

# “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*

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## I. INTRODUCTION

“If prosecutors are permitted to convict guilty defendants by improper, unfair means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.”<sup>1</sup> Prosecutors have a duty to provide defendants with fair trials.<sup>2</sup> Part of this duty is that prosecutors may not make racist arguments or appeal<sup>3</sup> to racial biases “to impugn the standing of the defendants before the jury and intimate that the defendants would be more likely than those of other races to commit the crime charged.”<sup>4</sup> Such appeals to racial biases are prosecutorial misconduct and may cause a court to grant the defendant a new trial.<sup>5</sup>

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1. *State v. Torres*, 554 P.2d 1069, 1075 (Wash. Ct. App. 1976) (stating that the prosecutor improperly suggested the defendant was guilty of crimes with which his codefendants had been charged, but not him).

2. *Id.* at 1071.

3. This Note defines “appeal” as an attempt to arouse a sympathetic or emotional response. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/appeal> (last visited Jan. 24, 2012). The court in *State v. Monday* chose to use “appeal” when referring to the prosecutor’s misconduct in this case and seemed to define it in this manner as well. *See State v. Monday*, 257 P.3d 551 (Wash. 2011).

4. *Torres*, 554 P.2d at 1072.

5. *See McCleskey v. Kemp*, 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.”); *United States v. Saccoccia*, 58 F.3d 754, 774 (1st Cir. 1995) (“Due to the singular importance of keeping our criminal justice system on an even keel, respecting the rights of all persons, courts must not tolerate prosecutors’ efforts gratuitously to inject issues like race and ethnicity into criminal trials.”).

Despite this duty, Washington courts have seldom granted new trials when prosecutors have committed this type of prosecutorial misconduct.<sup>6</sup> Instead, for the past forty years, most courts in Washington have downplayed the impact such appeals to racial biases may have had upon juries' verdicts by holding that such misconduct is generally harmless error.<sup>7</sup>

After forty years, this trend may be ending. In a recent prosecutorial misconduct case, *State v. Monday*,<sup>8</sup> the Washington State Supreme Court held that a prosecutor's appeals to racial biases deprived the defendant of his right to a fair trial notwithstanding overwhelming evidence of his guilt. Although eight of the nine justices agreed that the prosecutor's misconduct had deprived the defendant of his right to a fair trial, they arrived at this conclusion through different courses. Writing for the five-justice majority, Justice Chambers concluded that the prosecutor's conduct was not harmless error.<sup>9</sup> On the other hand, Chief Justice Madsen concluded in a separate opinion joined by two other justices that appeals to racial biases should be barred from trials from now on.<sup>10</sup> As the sole dissenting voice, Justice James Johnson argued that the evidence against the defendant was so overwhelming that the prosecutor's conduct likely had no effect on the jury's verdict, making any error harmless.<sup>11</sup>

This Note argues that of the three opinions from *Monday*, Washington state courts should follow Chief Justice Madsen's concurring opinion. Neither the majority nor the dissenting opinions adequately solve the problem of appeals to racial biases made at trial. Although Justice Chambers's opinion received a majority of the votes, it may not prevent attorneys from appealing to racial biases because such appeals may still be found by courts to be harmless error. On the other hand, Justice James Johnson's dissenting opinion downplays how such appeals may render a

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6. See, e.g., *State v. Gentry*, 888 P.2d 1105, 1129 (Wash. 1995) (upholding the defendant's conviction for murder despite the prosecutor's racially insensitive remarks to defense counsel out of court, the use of racial terms to define evidence, and the racist examination of a witness); *State v. Galvan*, No. 14920-0-III, 1997 WL 437676, at \*3-4 (Wash. Ct. App. Aug. 5, 1997) (stating that it was not reversible error when the prosecutor pursued evidence regarding a "Mexican Ounce" and a witness for the State commented that Hispanics conducted most of the drug trade in the area).

7. The general principle behind the harmless error rule in Washington is that errors that did not seem to affect the trial court's verdict are considered harmless and are disregarded. 5 WASH. PRACTICE, EVIDENCE LAW & PRACTICE § 103.25 (5th ed. 2011). Procedural rules for courts have not defined harmless error, so courts have generally looked to previous court decisions to determine whether an error was harmless. *Id.*

8. *Monday*, 257 P.3d 551.

9. *Id.* at 558.

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

11. *Id.* at 565 (Johnson, J., dissenting).

trial unfair. Only Chief Justice Madsen's opinion would adequately deter appeals to racial biases because it would bar all such appeals regardless of the circumstances.

The *Monday* decision also raises three questions that none of the opinions adequately answer: who does *Monday* apply to, what conduct does *Monday* forbid, and what is the legal source of the rules from *Monday*? The court will have to answer these questions in the future to determine the scope of its new rules. Part II of this Note discusses how Washington courts previously addressed the issue of prosecutorial misconduct and appeals to racial bias in trials. Part III analyzes the three opinions from *Monday*. In Part IV, this Note argues in favor of Chief Justice Madsen's concurrence. Part V looks at the three questions that the *Monday* opinion raises, and Part VI concludes.

## II. PROSECUTORIAL MISCONDUCT BEFORE *STATE V. MONDAY*

### A. *The Right to a Fair Trial*

The right to a fair trial by an impartial jury is one of the most fundamental rights guaranteed by the United States Constitution.<sup>12</sup> This right inheres in the Sixth Amendment.<sup>13</sup> Each state is required to provide this right as a matter of due process under the Fourteenth Amendment.<sup>14</sup> The Washington State Constitution contains its own version of the Sixth Amendment—article 1, section 22<sup>15</sup>—and the right to a fair trial is generally applied through the Washington State Constitution's own due process clause—article 1, section 3.<sup>16</sup> The right to a fair trial is as fundamental under the Sixth Amendment of the United States Constitution as

12. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031 (1991).

13. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI; see also *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . ."); *Jeffers v. United States*, 432 U.S. 137 (1977) (recognizing that the Sixth Amendment guarantees the right to a fair trial).

14. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (stating that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment"); *Seattle Times Co. v. Serko*, 243 P.3d 919, 927 (Wash. 2010) ("A defendant has a right to a fair trial under the Sixth and Fourteenth Amendments to the federal [C]onstitution, and under article I, section 22 of our state constitution.").

