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The Challenge for Cause Procedure in Canadian Criminal Law

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Abstract

There is a longstanding presumption in Canadian law that jurors will act impartially in carrying out their duties, but this presumption may be challenged when the defendant is a member of a racialized minority group. In those circumstances, the defence may initiate a challenge for cause procedure, wherein potential jurors are questioned about their ability to set aside any racial prejudice and judge the case solely on the evidence. Although the challenge for cause procedure has been in place for some time, little attention has been given to the process and whether it in fact effectively screens for juror bias. This article provides an overview of the challenge for cause procedure, with particular attention to race-based challenges, as well as psychological research assessing the effectiveness of the procedure. Reference is made to the authors' analysis of actual jury selection proceedings in which the challenge procedure was invoked. The data revealed that, although only a small percentage of potential jurors admitted to potential prejudice in open court, many more were excluded by triers and counsel.

Key words

Challenge; peremptory; jury bias; screening

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Resumen

En el derecho canadiense existe la presunción antigua de que los jurados actúan de forma imparcial al desarrollar sus funciones. Sin embargo, esta presunción se puede cuestionar cuando el acusado pertenece a una minoría racial. En esas circunstancias, la defensa puede iniciar un procedimiento de impugnación del jurado en el que se interroga a los potenciales miembros del jurado sobre su capacidad para dejar de lado cualquier prejuicio racial y basarse únicamente en evidencias para juzgar el caso. A pesar de que la impugnación del jurado es un tema que ha estado de actualidad durante algún tiempo, se ha prestado poca atención al proceso y si realmente se detectan de forma efectiva sesgos dentro del jurado. Este artículo proporciona una visión general del procedimiento de impugnación del jurado, prestando especial atención a las impugnaciones basadas en la raza, así como de la investigación psicológica para evaluar la eficacia del procedimiento. Se hace referencia al análisis de las autoras de los procesos de selección del jurado en los que se invocó la impugnación del jurado. Los datos revelaron que, aunque sólo un pequeño porcentaje de los posibles miembros de jurado admitieron un prejuicio potencial de forma pública, jueces y abogados excluyeron a muchos más.

Palabras clave

Impugnación; perentorio; sesgo del jurado; cribado

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1. Introduction

The Canadian right to trial by jury, originally making its way from England to the British colonies in the mid-1700s, is now enshrined in Canada's *Charter of Rights and Freedoms* (Canadian Charter of Rights and Freedoms 1982). Section 11(d) of the *Charter* guarantees that anyone charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by *an independent and impartial tribunal* (emphasis added) (Canadian Charter of Rights and Freedoms 1982, s. 11(d)). In addition, s. 11(f) guarantees that, where the maximum punishment for the offence is imprisonment for five years or more, the accused is entitled to the benefit of trial by jury (Canadian Charter of Rights and Freedoms 1982, s. 11(f)).[1] For the most serious offences, which include murder and treason, the defendant must be tried by a jury unless both the Crown and the defence agree to a trial by judge alone (Canadian Charter of Rights and Freedoms 1982, ss. 471, 473). For most other indictable offences, the defendant has the choice of electing to be tried by judge or by jury (Canadian Charter of Rights and Freedoms 1982, s. 536). The structure and composition of the criminal jury has undergone few substantial alterations since its inception; it is always composed of twelve persons and the verdict decision is always one of unanimity wherein all twelve members must agree upon the verdict (Canadian Charter of Rights and Freedoms 1982, s. 631(5), 631(2.1)).[2]

Under Canadian law, there is a longstanding presumption of juror impartiality, which was enunciated in a leading case on jury law, *R. v. Hubbert* (1975).[3] There, the court asserted that jurors will perform their duties in accordance with their oath and will render a verdict with an impartial mind (*R. v. Hubbert* 1975, para. 19). Beyond this legal presumption, the Canadian criminal jury system possesses additional procedural safeguards believed to ensure juror impartiality. Specifically, the jury is composed of twelve persons who will deliberate and neutralize any preexisting individual biases. Moreover, judicial instructions are thought to have a salutary effect on the jury by reminding the jurors of their solemn duty to be fair and impartial (*R. v. Hubbert* 1975, para. 50). On this note, the *Hubbert* presumption has been enunciated even more strongly in subsequent decisions. For example, in *R. v. Corbett* (1988), the Supreme Court considered whether the accused's prior convictions could be introduced in evidence to bear on character if the accused chose to testify. Rejecting social science research indicating that jurors were influenced by knowledge of criminal records, the *Corbett* decision expressed confidence in the experience of trial judges that firm instructions from the judge would result in juries performing their duties in accordance with the law (*R. v. Corbett* 1988, para. 42-43).

