial to be fair if racial bias is injected into the proceedings.

4. Defining Racial Bias in Contemporary Proceedings

One of the challenges of combating racial bias is that racial stereotypes are often rooted in learned human behavior and reflected in decision-making that is difficult to isolate.[103] While racial bias can be difficult to identify, the aggregate impact of those decisions is easier to locate and measure.[104] And it is largely the aggregate impact, rather than indi-

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100. While the concurring opinion does not expressly address concerns of judicial economy, the impact of the rule's application may indirectly address them. If all convictions resulting from a trial tainted by racial discrimination were reversed, the resulting deterrent effect would eradicate prosecutors' incentive to resort to racial bias—and do so quickly. With fewer prosecutors resorting to conduct that could be deemed racially biased, fewer convictions, if any, may require reversal.

101. State v. Davis, 10 P.3d 977, 994 (Wash. 2000) (citing State v. Parnell, 463 P.2d 134, 137 (Wash. 1969)).

102. State v. Fisher, 202 P.3d 937, 947 (Wash. 2009).

103. *Task Force Report*, *supra* note 1, at 629; *see also* Smith & Levinson, *supra* note 6, 823 n.116.

104. *Id.* at 663.

vidual behaviors, that produces a lasting impact on society. Thus, in order to reduce racial bias among prosecutors, courts must address not only blatant and conscious bias, but also subtle and unconscious bias.[105] Both the majority and concurring opinion do just that—the majority through its acknowledgement of "apparent racial bias" and the concurrence through its zero-tolerance approach to racial discrimination.

Acknowledging the need to address subtle and unconscious bias is a much-needed step in combating racial disparities within Washington's criminal justice system. The *Task Force Report* findings indicate that racial disproportionalities in Washington's criminal justice system are not primarily caused by intentional racism, but rather by practices and policies that facilitate racialized outcomes.[106] Because most racial bias is unconscious, the *Task Force Report* recommended concentration not on individual motives but instead on those practices and procedures that cumulatively produce racial disproportionalities.[107]

The *Monday* majority opinion acknowledged that bias may be difficult to identify, as "[n]ot all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias."[108] But just how to identify the subtle racial bias or how to tackle its use remains open to debate. Specifically, whether the impact of subtle bias should be measured from the standpoint of only the criminal defendant or from the standpoint of society at large remains an open question.

The concurrence's rule takes a strong stance on subtle racial bias because it considers not just the impact of racial discrimination on a particular case but also the aggregate impact of that discrimination.[109] As described in the *Task Force Report*, while subtle biases have some influence in any given case, they have their most substantial effects over time.[110] Thus, by measuring the impact of racial bias by its aggregate impact on society at large, rather than as it pertains to a single criminal defendant, the concurrence seeks to eradicate racial bias within the system as a whole.

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105. *Id.* at 644.

106. "[R]ace-effects are likely to be unconscious and unintended rather than conscious and purposeful. While traditional models of racism emphasize individual acts of discrimination or racially charged policies, structural racism describes the interaction between various institutions and practices that are neutral on their face but nevertheless produce racialized outcomes." *Id.* at 645.

107. *Id.*

108. State v. Monday, 257 P.3d 551, 557 (Wash. 2011).

109. *See id.* at 559 (Madsen, C.J., concurring).

110. *Task Force Report*, *supra* note 1, at 663.

But what standard are courts to apply when determining whether racial bias exists in a particular case, however subtle or unconscious it may be? The majority's opinion provides meaningful guidance to future courts as to what type of conduct constitutes an injection of racial bias. *Monday* held that constitutional harmless error is applied "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence."[111] The inclusion of qualifying terms such as flagrant,[112] apparent,[113] and intentional[114] provides courts with guidelines for the application of the new standard and demonstrates that the improper act must be clear to the court.[115]