15. WASH. CONST. art. I, § 22. ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . .").

16. *In re Crace*, 236 P.3d 914, 925 (Wash. Ct. App. 2010).

it is under article 1, section 22 of the Washington State Constitution,<sup>17</sup> and inheres in the section's guarantee of an impartial jury.<sup>18</sup>

Both the United States Supreme Court and Washington State Supreme Court have stated that defendants are not entitled to perfect trials, just fair ones.<sup>19</sup> Courts have agreed, however, that prosecutorial misconduct may render a merely imperfect trial unfair.<sup>20</sup> The term "prosecutorial misconduct" has come to encompass many types of behavior.<sup>21</sup> For example, it is misconduct for a prosecutor to appeal to the prejudices of the jury to convict a defendant.<sup>22</sup> Such appeals may involve making statements to unfairly inflame "passion, sympathy or resentment" in the jury, attempting to mislead the jury about the evidence during closing argument, or unfairly prejudicing the jury against the defendant.<sup>23</sup> If misconduct occurs, a court may choose to reverse a defendant's conviction, even when the defendant fails either to object to the misconduct or to request the court to instruct the jury to disregard the prosecutor's misconduct.<sup>24</sup>

Before *State v. Monday*, trial courts in Washington possessed the discretionary power to reverse convictions if a prosecutor's conduct was both improper and prejudicial.<sup>25</sup> But courts have limited this power to situations where "the defendant's right to a fair trial was prejudiced" by the misconduct.<sup>26</sup> Traditionally, when determining whether such prejudice occurred, courts considered whether the State's case was strong enough to overcome any prejudice that a prosecutor's misconduct may have instilled in the jury.<sup>27</sup> To make this determination, courts would

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17. *State v. Statler*, 248 P.3d 165, 172–73 (Wash. Ct. App. 2011).

18. *See Federated Publ'ns, Inc. v. Kurtz*, 615 P.2d 440, 445 (Wash. 1980).

19. *See, e.g., Brown v. United States*, 411 U.S. 223, 231–32 (1973); *Bruton v. United States*, 391 U.S. 123, 135 (1968) (citing *Lutwak v. United States*, 344 U.S. 604, 619 (1953)); *In re Elmore*, 172 P.3d 335, 351 (Wash. 2007); *Statler*, 248 P.3d at 172.

20. 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, § 2[a] (1989).

21. *See, e.g., State v. Suarez-Bravo*, 864 P.2d 426, 432 (Wash. Ct. App. 1994) (holding that it was misconduct when the prosecutor's cross-examination was intended to compel witnesses to call police officers liars); *State v. Stover*, 834 P.2d 671, 672–73 (Wash. Ct. App. 1992) (stating that the prosecutor's repeated questioning and gratuitous remarks concerning the defense witnesses' credibility were improper, as was the prosecutor's cross-examination, because such conduct was designed to compel the witnesses to state legal conclusions).

22. *State v. Thompson*, 870 P.2d 1022, 1028 (Wash. Ct. App. 1994) (citing *State v. Reed*, 684 P.2d 699 (Wash. 1984)).

23. *Id.*

24. *Id.* at 1028–29.

25. *State v. Monday*, 257 P.3d 551, 555 (Wash. 2011).

26. *Id.*

27. *State v. Negrete*, 863 P.2d 137, 140 (Wash. Ct. App. 1993).

analyze the State's case as a whole, including the prosecutor's comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."<sup>28</sup> When performing this analysis, however, appellate courts generally deferred to the decisions of trial courts about whether prosecutorial misconduct had affected the jury's verdict.<sup>29</sup> The defendant also bore the burden of demonstrating by a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.<sup>30</sup> For forty years, this standard governed prosecutorial misconduct cases in Washington<sup>31</sup> and led to few reversals,<sup>32</sup> a trend that matched the rest of the country.<sup>33</sup> When arguing that prosecutorial misconduct had infringed on their rights to a fair trial, defendants traditionally faced an uphill battle.

### *B. Developments Prior to State v. Monday*

Recently, the criminal justice system in Washington has experienced intense scrutiny for being racially biased against minorities.<sup>34</sup> Allegations of bias stemmed not just from questionable police conduct but also from comments made by Justices Richard Sanders and James Johnson of the Washington State Supreme Court. On October 7, 2010, the court met with professors and practitioners to determine how to make its boards and commissions more effective and accessible to minorities.<sup>35</sup> During this meeting, some presenters argued that racial biases existed in the criminal justice system that explained the racial disparity in Washington's prison population.<sup>36</sup> Although both Justices Sanders and Johnson

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28. *State v. McKenzie*, 134 P.3d 221, 226 (Wash. 2006) (citing *State v. Brown*, 940 P.2d 546, 553–54 (Wash. 1997)).

29. *State v. Luvane*, 903 P.2d 960, 967 (Wash. 1995).

30. Krista L. Nelson & Jacob J. Stender, Note, "Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System, 35 SEATTLE U. L. REV. 849, 855 (2012).

31. *Monday*, 257 P.3d at 555.

32. See *State v. Gentry*, 888 P.2d 1105, 1130–31 (Wash. 1995).

33. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 363 (2006).

34. See, e.g., Mike Carter, *Justice Department to Investigate Seattle Police Civil-Rights Practices*, SEATTLE TIMES, Mar. 31, 2011, [http://seattletimes.nwsourc.com/html/localnews/2014648060\\_dojinvestigation01m.html](http://seattletimes.nwsourc.com/html/localnews/2014648060_dojinvestigation01m.html); Mike Carter & Steve Miletich, *Justice Department Report Blasts Seattle Police*, SEATTLE TIMES, Dec. 15, 2011, [http://seattletimes.nwsourc.com/html/localnews/2017026414\\_doj16m.html](http://seattletimes.nwsourc.com/html/localnews/2017026414_doj16m.html).

35. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES, Oct. 21, 2010, [http://seattletimes.nwsourc.com/html/localnews/2013226310\\_justices22m.html](http://seattletimes.nwsourc.com/html/localnews/2013226310_justices22m.html).