It should be noted that juror privacy is highly protected in Canada; in contrast to the American *voir dire* process, Canadian jurors are not typically questioned about their personal beliefs, attitudes, or backgrounds.[4] As such, prospective jurors in Canada are not typically questioned, leaving attorneys with information pertaining only to the prospective jurors' age, gender, demeanor and, occasionally, occupation as the basis for their decisions about the suitability of that juror. Under Canadian criminal law, both the Crown and the defence are entitled to a set number of peremptory challenges, by which they may exclude a potential juror from serving on the jury, without having to explain or justify why they have done so. The number of peremptory challenges each side is allotted is limited, with the number

[1] One important exception to this guarantee occurs where there has been an offence under military law, wherein the accused will be tried before a military tribunal pursuant to the *National Defence Act* (1985, Part III, ss. 60-74). And for less serious crimes, where the sentence is less than five years, the defendant is tried by judge alone, *Canadian Criminal Code* (1985, ss. 552-553).

[2] No provisions are made for alternate jurors, and removal of a juror is considered to be a very serious matter (Granger 1996, p. 143).

[3] *R. v. Hubbert* (1977). See also *R. v. Sherratt* (1990).

[4] See e.g., Schuller and Vidmar (2011, p. 517).

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varying depending on the seriousness of the crime.[5] For serious offences such as murder or high treason, both defence and prosecution each have twenty peremptory challenges per defendant (*Canadian Criminal Code* 1985, s. 634(2) (a)). For charges other than murder or high treason, for which the defendant(s) could face more than five years in prison, both sides are entitled to twelve peremptory challenges (*Canadian Criminal Code* 1985, s. 634(2) (b)). For all other charges, each side may exercise four peremptory challenges per defendant (*Canadian Criminal Code* 1985, s. 634(2) (c)). Thus, the exercise of peremptory challenges may be seen as a final safeguard allowing the exclusion of jurors who may be considered unsuitable by counsel.

Where there is reason to doubt the presumption of juror impartiality, however, a challenge for cause can be requested. To do so, the party seeking to challenge prospective jurors' partiality must first make a compelling case to the trial judge, usually in a pre-trial motion, that some of the jurors on the panel may not be impartial (*R. v. Sherratt* 1991).[6] The standard of proof that is required is an "air of reality" or a "realistic potential" that 1) a widespread bias exists in the community, and 2) that some jurors may be incapable of setting aside this bias, despite trial safeguards (*R. v. Parks* 1993). Once this threshold test has been met, potential jurors can be questioned regarding their ability to remain impartial in a challenge for cause procedure.

2. Types of prejudice

Neil Vidmar (1997) outlined four main types of prejudice relevant to the issue of juror partiality.[7] The first is *interest prejudice*, wherein the juror has a personal or financial interest in the outcome of the case. This form of prejudice might occur where the defendant is a friend or relative of the juror, or where the juror's personal interests would be affected by the outcome of the trial. This form of prejudice is relatively straightforward and uncontroversial. A second type is *normative prejudice*, which occurs where there are strong community beliefs about the case, as may happen where the crime occurs in a small town.[8] A third type, *specific prejudice,* refers to attitudes or beliefs directly related to the case at hand that may interfere with the jurors' ability to decide the case fairly, with this information typically obtained from mass media coverage prior to the trial. This has occurred in a variety of Canadian courtrooms when the pre-trial publicity of a case has been extensive, typically where the crime is particularly gruesome or notorious.[9] Finally, there is *generic prejudice*, which Vidmar (1997) defines as

[5] See *Canadian Criminal Code* (1985, s. 634(2), subject to subsections (2.1) to (4)), which provides that the prosecutor and the accused are each entitled to (*a*) twenty peremptory challenges, where the accused is charged with high treason or first degree murder; (*b*) twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (*a*), for which the accused may be sentenced to imprisonment for a term exceeding five years; or (*c*) four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (*a*) or (*b*).

