THE OBJECTIVE OBSERVER TEST AND RACIAL BIAS IN CIVIL JURY TRIALS: THE WASHINGTON STATE APPROACH

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Introduction

At first blush, the facts of *Henderson v. Thompson*—a Washington Supreme Court case decided in 2022—make the case look like a run-of-the-mill tort suit. One woman, Thompson, accidentally rear-ended another, Henderson, causing her to experience whiplash. At trial, to show damages, Henderson testified that the whiplash made her preexisting disability worse. To support her claim, her doctors, her chiropractor, her close friends, and her family testified to the disability's impact on her quality of life. In response, defense counsel questioned the credibility of these witnesses, noting that Henderson's friends' stories were remarkably consistent with each other and suggesting that the chiropractor may have had a personal relationship with the victim that biased his testimony. Defense counsel also characterized the victim as "quite combative" on the stand, casted her high damages claims as an attempt to obtain a windfall from the accident, and tried to generate sympathy for the defendant by contrasting her with the "combative" and dishonest plaintiff.

Were these arguments that attacked the credibility of the witnesses and emphasized the victim's financial interest in a high damages award improper? Obviously, that question depends in part on state evidentiary rules, but as a general matter, case law clearly establishes that they are not. Federal courts have held that testimony on witness coaching is "clearly relevant," that it is "not improper" for an attorney to use a claim for money damages to impeach a plaintiff for purported financial incentive, and that a witness "necessarily puts the genuineness of his demeanor into issue" when he takes the stand.

But imagine these same arguments against the backdrop of stark racial differences between the plaintiff's bench and the defense's—where the plaintiff, her attorney, and her lay witnesses are Black, while the defendant and her attorney are white (not to mention the white judge and completely white jury). Should these racial dynamics change the way courts perceive the litigants' arguments? More specifically, is it OK for courts to think about race when they decide whether to bar certain arguments from being made, because

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they think those arguments could rely on stereotypes or otherwise play on the jury's racial biases?

For the Washington Supreme Court, the answer is yes—in fact, courts have a duty to consider race in making these evidentiary decisions. After Henderson was awarded only $9,200 by the jury (far below the $3.5 million she claimed she was owed, and even the $60,000 the defense suggested as a better number), she filed a motion for a new trial, arguing that defense counsel's "biased statements . . . likely influenced the jury's unconscious bias against [her] such that justice was not done." While the trial court agreed that "using the terms combative in reference to the plaintiff and intimidated in reference to the defendant can raise [racial] bias," it said that "[t]he terms [used by the defense] were tied to the evidence in the case, rather than being raised as a racist dog whistle with no basis in the testimony." It further concluded that it could not "require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones."

The Washington Supreme Court, in an opinion written by Justice Raquel Montoya-Lewis, reversed. The opinion began with the premise that "racial bias often interferes with achieving justice in our courts," and that when it does, courts should order new trials. This is nothing controversial: both *Thompson* and the U.S. Supreme Court recognize that "[t]he Constitution prohibits racially biased [attorney] arguments." Yet the court's opinion takes a radical step forward in Washington's jurisprudence, redefining how courts should screen attorney arguments for potentially biasing effects. Rather than statements or arguments that are made with a clearly racist intent, the Washington Supreme Court's idea of "racially biased arguments" is far more capacious: it includes "dog whistles," or superficially harmless comments that have the effect of operating on a jury's implicit biases. This means doing some kind of objective inquiry into whether racial bias affected the verdict.

I. The "Objective Observer" Test

How should courts perform this inquiry? *Henderson*'s objectivity analysis draws from other attempts in Washington law to move away from subjectivity as the standard courts use to identify potential racial bias in a trial. These attempts began with a state procedural rule codified as GR 37. GR 37 is Washington's effort to correct for the failures of *Batson v. Kentucky* (1986). *Batson* held that when state criminal prosecutors use peremptory strikes against a prospective juror based on her race, they violate the *defendant's* Fourteenth Amendment right to equal protection of the laws. *Batson* established a burden-shifting framework for identifying these racially motivated

strikes. Specifically, it requires litigants to show that an attorney's race-neutral reasons for striking a juror are pretextual—or that the attorney discriminated purposely.

GR 37 reworked this framework. Rather than mandate a showing of pretext by litigants, GR 37 situates the finder of fact as "an objective observer" who understands that racism and implicit bias have historically influenced jury verdicts. If this informed, objective observer would view an attorney's peremptory strike as racially targeted, then the court must forbid the strike.