36. *Id.* The disparity cited by the presenters was the number of African-Americans imprisoned in Washington compared to the total population: "African Americans represent about 4 percent of Washington's population but nearly 20 percent of the state prison population. Similar disparities nationwide have been attributed by some researchers to sentencing practices, inadequate legal repre-

responded to this argument with racially charged comments, Justice Sanders received the most notoriety with his comment that “‘certain minority groups’ are ‘disproportionally represented in prison because they have a crime problem.’”<sup>37</sup>

These comments were poorly timed; Sanders was already locked in a tight race for reelection.<sup>38</sup> In response to his comments, the *Seattle Times* editorial board withdrew its endorsement of Sanders and threw all of its support behind his opponent Charlie Wiggins.<sup>39</sup> Although Wiggins had attacked Sanders primarily on his record as a supreme court justice,<sup>40</sup> Sanders’s comments likely were the tipping point.<sup>41</sup> In a tight election with two million total votes, Wiggins defeated Sanders by 13,000 votes.<sup>42</sup> Although acknowledging his own distinguished career as an attorney, Wiggins later admitted that he likely won not because of who he was but “because of who he wasn’t.”<sup>43</sup> Sanders also admitted that losing the *Seattle Times*’s support likely cost him the election.<sup>44</sup>

Sanders’s comments also prompted many legal scholars and practitioners to examine the criminal justice system in order to determine whether the comments contained any truth.<sup>45</sup> This interest led to the formation of the Task Force on Racial Bias and the Criminal Justice System (Task Force), a group of judges, scholars, and practitioners who re-

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sentation, drug-enforcement policies and criminal-enforcement procedures that unfairly affect African Americans.” *Id.*

37. *Id.* Justice James Johnson stated that he agreed with Justice Sanders’s comments and that a high number of African-Americans commit crimes against their own communities. *Id.* He also used the phrase “poverty pimp” during the course of the presentation, although the context was not clear. *Id.* When asked to clarify his statements, Justice Sanders confirmed he had stated certain minority groups are “disproportionally represented in prison because they have a crime problem.” *Id.*

38. Miletich, *supra* note 35. Sanders sought a fourth term on the Washington State Supreme Court. *Id.*

39. Steve Miletich, *Count Nearly Done: Wiggins Wins*, SEATTLE TIMES, Nov. 13, 2010, <http://www.wenatcheeworld.com/news/2010/nov/13/count-nearly-done-wiggins-wins>.

40. Rachel La Corte, *WA Supreme Court Race Puts Sanders on Defense*, ASSOCIATED PRESS, Oct. 16, 2010, available at <http://www.kitsapsun.com/news/2010/oct/16/wa-supreme-court-race-puts-sanders-on-defense>. Wiggins primarily attacked Sanders on his judicial record, including many dissenting opinions he wrote when he was the sole dissenting justice. *Id.*

41. Eli Sanders, *How a Shoo-In Lost the Race*, THE STRANGER, Nov. 16, 2010, <http://www.thestranger.com/seattle/how-a-shoo-in-lost-the-race/Content?oid=5543162>.

42. Gene Johnson, *Incoming State Supreme Court Justice Charlie Wiggins Enjoys Legal Rigor*, SEATTLE TIMES, Jan. 6, 2011, [http://seattletimes.nwsource.com/html/politics/2013867212\\_wiggins\\_07.html](http://seattletimes.nwsource.com/html/politics/2013867212_wiggins_07.html).

43. Wiggins polled well in Seattle and King County and was likely carried by a large group of voters who disapproved of former-Justice Sanders’s comments. *Id.*

44. Miletich, *supra* note 35.

45. *About the Task Force*, SEATTLE UNIV. SCH. OF LAW, [http://www.law.seattleu.edu/Centers\\_and\\_Institutes/Korematsu\\_Center/Race\\_and\\_Criminal\\_Justice/About\\_the\\_Task\\_Force.xml](http://www.law.seattleu.edu/Centers_and_Institutes/Korematsu_Center/Race_and_Criminal_Justice/About_the_Task_Force.xml) (last visited Jan. 22, 2012).

searched whether Washington's criminal justice system was biased against racial minorities.<sup>46</sup> On March 2, 2011, the Task Force presented its findings to the Washington State Supreme Court.<sup>47</sup> Calling Sanders's comments "a gross oversimplification,"<sup>48</sup> the Task Force argued that the criminal justice system in Washington had problems with implicit racial bias.<sup>49</sup> White police officers were more likely to use deadly force while apprehending black suspects.<sup>50</sup> Additionally, many race-neutral policies tended to lead to racially disparate outcomes.<sup>51</sup> For example, the Task Force found that prosecutors were less likely to charge white defendants than defendants of color accused of the same crimes.<sup>52</sup> Perhaps the most significant finding was that prosecutors were 75% less likely to recommend alternative sentences for black defendants than for white defendants.<sup>53</sup>

With these findings in the background, the court had an opportunity to address the issue of racial bias in the criminal justice system. In *State v. Monday*, the court heard a prosecutorial misconduct case where the prosecutor had made comments related to the race of both the defendant and the witnesses.<sup>54</sup>

### III. DIFFERING OPINIONS FROM THE SUPREME COURT

The prosecutor in *State v. Monday* had successfully prosecuted the defendant for murder, but he made both explicit and implicit comments about race throughout the trial that may have deprived the defendant of his right to a fair trial.<sup>55</sup>

#### *A. Facts and Procedural History*

The State presented a compelling case against Kevin Monday. In April 2006, a red-shirted man shot Francisco Green in downtown Seattle

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46. See Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 626 (2012) [hereinafter *Task Force Report*].

47. A video and slides from the presentation made to the Washington State Supreme Court are available at [http://www.law.seattleu.edu/Centers\\_and\\_Institutes/Korematsu\\_Center/Race\\_and\\_Criminal\\_Justice.xml](http://www.law.seattleu.edu/Centers_and_Institutes/Korematsu_Center/Race_and_Criminal_Justice.xml).

48. Christine Clarridge, *Task Force Critical of Sanders' Comments on Racial Bias*, SEATTLE TIMES, Mar. 2, 2011, [http://seattletimes.nwsourc.com/html/localnews/2014381291\\_bias03m.html](http://seattletimes.nwsourc.com/html/localnews/2014381291_bias03m.html).