[6] See Tanovich *et al.* (1997, p. 137–147), Vidmar and Melnitzer (1984, p. 491-493).

[7] The four types of prejudice also were acknowledged by the Supreme Court of Canada in *R. v. Williams* (1998).

[8] For example, Vidmar and Melnitzer (1984) studied the challenge for cause process in a case occurring in a small, rural town in Ontario in which a mother and father were accused of murdering their fourteen-month-old child. Although there had been some media coverage, much of the community knowledge was spread by rumour and word-of-mouth. Defence counsel conducted a telephone survey among community residents and determined that 66% were familiar with the case, and a large percentage of those spontaneously referred to child abuse concepts. On the basis of this information, the judge granted a challenge for cause on the basis of normative community bias.

[9] One extreme example may be found in the case of Paul Bernardo and Karla Homolka in the early 1990s, in which two teenage girls were abducted, sexually assaulted, and murdered, with much of the violence recorded on videotape by the accused. This occurred in the context of a series of high profile sexual assaults in the suburbs of Toronto by an assailant dubbed "the Scarborough rapist," later identified as Bernardo. Due to the brutal and widely publicized nature of the crimes, it was difficult to empanel a jury of impartial jurors. At the time of jury selection, 980 jurors had been called. Those eligible and available to serve were asked 8 questions regarding their media exposure to the case,

prejudice that involves "the presence of general attitudes, beliefs, and biases held by the juror that prevents him or her from deciding the case with a fair and impartial mind" (Vidmar 1997, p. 6). Racial or ethnic prejudices would be instances of this form of generic prejudice. The concern here is that persons who hold prejudicial beliefs about a particular racial group (e.g., Blacks, Aboriginal, etc.) may judge an accused who is a member of that group on the basis of his or her group membership as opposed to the evidence at trial. These beliefs may pertain to the defendant, the victim/complainant, or other witnesses.[10] Another form of generic prejudice surfaced in the mid-1990s, when defence attorneys began to mount what is referred to as offence-based challenges. These were based on the notion that jurors would be unable to judge an accused fairly due to the nature of the crime with which he or she had been charged, although such challenges are rarely if ever successful (Dufraimont 2000).[11]

Generally, challenges on the basis of the defendant's personal characteristics have been disallowed,[12] with one important exception, which is the focus of this paper: the race-based challenge. The potential for racial bias in trials involving Black defendants was explicitly acknowledged in the early 1990s. In an influential case, *R. v. Parks*, the defense sought to ask potential jurors whether their ability to judge the evidence in the case "without bias, prejudice, or partiality" would be affected by the fact that the person charged was Black. The original trial judge's refusal to permit this question was successfully appealed by the defense. In the words of the Ontario Court of Appeal that followed, two discrete aspects of partiality were articulated, "an attitudinal and a behavioral component," with the emphasis being the expression of prejudice in the juror's decision (*R. v. Parks* 1993, para. 35).

> It refers to one who has certain preconceived biases and who will allow those biases to affect his or her verdict despite the trial safeguards to prevent reliance on those biases. A partial juror is one who is biased and will discriminate against one of the parties to the litigation on that bias (*R. v. Parks* 1993, para. 35).

The acknowledgment of these two distinct aspects of partiality, however, did not lead to specific questions for each component.

In a leading decision from Canada's highest court, the Supreme Court of Canada in *R. v. Williams* (1998) held that the threshold test for determining whether to allow a challenge for cause is whether there is a "realistic potential for juror partiality" (*R. v. Williams* 1998, para. 57). The defendant is not required to provide evidence that jurors will be unable to set aside their bias, but only that widespread bias against the defendant's race exists in the community, which will generally be satisfied where such bias exists at the national or provincial level (*R. v. Williams* 1998, para. 41). Since this time, attorneys have been permitted to question and eliminate prospective jurors who might harbor racial bias in trials involving not only Black defendants (*R. v. Wilson* 1996, para. 21, *R. v. Spence* 2005, para. 27), but

whether they had pre-formed ideas about his guilt, and whether they would be able to judge the case impartially. (Vidmar 1996).