The Washington Supreme Court has imported GR 37's "objective observer" framework into other aspects of jury trials that might be susceptible to racial bias. In *State v. Berhe* (Wash. 2019), the court held that in criminal cases, trial courts were required to hold an evidentiary hearing upon a party's showing that "an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict." Writing for the court, Justice Mary Yu concluded that a framework centered around a litigant's *subjective intent* to leverage a jury's racial biases could not effectively address implicit bias. Specifically, she explained that "when determining whether there has been a prima facie showing of implicit racial basis, courts," contra *Batson*, "cannot base their decisions on whether there are equally plausible, race-neutral explanations."

The Washington Supreme Court in *Henderson* adopted the *Berhe* framework for civil trials. Under *Henderson*, once a litigant makes a prima facie case that an objective observer could view race as a factor in the jury's decision, Washington courts must order an evidentiary hearing at which "the trial court is to presume that racial bias affected the verdict, and the party benefiting from the alleged racial bias has the burden to prove it did *not*."

The *Henderson* Court further concluded that the facts of the case clearly met the burden for a prima facie case: it found that the defense lawyer's characterization of Henderson as combative evoked the "harmful stereotype of an angry Black woman," further playing into the comparison she was attempting to draw between her and Thompson (the authentic, genuine, intimidated white woman). The Court further explained that from an objective point of view, "[d]efense counsel's argument that Henderson was exaggerating or fabricating her injuries appealed to [ ] negative and false stereotypes about Black women being untrustworthy, lazy, deceptive, and greedy," while the defense's suspicions of collusion tapped into an "us-versus-them" mentality.

II. Why the Objective Observer Framework Might Work

Does an approach like that of Washington's make sense for other states to adopt? Social science research suggests it might. Professor Jerry Kang and others have shown there is "a moderately strong implicit stereotype associating litigators with Whiteness" and that "this stereotype correlated with more favorable evaluations of the White lawyer . . . in terms of his competence, likeability, and hireability." Kang further hypothesized that "similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial." Still, Kang's analysis doesn't bode entirely well for the objective observer framework. Even if jurors are likely to evaluate white lawyers, parties, and witnesses more positively than nonwhite ones, judges may be in a no better position to weed out bias. After all, the *Henderson* framework essentially employs judges in the role of "objective observer." Yet, Kang has asserted that "thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases."

Perhaps Washington's approach also ignores the roles that prophylactic measures, like using voir dire to probe for racial bias or issuing jury instructions on implicit bias, could, or already do, play in reducing the effects of stereotype-based arguments. These approaches may be less costly. If effective, they would neutralize an attorney's dog whistles or other attempts to animate a jury's racial bias without forcing courts to order a new trial. Yet both measures have important limitations. The U.S. Supreme Court itself has recognized the shortcomings of voir dire as a tool for revealing racial bias. In *Pena-Rodriguez v. Colorado* (2016), for instance, the Court labeled voir dire, among other fact-finding procedures over the course of a trial, an "important[ ] mechanism[ ] for discovering bias," but it also recognized that it "may prove insufficient." The Court characterized the strategic choice whether to probe jurors for racial bias at voir dire as a "dilemma." It found that "[g]eneric questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations," while "more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" As for implicit bias instructions, Professor Mikah K. Thompson has found that even after the Supreme Court in *Pena-Rodriguez* applauded the value of jury instructions on implicit bias, "lower courts appear quite reluctant to allow instructions that specifically mention racial bias or provide guidance to jurors on the ways in which they can avoid making a racially biased decision." Moreover, she has argued that even when judges do give implicit bias instructions, they "are not always effective." Lastly, trial judges

themselves have doubted the effectiveness of voir dire questions about implicit bias.[1]

Finally, one might argue that *Henderson*'s rule, as applied, encourages Washington's lower courts to monitor litigants' use of racially problematic arguments at all stages of litigation—that is, before they come to taint a jury's perception of the case at trial. In *Velazquez Framing, LLC v. Cascadia Homes, Inc.* (2022), for instance, the Washington Court of Appeals invoked *Henderson* to scold counsel for their portrayal of the case's facts in a summary judgment motion. Specifically, the court criticized the defendant's claim that it could not differentiate between the plaintiff and other framing contractors because both companies employed Hispanic workers.