49. *Id.*

50. See *Task Force Report*, *supra* note 46, at 666–67.

51. *Id.* at 644.

52. *Id.* at 647.

53. *Id.*

54. *State v. Monday*, 257 P.3d 551, 553–55 (Wash. 2011) (Johnson, J., dissenting).

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

during a confrontation with several men.<sup>56</sup> Before the shooting occurred, a street musician had set up a digital video camera to record himself while playing.<sup>57</sup> When the musician got home after the shooting, he realized that he had recorded the entire incident on video. He gave a copy of the recording to the police the following day.<sup>58</sup> Police interviewed witnesses who identified a man named Kevin Monday as the shooter.<sup>59</sup> When the police picked up Monday, he was wearing a red shirt and cap that resembled those worn by the shooter in the video.<sup>60</sup> Monday eventually confessed to the shooting and was charged with first-degree murder, two counts of first-degree assault for wounding two other people during the shooting, and unlawful possession of a handgun.<sup>61</sup>

Monday's trial lasted for one month, partly because the eyewitnesses who originally identified Monday as the shooter changed or recanted their original testimonies.<sup>62</sup> This seemed to rankle the deputy prosecutor. He mocked the way one of the witnesses pronounced the word "police," emphasizing the "o" and "c" so that the word sounded like "po-leese."<sup>63</sup> The prosecutor told the jury that the witnesses recanted because they were following an antisnitch code, a code that he seemed to attribute to African-Americans.<sup>64</sup>

Defense counsel objected to the comments, and the trial judge warned the prosecutor to abstain from commenting on the credibility of the witnesses.<sup>65</sup> Nevertheless, he continued to question the witnesses about the code, although they never confirmed its existence.<sup>66</sup> During his closing argument, the prosecutor returned to the code to explain the conduct of the witnesses:

[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

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 552–53.

60. *Id.* at 553.

61. *Id.*

62. *Id.* at 553–54.

63. *Id.* The transcripts of the testimony vary because different court reporters were used during the course of the trial. One of the reporters, however, consistently transcribed the prosecutor's use of the word "police" during his direct examination of one of the witnesses as "po-leese."

64. *Id.* at 557.

65. *Id.* at 554.

66. *Id.* at 557.

black folk don't testify against black folk. You don't snitch to the police.<sup>67</sup>

He continued to refer to this code during the rest of his closing argument.<sup>68</sup>

The jury found Kevin Monday guilty of first-degree murder and two counts of first-degree assault.<sup>69</sup> He appealed on multiple grounds, including that the prosecutor's conduct had deprived him of his right to a fair trial.<sup>70</sup> In an unpublished opinion, Division 1 of the Washington Court of Appeals upheld the trial court's verdict.<sup>71</sup> The appellate court agreed with Monday that the prosecutor's comments at trial were improper.<sup>72</sup> But the court held that any prejudice the comments created could have been cured by either an objection or jury instruction, steps that Monday had not taken at trial.<sup>73</sup>

#### *B. The Washington State Supreme Court's Decision*

The Washington State Supreme Court limited its review to the question of whether the prosecutor's conduct deprived Monday of his right to a fair trial. Eight of the justices agreed that the prosecutor's conduct had denied Monday this fundamental right.<sup>74</sup> As a result, Monday's conviction was overturned, and the court remanded the case for a new trial.<sup>75</sup> By overturning Monday's conviction, the court made a dramatic departure from its established precedent in prosecutorial misconduct cases. This shift may have been an acknowledgment by most of the justices that the court needed to address the issue of racial bias in the criminal justice system, although they had different ideas on how to do so. Three separate opinions emerged from *Monday*: a five-justice majority authored by Justice Chambers (and joined by Justice Sanders, acting as pro tem), a three-justice concurrence written by Chief Justice Madsen, and a dissent from Justice James Johnson.

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67. *Id.* at 555.

68. *Id.*

69. *Id.*

70. *Id.*

71. *State v. Monday*, No. 60265-9, 2008 WL 5330824, at \*10 (Wash. Ct. App. Dec. 22, 2008), *rev'd*, 257 P.3d 551 (Wash. 2011).

72. *Id.*

73. *Id.* at \*8.

74. *Monday*, 257 P.3d at 558–60.

75. *Id.* at 558.

### 1. Justice Chambers's Majority Opinion

In his majority opinion, Justice Chambers held that the prosecutor's conduct had been more than harmless error<sup>76</sup> and had therefore deprived Kevin Monday of his right to a fair trial.<sup>77</sup> To reach this conclusion, the majority had to minimize the strength of the evidence in the State's case. For example, the majority stated that the videotape showed a man "in a distinctive, long red shirt" rather than the suspect.<sup>78</sup> This analysis of the videotape was unique to the majority, as both the concurrence<sup>79</sup> and dissent<sup>80</sup> stated that the man in the video was clearly Monday. The majority also spent little time on the fact that Monday had confessed to the shooting,<sup>81</sup> and focused instead on the prosecutor's examination of the witnesses and the comments he made during closing arguments.<sup>82</sup>

The majority held that the prosecutor had violated his duties to the public. These duties were twofold: to prosecute those who break the law<sup>83</sup> and to act as "the representative of the people in the search for justice."<sup>84</sup> While performing these duties, a prosecutor represents the interests of all people, including defendants.<sup>85</sup> According to the majority, the prosecutor's conduct violated his duty to provide Kevin Monday with a fair trial.<sup>86</sup> This violation constituted prosecutorial misconduct because the prosecutor had appealed to racial biases and implied to the jury that he believed Monday was guilty.<sup>87</sup>

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76. *Id.* at 557–58.

77. *Id.* at 558.

78. *Id.* at 552. Interestingly enough, the majority conceded in a footnote at the end of its opinion that the video evidence clearly identified Kevin Monday as the shooter. *Id.* at 558 n.4. To the majority, however, the video did not explain any of the context behind the shooting, such as whether Monday had premeditated the murder. *Id.* The majority further argued that the video did not rule out possible defenses for Monday, although it did not indicate what defenses were available based on the video. *Id.* Ultimately, the majority concluded that the State had also believed the video would have been insufficient to convict Monday because his trial lasted for weeks. *Id.*

79. *See id.* at 559 n.1 (Madsen, C.J., concurring).