[10] See *R. v. Shergill*, (1996), a case involving a Sikh Indian from the Punjab in which the Crown's objections to the question and request that it refer not only to the race of the accused, but also the race of the victims and witnesses was granted.

[11] Vidmar (1997) provided a detailed account of successful challenges in the context of sexual abuse against children. Challenges of this sort on the basis of offence type were allowed for a brief period during the 1990s, but are now unsuccessful and effectively barred by precedent: *R. v. Betker* (1997). Similarly, unsuccessful claims have been brought on the basis that the defendant was charged with spousal assault against his wife (*R. v. Banks* 1995), domestic violence resulting in homicide (*R. v. Griecken* 2009), sexual offences against children (*R. v. E.S.* 2000, *R. v. Doherty* 2000*, R. v. K.(A).* 1999), and possession of firearms (*R. v. Lucas* 2009).

[12] For example, the British Columbia Court of Appeal refused the defendant's request to challenge jurors on their potential bias against persons with mental illness where a schizophrenic man had found a severely beaten woman on the road and brought her home to take care of her: *R. v. Bennight* (2012). Other, more unusual challenges have been brought unsuccessfully on a number of other factors, including bias on the basis of the accused's HIV status (*R. v. Aziga* 2008) and participation in witchcraft and the occult (*R. v. Rowe* 2006).

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defendants of any non-Caucasian visible minority.[13] The widespread acceptance of the race-based challenge for cause procedure as a viable method for dealing with potential juror partiality has resulted in a *presumptive* form of challenge on the basis of race in trials of visible minority defendants. While Canada now permits accused persons to challenge prospective jurors for racial bias, empirical data assessing the effectiveness of the procedure is virtually nonexistent (Schuller and Vidmar 2011, p. 517). Before turning to the little empirical work that has been done, we first familiarize the reader with the challenge procedure.

3. The challenge for cause procedure

Schuller and Vidmar (2011, p. 516-517) describe the logistics of this quite unusual procedure. As you read through this description, we draw your attention to two essential elements that will bear on the accuracy and reliability of the procedure as a screening method for juror partiality: potential juror self-assessment of bias and identification of bias by others. The following discussion of the challenge procedure will be provided in the context of a race-based challenge for cause, although it should be noted that the same principles apply to challenges brought with regard to other forms of prejudice that were noted above (e.g., pre-trial publicity).

We turn first to the question that is asked of the prospective juror in the challenge process. Typically, as the race-based challenge has developed, it will involve a single question,[14] such as

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is Black?

A prospective juror's response to this question, given its format and the formal and intimidating environment in which it is solicited, not surprisingly, will be brief and typically limited to a "yes" or "no" response. Attempts by the defense to augment the *Parks* question with additional questions and/or to separate the question into two parts have been largely unsuccessful (*R. v. Gayle* 2001, *R. v. Douse* 2009, para. 4). As it now stands, a single question is used in the challenge proceedings.

Research and theorizing on prejudice and discrimination suggest that such self-assessments may often be incorrect, thereby raising serious questions about the efficacy of the challenge procedure. For instance, Johnson *et al*. (1995) found that, although White participants were more influenced by incriminating inadmissible evidence when a defendant was Black (as opposed to White), they reported feeling less affected by the inadmissible evidence than participants in a White defendant inadmissible condition. Similarly, theorizing related to aversive racism suggests that people may be unaware of existing biases and often maintain that they are personally fair and egalitarian (Dovidio and Gaertner 1986, Son Hing *et al*. 2002). In particular, research has demonstrated that while many people do not believe that they themselves are biased against Blacks, there is strong empirical evidence to suggest otherwise (Dovidio *et al*. 1996, Dovidio *et al*. 1997, Kawakami *et al*. 2002). Psychological research has also revealed that even if people acknowledge the possibility that they may be biased against Blacks, they may not fully understand how and to what extent these biases can affect their decisions. In particular, affective forecasting studies demonstrate that people are often ignorant as to how they will respond to actual situations and are often woefully inaccurate in their beliefs about the impact of certain cues and social categories on their emotional and behavioral responses (Nisbett and Wilson 1977, Wilson 2002, Wilson and Gilbert 2003, Mallett *et al*. 2008). Finally, even if people can admit to their possible biases and understand the extent and direction of its influence, they may still fail to correct for their partiality if they lack the motivation or cognitive capacity