The facts of *Monday* also help to demonstrate the situations to which this standard applies. The prosecution's repeated invocation of an African-American antisnitch code "functioned as an attempt to discount several witnesses' testimony on the basis of race alone."[116] The court recognized that more subtle references can be just as insidious.[117] The prosecutor's use of the pronunciation "po-leese" was regarded by the court as a likely deliberate attempt to call attention to the ethnicity of the witness and to emphasize the aforementioned code.[118] Again, "[l]ike wolves in sheep's clothing, a careful word here and there can trigger racial bias."[119] Both types of improper prosecutorial conduct had the effect of undermining the presumption of the defendant's innocence by "plant[ing] the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant."[120]

In contrast to the majority's formulation of the types of racial bias to which its rule is applied, the concurrence provides courts with great discretion in determining whether racial discrimination is present in a particular case. Despite affording zero discretion for a court to let a verdict tainted by racial bias stand, the opinion provided no criteria upon which to gauge whether a prosecutor engaged in racial discrimination. One possible result is that courts would apply a "you know it when you see it" analysis, considering the facts and circumstances of each case.

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111. *Monday*, 257 P.3d at 558.

112. When used to describe an offense or an offender, "flagrant" means "glaring, notorious, scandalous, [or] blatant." SHORTER OXFORD ENGLISH DICTIONARY 978 (6th ed. 2007).

113. Something is "apparent" when it is visible, manifest, or obvious. BLACK'S LAW DICTIONARY 112 (9th ed. 2009).

114. An act is "intentional" when "[d]one with the aim of carrying out the act." *Id.* at 883.

115. *See supra* Part II.A.1.

116. *Monday*, 257 P.3d at 557.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 558.

But if the concurrence's rule is applied at some future date, then courts may simply utilize the formulation given by the majority as guidance for its application.

Regardless of whether courts apply the rule from the majority or the concurrence, the true fight over prosecutorial misconduct will lie in whether the defendant has demonstrated that improper conduct occurred that would warrant application of the second step of the rule. Whether the second step is shifting the burden to the State or vacating the verdict, both the majority and the concurrence require courts to first determine whether a particular type of improper conduct occurred. Under the concurrence's standard, a demonstration that improper conduct occurred requires the court, without any further analysis, to vacate the verdict and remand the case for a new trial.[121] Under the majority's rule, a showing of improper conduct then shifts the burden to the State to demonstrate beyond a reasonable doubt that the conduct was harmless.[122] This standard, as applied to the facts present in *Monday*, is likely to be very difficult for the State to satisfy.[123] Thus, the State will likely focus its efforts on contending that no misconduct occurred that would trigger the second step of whichever rule applies.[124]

IV. CONCLUSION

The *Task Force Report* concludes with the following reminder:

> Our democracy is based on the rule of law and faith in the fairness of the justice system. This faith is undermined by disparity and by high-profile incidents of violence toward people of color by law enforcement. The problem is not a "people of color" problem. It is our problem as a society to address.[125]

As acknowledged in the *Task Force Report*, the legitimacy of Washington's criminal justice system is limited by the extent to which the people appreciate its value. Thus, if the people of Washington lose faith in the criminal justice system because convictions tainted by racial bias are permitted to stand, not just criminal defendants but all of society will suffer. While the future of the law combating prosecutorial racial

121. *Id.* at 559 (Madsen, C.J., concurring).

122. *Id.* at 558 (majority opinion).

123. *See supra* Part III.B.1.

124. Indeed, appellate courts are already beginning to focus their attention on whether improper conduct occurred such that application of the *Monday* rule is warranted. *See* State v. Pierce, No. 39348-4-II, 2011 WL 5357095, at *15–16 (Wash. Ct. App. Nov. 8, 2011) (finding reference to "no-snitch" rule in relation to gang activity did not constitute an appeal to racial stereotypes); State v. Fuller, No. 67435-8-1, 2011 WL 4489006, at *2 (Wash. Ct. App. Sept. 26, 2011) (finding alleged prosecutorial misconduct did not inject racial bias into the trial proceedings).

125. *Task Force Report*, *supra* note 1, at 671.

bias in Washington remains uncertain and the best approach to combat its presence has sparked widespread debate, what is certain is that the solution must be one that is fair and maintains the respect of those who put their trust in the system.