80. *Id.* at 560–61 (Johnson, J., dissenting).

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

82. *Id.* at 553–55.

83. *Id.* at 555.

84. *Id.*

85. Defendants are among the people represented by a prosecutor. *Id.* A prosecutor owes a duty to defendants to ensure their rights to a constitutionally fair trial are not violated. *Id.* Thus, a prosecutor must function within boundaries while zealously seeking justice. *Id.* A prosecutor gravely violates a defendant's right to an impartial jury under the Washington constitution when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions. *Id.* (citing *State v. Case*, 298 P.2d 500, 503 (Wash. 1956)).

86. *Id.* at 556–57.

87. *Id.* at 556 ("[T]his court has noted that it is just as reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt."). Specifically, the

The majority agreed with Monday's argument that the State had committed improper conduct when the prosecutor "injected" racial biases into the trial proceedings.<sup>88</sup> The first injection was his argument that African-Americans followed an antisnitch code.<sup>89</sup> The majority dismissed this argument, stating that the antisnitching movement did not apply only to African-Americans, but to all people.<sup>90</sup> The majority was convinced that when the prosecutor attempted to attribute this movement to only African-Americans, he attempted to derogate the testimony of several witnesses based solely on their race.<sup>91</sup> This instance was not his sole attempt to appeal to racial bias, as he had also referred to the police as "po-leese" during direct examination of a witness.<sup>92</sup> The majority was convinced that the prosecutor had made subtle (and possibly intentional) attempts to focus the jury on two things: Kevin Monday's race and an antisnitch code allegedly followed by African-Americans.<sup>93</sup>

The State attempted to counter Monday's arguments by focusing on procedure. Under the traditional rule, Monday still bore the burden of showing by a substantial likelihood that the prosecutor's misconduct had affected the jury's verdict. Given the overwhelming evidence against Monday, the State argued that he had failed to meet this burden. The majority, however, was not persuaded.<sup>94</sup> Rather than respond to the State's procedural argument, the majority focused on the substantive issue of whether the prosecutor had resorted to racist arguments to win the case.<sup>95</sup> In the majority's view, the prosecutor's misconduct was "so fundamentally opposed to [the] founding principles, values, and fabric of our justice system" that it was not harmless.<sup>96</sup>

In determining the impact of the misconduct in *Monday*, the majority turned to the harmless error standard but made some changes.<sup>97</sup> One change was to place the burden of proof on the State. The majority held that when a prosecutor flagrantly or apparently intentionally appealed to

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court cited to Washington Rule of Professional Conduct 3.4(e), which states that in trial, a lawyer shall not "assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." WASH. RULES OF PROF'L CONDUCT 3.4(e) (2006).

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

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 557-58.

95. *Id.*

96. *Id.* at 558.

97. *Id.*

race in order to undermine the defendant's credibility, a court must vacate the conviction unless the misconduct did not appear to affect the jury's verdict beyond a reasonable doubt.<sup>98</sup> Applying this revised standard, the majority stated that the prosecutor's comments had "tainted nearly every lay witness's testimony . . . [and] planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant."<sup>99</sup> This taint was enough for the majority to conclude that the prosecutor's conduct was not harmless error and had deprived Kevin Monday of his right to a fair trial.<sup>100</sup>

## 2. Chief Justice Madsen's Concurrence

Although Chief Justice Madsen agreed with the majority's result, she deeply disagreed with its solution to cases like *Monday*. Because the evidence against Kevin Monday had been abundant, Chief Justice Madsen stated that she could not join the majority's "illusory" harmless error standard.<sup>101</sup> Instead, the Chief Justice proposed a more rigid rule, namely that racial comments by a prosecutor should be completely barred from trial.<sup>102</sup> The concurrence justified this absolute bar on the grounds that "the injection of insidious discrimination into this case" was too repugnant to let Monday's conviction stand.<sup>103</sup> Only a new trial would remove the taint to the criminal justice system that this insidious discrimination had caused.<sup>104</sup> In support of this rigid rule, the Chief Justice cited numerous federal cases where courts had reversed convictions on the grounds that racism had been improperly injected into the trial.<sup>105</sup> These reversals were justified because the injection of racism into the trial had violated both the due process and equal protection clauses.<sup>106</sup> Chief Justice Madsen further noted that none of these cases had relied on a harmless error analysis; instead, they focused on how the injection of racism into the trial had deprived the defendants of their right to a fair trial.<sup>107</sup>

The Chief Justice believed that the prosecutor's conduct had deprived Kevin Monday of his right to a fair trial as well:

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98. *Id.*

99. *Id.*

100. *Id.*

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

102. *Id.*

103. *Id.*

104. *Id.*

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

106. *Id.* (citing *Haynes*, 481 F.2d at 159). The Chief Justice cited a federal case for this assertion but did not indicate whether she referred specifically to the U.S. Constitution or the Washington State Constitution.

107. *Id.* (citing *Haynes*, 481 F.2d at 159).

[T]he prosecutor's blatant racist attacks impugned the standing and credibility of the State's witnesses, who were African American, and explicitly informed the jury that because these witnesses were black they lied on the stand because all black people have a "code" under which they refuse to tell the truth to police and refuse to testify truthfully. Further, it cannot be ignored that the defendant himself is African American and was presumably subject to the same charge in view of the prosecution's questioning. The appeals to racial bias in this case were not isolated incidents but instead pervaded the prosecution of this case.<sup>108</sup>

The Chief Justice believed that the prosecutor's conduct alone justified reversing Monday's conviction, even with the overwhelming evidence supporting a conviction.<sup>109</sup> The prosecutor's racially charged conduct was repugnant to integrity of the criminal justice system,<sup>110</sup> and in the Chief Justice's opinion, any criminal conviction based on such conduct could not be permitted to stand.<sup>111</sup> Therefore, unlike the majority's more flexible harmless error standard, the Chief Justice argued for a bright-line rule against appeals to racial biases during trial for the sake of the criminal justice system's integrity.<sup>112</sup>