[13] The courts have considered a variety of racialized minorities other than Blacks, including Aboriginals (*R. v. Williams* 1998, *R. v. Hummel* 2002); Chinese (*R. v. Koh, Lu & Lim* 1998), Vietnamese (*R. v. Duong* 1998), South Asian Muslims (*R. v. Patel* 2014), and Black Muslims (*R. v. Hersi* 2014).
[14] See also Tanovich *et al*. (1997, p. 137–147).

to do so (Wilson and Brekke 1994, Wegener and Petty 1997, Kawakami *et al*. 2000, Kawakami *et al*. 2005, 2007).

We now turn to the second element of this procedure, that is, the determination of juror partiality on the basis of the jurors' responses. Unique to Canada (Schuller and Vidmar 2011, p. 517),[15] the determination of partiality is made by two lay persons (referred to as triers), who often will be members of the actual jury. To begin the process, two individuals from the prospective jury panel are selected randomly to act as "triers." Triers do not respond to the challenge question themselves, but rather are sworn in to judge the acceptability of the potential jurors who are called forward.[16] While there are no legislative requirements on the instructions triers should be given regarding how to determine the acceptability of a potential juror, precedential guidance, albeit focused more on procedural matters than juror understanding, can be found in case law regarding sufficiency of trier instructions. Generally, triers should be informed of five main points: 1) their role is to decide on the partiality of potential jurors; 2) the decision must be made on a balance of probabilities; 3) the decision should be unanimous; 4) they may retire to the jury room to confer; and 5) they should advise the court if they are not able to reach a unanimous decision in a reasonable time.[17] Whether or not these points are imperative is open to some debate, as several courts have ordered a new trial where certain instructions were absent,[18] whereas others have deemed incomplete instructions to be satisfactory.[19]

After conferring with each other, the two triers render a decision about the prospective juror's acceptability as a juror, and their decision must be unanimous. If the prospective juror is deemed acceptable, both Crown and defence counsel maintain the option to reject the juror on the basis of one of their peremptory challenges.[20] If neither side exercises a peremptory challenge, that person becomes

[15] See also Vidmar and Schuller (2001). In sharp contrast, in most commonwealth countries and the United States, it is the judge who renders the decision on the prospective juror's impartiality.

[16] Typically, the triers are sworn in with some variation of the following: "*Do you swear [or affirm] that you shall well and truly try whether prospective jurors stand indifferent between the Queen and the accused*?"

[17] *R. v. Cardinal* (2005) relying on earlier precedent set forth in *R. v. Hubbert* (1975).

[18] For example, the Ontario Court of Appeal ordered a new trial where the trial judge failed to inform triers that the decision was to be unanimous, made on a balance of probabilities, that partiality was the basis of the decision, or that they could retire if they deemed it necessary (*R. v. Moore-MacFarlane,* 2001). Similarly, a new trial was ordered in another Ontario case, *R. v. Douglas* (2002), where the trial judge did not instruct any triers about the procedure they were to follow, what standard of proof they were to apply, and the need for a unanimous decision. There was concern that failing to explain that they were to base their decision on a balance of probabilities may have led some jurors to apply the much higher criminal threshold of beyond a reasonable doubt, which would require near certainty that the potential juror would be impartial. In addition, failing to explain the need for unanimity may have led some triers to err on the side of rejecting a juror when they disagreed. In addition, new trials have been ordered when the trial judge failed to instruct the triers with regard to their general role and purpose, the procedures to be followed, and the meaning of partiality and acceptability (*R. v. Li* 2004, *R. v. Olukoya* 2003).