III. Why the *Henderson* Rule Might Not Work

Even if other state courts embrace Washington's approach, the option of following in their footsteps may be foreclosed by the U.S. Supreme Court's recent opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023). Upon the Washington Supreme Court's ruling, Thompson petitioned the U.S. Supreme Court for certiorari, arguing that Washington's new rule deprived her of due process of law by disallowing legitimate, evidence-based arguments. She also argued that it violated the Equal Protection Clause by permitting Black litigants to make credibility-based arguments that white litigants could no longer make without risking allegations of racial bias, and possibly, a new trial. While the Supreme Court denied certiorari, Justice Samuel Alito issued a statement, which Justice Clarence Thomas joined, blasting the Washington Supreme Court's *Henderson* decision on equal protection grounds. Quoting *Students for Fair Admissions*, Justice Alito agreed with Thompson that "the procedures the [Washington] state court has imposed appear likely to have the effect of cordoning off otherwise-lawful areas of inquiry and argument solely because of race, violating the central constitutional command that the law must 'be the same for the Black as for the white; that all persons . . . shall stand equal before the laws of the States.'" He further predicted that, considering the Court's decision in *Students for Fair Admissions*, "[t]he Washington Supreme Court's opinion is [ ] on a collision course with the Equal Protection Clause."

Does *Henderson*'s rule deprive white litigants of the equal protection under the law? Answering this question depends first on answering another: Can Washington courts apply *Henderson* without

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[1] *See generally* Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023 (2008).

classifying litigants and other courtroom actors (like the judge and jury) based on race? One Washington Supreme Court opinion applying *Berhe*, also written by Justice Montoya-Lewis, made racial classifications central to its analysis, emphasizing that the judge, jury, lawyers, and nearly all the witnesses were white, while the defendant (on trial for burglary) and a singular witness were Black. On the other hand, one division of the Washington Court of Appeals has taken *Henderson* to command that courts *exclude* evidence that might draw attention to litigants' races.

Still, it seems inevitable that certain applications of *Henderson*'s framework will rely on race-based classifications. Might they hold up under strict scrutiny? The Washington Supreme Court has framed the race-conscious posture it takes qua objective observer as a remedy for a past injustice—specifically, the use of racially charged arguments at a trial that has already occurred and whose facts have already been found by a jury.

In deciding *Students for Fair Admissions*, the Supreme Court rejected the remedial justification for race-based affirmative action favored by the dissent in that case and four justices in *Regents of the University of California v. Bakke* (1978). The Court relied on *Shaw v. Hunt* (1996) and *Richmond v. J.A. Croson Co.* (1989) to dismiss the idea that "ameliorating societal discrimination . . . constitute[s] a compelling interest that justifies race-based state action." In addition, to establish a "governmental interest in remedying past discrimination" under *Croson*, "judicial, legislative, or administrative findings of constitutional or statutory violations must be made." Still, the *Students for Fair Admission* Court contrasted the remedial interest at issue in that case with the government's interest in *Franks v. Bowman Transportation Co.* (1976). There, the Court recognized that "to make persons whole for injuries suffered on account of unlawful employment discrimination . . . Congress in § 706(g) vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate.'" Not unlike the race-based remedy held constitutional in *Franks*, the racial classification at issue in *Henderson* might be permissible if it is used to remedy a violation of a litigant's statutory or constitutional right to an impartial jury trial in certain civil cases.

Conclusion

While Washington appears to be the only state so far to adopt an objective observer test for post-verdict allegations of bias, it is possible that other states could follow suit, especially those who have embraced the test for purposes of addressing racially biased peremptory

challenges. Statistics would suggest that states would not be wrong to do so: the *Henderson* framework has the potential to increase the public's trust in state courts. In a 2022 survey by the National Center for State Courts, 61% of Black participants (compared with 46% of white participants) opined that state courts failed to provide equal justice to all. Given this discouraging statistic, it might make sense for the Supreme Court to defer to states to implement procedural mechanisms that could improve Black citizens' confidence in the functioning of their courts. Finally, signs from Washington courts applying *Henderson* suggest that Justice Alito may have rushed to surmise that the case's rule would inevitably disadvantage white litigants. For instance, a division of the Washington Court of Appeals has reasoned that *Henderson*'s "underlying goal" was ensuring that all litigants, Black and white, would receive a fair trial. Indeed, the "denial of a fair trial is the reason why racial bias in court proceedings merits grant of a new trial." *Henderson* can thus be thought of as an effort to introduce a baseline of racial fairness to civil litigation in state courts—not to lead them away from it.

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