### 3. Justice James Johnson's Dissent

Unlike the other eight justices, Justice Johnson argued in his dissent that Kevin Monday's conviction should have stood. He focused primarily on the video of Monday shooting the victim, stating that it was overwhelming evidence of Monday's guilt.<sup>113</sup> To bolster this argument, he went through a literal play-by-play of the video, concluding that it was "sufficient to remove any reasonable doubt that Monday [had] deliberately killed Green."<sup>114</sup> The justice argued further that even under the majority's harmless error standard, the video undeniably proved Monday's guilt.<sup>115</sup> Because, in his opinion, the videotape removed any doubt of Monday's guilt, Justice Johnson argued that the Court should have upheld the conviction.<sup>116</sup>

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108. *Id.* at 560.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 565 (Johnson, J., dissenting). In a rather macabre footnote, Justice James Johnson provided a link to the video, stating, "I am happy to allow the videotape to speak for itself: <http://www.courts.wa.gov/newsinfo/content/video/827362EvidenceVideo.htm>." *Id.* at 565 n.1.

114. *Id.* at 562.

115. *Id.* at 565.

116. *Id.*

Unlike the other justices, Justice Johnson believed that while the prosecutor's comments were "problematic," they did not warrant reversing Monday's conviction for three reasons. First, the other justices had taken the prosecutor's comments out of context,<sup>117</sup> breaking with past Washington law.<sup>118</sup> Second, when the prosecutor had examined the witnesses, he had not acted in a derogatory or racist manner.<sup>119</sup> Although Justice Johnson conceded that the prosecutor had acted unprofessionally,<sup>120</sup> he argued that the court could not infer any racist acts by the prosecutor solely from the trial transcript.<sup>121</sup> Further, the jury had properly reached its verdict because of the overwhelming evidence against Monday.<sup>122</sup> Third, the justice castigated the majority for replacing the old rule for prosecutorial misconduct cases.<sup>123</sup> Rather than break with precedent, he would have upheld Monday's conviction based on previous Washington case law and the videotape evidence.<sup>124</sup>

Besides relying on case law and the videotape evidence, Justice Johnson argued that reversing Monday's conviction would abrogate the rights of the victim's family under article 1, section 35 of the Washington State Constitution,<sup>125</sup> the so-called Victim's Rights Amendment.<sup>126</sup>

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117. *Id.* at 563–64.

118. *See, e.g.,* State v. McKenzie, 134 P.3d 221, 226–28 (Wash. 2006); State v. Emery, 253 P.3d 413, 425 (Wash. Ct. App. 2011).

119. *Monday*, 257 P.3d at 563–64 (Johnson, J., dissenting).

120. *Id.* at 564.

121. *Id.*

122. *Id.*

123. *Id.* at 564 ("The majority disregards the context of the total argument[,] . . . does not look to the issues in the case[,] . . . does not look to the evidence or to the instructions given to the jury[,] . . . [and] looks to several comments in isolation.").

124. *Id.*

125. Section 35 states the following:

Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights. Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding or a basis for providing a victim or the victim's representative with court appointed counsel.

WASH. CONST. art. I, § 35.

126. *See* State v. Aguirre, 229 P.3d 669, 677 (Wash. 2010). For a list of jurisdictions that have adopted such amendments, see Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural*

But the justice failed to explain either how reversing Monday's conviction abrogated the rights of the victim's family or why article 1, section 35 could constitutionally abrogate Monday's right to a fair trial. Despite omitting this analysis, Justice James Johnson concluded that the majority's decision had robbed the victim and his family of "the dignity and respect [they] deserve[] under our constitution."<sup>127</sup>

#### IV. THE BEST WAY FORWARD

These three opinions in *Monday* offer very different approaches to addressing the issue of racial bias and the right to a fair trial. If Washington courts are serious about deterring attorneys from appealing to racial biases, the courts should adopt Chief Justice Madsen's absolute bar as the rule.

Of the three opinions in *State v. Monday*, Chief Justice Madsen's concurrence is the most likely to change the behavior of prosecutors. Her concurrence gives courts and prosecutors a clear rule to follow, namely that prosecutors may not make racial remarks at trial.<sup>128</sup> On the other hand, such remarks by prosecutors could be permissible under the majority's rule, so long as the prosecutors could show beyond a reasonable doubt that the remarks did not affect the jury's verdict.<sup>129</sup> In order to reverse the defendant's conviction under this rule, the majority opinion had to problematize the evidence against the defendant: in its statement of the facts, the videotape became less conclusive<sup>130</sup> while the witnesses' recantations became central.<sup>131</sup> By reframing the evidence, the majority made its harmless error analysis work.<sup>132</sup> The majority's rule would still permit

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*Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 83 n.217 (2010).

127. *Monday*, 257 P.3d at 565 (Johnson, J., dissenting).

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

129. *Id.*

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

131. *Id.* at 553–55.

132. For a discussion on how the framing of facts may be used as a means of persuading readers, see, for example, Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 281 (2011) ("Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story. Indeed, the genius of storytelling as an act of persuasion is that it buries argument in the facts."); Steven Lubet, *Story Framing*, 74 TEMP. L. REV. 59, 62–64 (2001) (examining how the way in which an attorney chooses to frame the facts can be a powerful tool of persuasion); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 771–72 (2006) (emphasizing the significance of narrative in the law and the power that the writers of briefs and opinions exercise over those narratives by controlling "how much the audience knows about [the defendant's] needs and goals").

the State to appeal to racism so long as it had strong evidence against the defendant. Such a rule is unlikely to completely deter prosecutors from commenting on racial biases.

A broad reading of the dissent's rule would permit racist prosecutorial misconduct in cases where the State has overwhelming evidence against the defendant, while still burdening the defendant with showing that the misconduct was improper and prejudicial. The dissent claims the video evidence in *Monday* was so overwhelming that the prosecutor's comments would not have affected the jury's verdict, but it fails to state a threshold for determining when evidence is overwhelming.<sup>133</sup> The dissent also did not clarify how article 1, section 35 was implicated in this case<sup>134</sup> or how the majority's decision denied the victim and his family their constitutional rights.<sup>135</sup> The Washington State Supreme Court has held that article 1, section 35 did not overrule previous sections of the Washington State Constitution, and that victims' rights must be harmonized with defendants' due process rights.<sup>136</sup> This holding indicates that article 1, section 35 cannot be used as a catch-all to uphold convictions in cases where the prosecutor committed misconduct.