[19] In *R. v. McLean* (2002) the Ontario Court of Appeal again considered the propriety of judicial instructions to triers, concluding that the instructions were sufficient. The judge had informed triers that their role was to determine whether a potential juror was acceptable, and that this decision was to be based on their belief in that juror's impartiality, and their decision was to be unanimous. Impartial jurors would "approach their duties with an open mind and decide the case on the basis of the evidence and on the instruction of the trial judge" (*R. v. McLean* 2002, para. 6). Although the judge failed to explain the appropriate standard of proof and that they could retire to the jury room to confer, the appellate court did not find these omissions to be fatal to the case. Generally, the courts recognize wide discretion in how trial judges instruct triers; as long as the triers understand the nature of their task and the procedures to follow, there is no need for strict adherence to pre-set methods or processes, e.g., *R. v. Cardinal* (2005), *R. v. Patterson* (2003).

[20] The trial judge must ensure that counsels' peremptory challenges are done in accordance with the provisions of the *Charter*, particularly the equality provisions enshrined in s. 15 (Canadian Charter of Rights and Freedoms 1982, s. 15). In *R. v. Brown* (1999), the defendants sought to prevent the Crown from exercising peremptory challenges discriminatorily against Black jurors. The court noted that the law conferring discretion to exercise peremptory challenges did not specifically prohibit race-based use of a peremptory; this did not mean that Black jurors could not be excluded, only that they must not be

Juror #1 and one of the original triers is then excused. The remaining trier along with Juror #1 assesses the acceptability of the prospective jurors until Juror #2 is selected. The original trier is then excused and this process continues with Jurors #1 and #2 assessing the acceptability of Juror #3; Jurors #2 and #3 assessing the acceptability of Juror #4, and so on until 12 jurors have been chosen to sit on the jury. In contrast to this rotating process with the last two jurors selecting the next juror, in some recent cases, judges have permitted what has been referred to as 'static triers.' Amendments to s. 640 the *Canadian Criminal Code* in 2008 allowed for the discretionary use of static triers, such that the same two triers would sit for the entire jury selection where an application to do so was made by the defendant.[21]

4. Some procedural matters under judicial discretion

The trial judge oversees the challenge and has considerable discretion as to the manner in which the challenge will proceed and the question(s) that will be asked. Attempts by the defense to augment the *Parks* question with additional questions and/or to separate the question into two parts have been largely unsuccessful.[22] Although the courts agree that a singular question is sufficient to get at partiality, recent debate has centered on how the question should be answered. Specifically, there is some disagreement as to whether a multiple choice response format might be a better vehicle by which to assess underlying biases. It is with these concerns in mind that some courts recently permitted a modified response format to the challenge question by providing jurors with multiple-choice response options. This method was introduced and permitted in *R. v. Douse* (2009, para. 4), where prospective jurors were provided a written copy of the question and then asked to provide their answer by selecting a response from four alternatives:

a) I would not be able to judge the case fairly;

b) I might be able to judge the case fairly;

c) I would be able to judge the case fairly, or

d) I do not know if I would be able to judge the case fairly.

Subsequent cases have been divided on the use of this multiple-choice response format, with some judges allowing it and others refusing to allow it. For example, in *R. v. Valentine* (2009), the defense argued that the basic yes/no question would be insufficient to assess juror bias. In *R. v. Johnson* (2010), the defence requested to challenge potential jurors with a multiple-choice response type question, arguing

excluded in a discriminatory manner. Where there is evidence or suspicion of discriminatory exercise of peremptory challenges, the Crown will not be compelled to explain its actions absent clear evidence of professional misconduct. Ultimately, the decision will be based on the totality of the circumstances and whether or not the Crown's exercise of peremptory challenges has led to a miscarriage of justice. Where misconduct is found, available remedies may include a mistrial, an order preventing further exclusion of Black jurors by the Crown, or re-challenging of already excluded jurors. The Ontario Court of Appeal has held that this sort of discrimination is impermissible, see *R. v. Gayle* (2002).

[21] Pursuant to Canadian Criminal Code (1985 s. 640(2.2)), the provision states:

If an order is made under subsection (2.1) [i.e., ordering the jury panel to leave the courtroom], two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection 631(2.2) — and any alternate jurors are sworn.