Ultimately, both the majority and the dissent have the same problem: neither of the opinions would completely deter appeals to racial biases during trial. Arguably, the majority's rule seems to place a significant burden on the State for future cases similar to *Monday*. The majority held that the prosecutor's misconduct was not harmless error despite the overwhelming evidence against Monday.<sup>137</sup> But in its statement of the facts, the majority still reframed the evidence as problematic. This reframing indicates that the majority may have attempted to lessen the burden on the State by recasting the evidence against Monday as less than overwhelming. On the other hand, the dissent's rule does nothing to address the underlying problems of appeals to racial bias. The dissent's rule would permit prosecutors to make such appeals so long as they had overwhelming evidence against the defendant. Adding insult to injury, the dissent's rule would still place the burden on the defendant of showing that the prosecutor's misconduct affected the jury's verdict. Most troubling, however, is that both opinions envisioned situations where

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133. *Monday*, 257 P.3d at 562 (Johnson, J., dissenting).

134. The majority opinion noted that all of society suffers when the State resorts to racial bias in order to achieve its ends, including victims. *Id.* at 558 n.5 (majority opinion).

135. *Id.* at 563 (Johnson, J., dissenting).

136. *State v. Gentry*, 888 P.2d 1105, 1138 (Wash. 1995).

137. Nelson & Stender, *supra* note 30, at 860–61 (“Despite the substantial evidence entered against the defendant, the majority still did not find that the State met its burden to demonstrate harmless error.”).

evidence could be so compelling that appeals to racial biases would have no effect on a case's outcome. Appeals to racism could still be made under both of these rules. This possibility means that the *Monday* decision may ultimately fail to completely stop future appeals to racial biases if Washington courts follow these rules.

The concurrence's rule leaves no question that racist misconduct violates a defendant's right to a fair trial, and a conviction based on an unfair trial cannot stand regardless of the evidence against the defendant.<sup>138</sup> A rule that bans all racist conduct is easier for both courts and parties to follow than the majority's rule, as that rule would permit racist comments to be made in some situations. Most importantly, the concurrence's rule will actually deter all racist misconduct by prosecutors. So long as Washington's courts continue to allow racist misconduct, the people of Washington are likely to lose faith in their criminal justice system.<sup>139</sup>

#### V. QUESTIONS THAT REMAIN

Regardless of which opinion Washington courts ultimately follow, the state supreme court will have to resolve issues that *Monday* has raised. Three issues in particular emerge: who should be forbidden from making appeals to racial biases, what type of conduct does *Monday* forbid, and what is the legal source of *Monday*'s rules?

##### A. *Who Should Be Forbidden from Making Appeals to Racial Biases?*

The first question that *Monday* raises is whether all parties should be barred from making appeals to racial biases. In their respective opinions, both Justice Chambers<sup>140</sup> and Chief Justice Madsen<sup>141</sup> concentrated on the conduct of prosecutors, and their respective rules were prophylactic remedies to prevent prosecutors from appealing to racial biases in the future. Both justices were mostly silent about whether their rules would also bar defense attorneys from making appeals to racial biases, although Chief Justice Madsen wrote that she was disgusted at the "appeals to racism here by an *officer* of the court."<sup>142</sup> It remains to be seen whether this

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

139. Nelson & Stender, *supra* note 30, at 867.

140. *Monday*, 257 P.3d at 557 ("The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained.")

141. *Id.* at 560 (Madsen, C.J., concurring) ("In the present case . . . the prosecutor's corruption of the trial cannot be tolerated.")

142. *Id.* (emphasis added).

statement means that the court will create a rule in the future to curtail defense attorneys from appealing to racial biases.

Defense attorneys can argue that they should be exempted from the spirit underlying *Monday*'s rules because they face the task of zealously representing their clients against the overwhelming power of the State.<sup>143</sup> Limiting the tools defense attorneys can use to represent their clients could severely disadvantage defendants, who are already at a disadvantage against the power of the State. But permitting any officers of the court to appeal to racial biases runs against one of the possible goals behind *Monday*: namely, to prevent attorneys from making appeals to racial biases. Moreover, in order to realize this goal, both prosecutors and defense attorneys must agree that neither side will employ such appeals.<sup>144</sup> Whether all officers of the court will from now on be barred from making appeals to racism is unclear from *Monday*. Another concern is what a prophylactic rule against defense attorneys would look like. The rules in *Monday* provide a clear remedy for defendants, namely a new trial, but such a remedy would encourage defense attorneys to violate the rule in order to secure new trials for their clients. If the court ultimately plans to forbid all appeals to racial biases, it will have to carefully consider how to craft a rule for defense attorneys that serves the same prophylactic function as the rule for prosecutors in *Monday*.

### B. What Type of Conduct Does Monday Forbid?

The second question is what type of conduct courts should be looking for under *Monday*. In other words, what does an appeal to racial bias look like? This question is much more difficult to answer than it seems because appeals to racial biases may be either explicit or implicit. The court was concerned about both types of bias, but it seemed especially concerned with subtle, implicit appeals: "Like wolves in sheep's clothing, a careful word here and there can trigger racial bias."<sup>145</sup> The majority opinion tried to give courts some guidance for future cases, using many

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143. Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 1–4 (1994). *But see* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 758 (2012) (arguing that criminal defense attorneys need to be cognizant of their own racial biases, particularly during voir dire).

144. Morgan Tilleman, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1686–87 (2010) (emphasizing the role prosecutors can play in curbing defense attorneys appeals to biases, such as appeals to biases against transsexual individuals).

145. *Monday*, 257 P.3d at 557 (citing Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222–23 & nn.67, 71 (1992)).

qualifying terms such as “flagrant, apparent, and intentional.”<sup>146</sup> But courts are less likely to encounter such explicit bias, and more likely to face subtle implicit bias.<sup>147</sup> Subtle bias may be just as detrimental to a defendant as explicit bias,<sup>148</sup> but without further guidance, courts may be unsure what conduct they should seek to prevent.<sup>149</sup>

Issues of subtle bias may also test the limits of *Monday*’s prophylactic rules and what behavior courts can hope to control. While courts can punish explicitly racist conduct in their courtrooms, they cannot prevent people from having their own internal biases. These biases can come from society or upbringing and may be triggered by subtle references.<sup>150</sup> *Monday*’s opinions provide little guidance though for when subtle appeals to biases reach a threshold that requires reversal. And locating this threshold is important. If the threshold is too low, the justice system could become ineffective because more convictions would have to be reversed. But if the threshold is too high the rules from *Monday* may fail to prevent less subtle appeals to racial biases. While the threshold of *Monday*’s rules remains to be defined, courts may have to accept that they can prevent only some—but not all—behaviors or biases. Ultimately, society as a whole may have to work to prevent such biases, through education and awareness as well as through the justice system.

Another issue for courts is how to differentiate between permissible and impermissible references to race.<sup>151</sup> Despite the holding in *Monday*, references to race may play an important role in serving the criminal justice system, so long they are based on evidence in a case and not intended to inflame the passions of jurors.<sup>152</sup> The majority opinion in *Monday* hinted at this distinction when it criticized the prosecutor for arguing that the witnesses were following an antisnitch code that was particular to

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146. *Id.* at 558; see also Nelson & Stender, *supra* note 30, at 856–57.

147. Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 336 (2001) (“Providing a hearing at the moment a comment is introduced is one means of assisting courts in the identification of prejudice, a task that is becoming increasingly difficult as prejudice becomes more subtle.”).

148. *Id.*

149. See Liann Ebesugawa, *State v. Rogan: Racial Discrimination and Limits of the Color-Blind Approach*, 24 U. HAW. L. REV. 821, 821 (2002) (“[T]he ability of this holding to stop future racial prejudice is unclear because the court did not provide adequate guidance as to what constituted an egregious racial remark in the context of Hawai’i’s multicultural background.”).

150. Nelson & Stender, *supra* note 30, at 852; Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 823 n.116 (2012); *Task Force Report*, *supra* note 46, at 663.

151. Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222 (1992).

152. *Id.*

African-Americans, an argument that the State's evidence did not support.<sup>153</sup> The rules of evidence already give judges the power to exclude potentially inflammatory evidence.<sup>154</sup> These judges, however, will need additional guidance in the future to determine what type of evidence should be excluded and when references to race become permissible.

### C. What Is the Legal Source of Monday's Rules?

The third question is whether the majority and concurrence based their respective rules in the United States Constitution or the Washington State Constitution. The majority opinion mentions both article 1, section 22 of the Washington State Constitution and the Sixth Amendment of the United States Constitution<sup>155</sup> and hints that its harmless error standard stems from both.<sup>156</sup> On the other hand, the concurrence explicitly mentions the federal Due Process and Equal Protection Clauses.<sup>157</sup> But neither opinion clearly answers this question nor do the parties' briefs, which cite to both Washington and federal cases in their sections on prosecutorial misconduct but not to either the Washington or federal constitution.<sup>158</sup> The parties also did not perform a *Gunwall* analysis of this issue to determine whether the case could have been decided on separate state constitutional grounds.<sup>159</sup>

These omissions are significant. If the rules from the majority and concurrence inhere in the federal Constitution, then they may be affected by the decisions of federal courts. But if the rules inhere in the Washington State Constitution, then Washington courts can maintain control of the scope of the rules. The majority seems to indicate that its rule is grounded in the Washington State Constitution because it cites to Washington case law in support of its new harmless error standard.<sup>160</sup> The

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

154. WASH. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

155. *Monday*, 257 P.3d at 557–58.

156. *Id.* ("The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless.").

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

158. See generally Brief of Appellant, *State v. Monday*, 257 P.3d 551 (Wash. 2011) (No. 82736-2), 2008 WL 7645138, at \*38–56; Brief of Respondent, *State v. Monday*, 257 P.3d 551 (Wash. 2011) (No. 82736-2), 2008 WL 7645140, at \*30–35; Appellant's Reply Brief, *State v. Monday*, 257 P.3d 551 (Wash. 2011) (No. 82736-2), 2008 WL 7645139, at \*7–11.

159. *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

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

concurrence is less clear because it relies on persuasive authority from both federal courts and other states.<sup>161</sup> For either of these standards, the Washington State Constitution seems like a more appropriate source for *Monday*'s rules because the state constitution has been interpreted to provide greater protections for civil liberties than the United States Constitution.<sup>162</sup> Time will tell how courts will determine which constitution is the source of the rules in *Monday*.

## VI. CONCLUSION

*State v. Monday* has the potential to dramatically change the nature of Washington courtroom proceedings and trial tactics that implicate race. Of the three opinions from *Monday*, however, only Chief Justice Madsen's rigid rule is likely to deter appeals to racial bias in the future. The majority's harmless error standard may ultimately fail in curbing prosecutors—or attorneys, in general—from making appeals to racial bias because the standard would permit convictions premised on such appeals to stand in some cases. The dissent's holding could exacerbate rather than prevent the problem of racial bias because it denies that any change must be made to the old standard. The inherent problems with these two opinions may render them incapable of solving the problem of racial bias in the criminal justice system. On the other hand, Chief Justice Madsen's rule is the most likely to deter appeals to racial biases because it is an absolute bar on appeals to racial biases that cannot be circumvented.

Whichever rule from *Monday* Washington courts ultimately choose to follow, they will have to determine who *Monday* applies to, what type of conduct *Monday* forbids, and what the legal sources of *Monday*'s rules are. Although these questions remain, *Monday* has the potential to change the criminal justice system in Washington for the better by deterring appeals to racial biases. As the Task Force noted, "Our democracy is based on the rule of law and faith in the fairness of the justice system."<sup>163</sup> Hopefully, the *Monday* decision represents the first step toward making the system fairer.

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161. *Id.* at 558–60 (Madsen, C.J., concurring).

162. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 SEATTLE U. L. REV. 491, 499 (1984).

163. *Task Force Report*, *supra* note 46, at 671.