In *R. v. Swite* (2011), the trial judge had refused to allow the accused's request for rotating triers, believing that the legislative amendments required the use of static triers. The court held that this constituted a fundamental error and resulted in an improperly empanelled jury, and it ordered a retrial. Conversely, in *R. v. Stewart* (2011), the Crown's application to have static triers was denied on the basis that the accused had not made the application, and that the procedure would default to the traditional rotating triers format. Further, in *R. v. White* (2009) the court concluded that Parliament's intention in amending s. 640(2.2) was to allow for the employment of static triers where desired, rather than to limit the trial judge's discretion.

[22] In *R. v. Gayle* (2001), attempts to ask a series of general questions that touched upon prospective jurors' general attitudes towards Blacks, as well as their assessment of the impact of their attitudes on behavior, was refused (*R. v. Douse* 2009, para. 4).

that most jurors do not respond with a simple yes or no, but give some elaboration along the lines of the multiple choice options; the request was refused. Similarly, in *R. v. Ahmad* (2010), the judge refused to permit the multiple choice response option on the grounds that it would lengthen the challenge process and be more intrusive of prospective jurors' privacy, while in *R. v. Stewart* (2011), the trial judge refused to allow the multiple choice response format on the basis that there was no evidence that the defendant's rights would be infringed by failure to do so.

Whether or not to exclude the jury panel from the courtroom during the challenge questioning is also at the discretion of the judge.[23] In *R v. Moore-MacFarlane* (2001), the Ontario Court of Appeal considered whether a challenge for cause would require that all other potential members of the jury pool be removed from the courtroom while the challenge question was asked. The court determined that it was within the trial judge's discretion whether or not to remove the jury panel and that allowing the panel to remain would not in itself be grounds for appeal. Similarly, in *R. v. McKenzie* (2001), the defendant brought a motion to challenge jurors individually without the remainder of the panel present. This, it was argued, would reduce embarrassment and the possibility that jurors would be influenced by other people's responses. The court rejected the motion on the grounds that it would substantially lengthen the time required to conduct the challenge and would be a drain on court time and resources. This was not justified where the court would still be full of other people, such as the judge, lawyers, and court officers. Rather, in the court's view, potential jurors might in fact feel less intimidated if they were able to witness others go through the challenge process before them. Moreover, allowing potential jurors to witness the questions being asked of other jurors would give them time to reflect and think about their own answer more deeply.

5. Field work examining the race based challenge

Recently, we presented some field research that we had conducted with colleagues on the race-based challenge (Schuller *et al*. 2015) at the Oñati conference in June, 2014. This research provided a rare investigation into the race-based challenge for cause as it played out in actual criminal trials.[24] The authors attended in court or reviewed the transcripts of the challenge process for 23 criminal trials involving 32 defendants (28 men, 4 women) that occurred in an Ontario courthouse near metropolitan Toronto, between 2009 and 2011. The cases spanned a variety of offences, including violent offences such as murder and sexual assault and non-violent offences such as importation of narcotics and drug trafficking. Sixteen cases involved Black defendants, four involved defendants of East Indian heritage, two involved defendants of Vietnamese descent, and one case involved a South American.

All trials followed a similar format. The entire jury panel (approximately 120-140 people) was called into the courtroom, and the charges were read against the defendant(s). Any persons with personal knowledge or interest in the case were invited to come forward, as were those with language proficiency issues or extenuating circumstances (e.g., medical issues, childcare needs). These persons were questioned by the judge, and some were excused from further service. In total, 236 of the original 1392 jurors were excluded for personal reasons, leaving

[23] E.g., *R. v. Huard* (2009).

[24] The authors are aware of one other in-court investigation into the challenge for cause (Vidmar 1997). In that research, the author attended 25 trials involving a challenge for cause on the basis of prejudice against child sexual offences, which were still permitted at the time of study. Vidmar found that an average 36% of potential jurors reported that they would be unable to judge a child sexual abuse case impartially. However, the data did not indicate what proportion of the jurors was accepted onto the jury, how triers made acceptability decisions, or how counsel exercised peremptory challenges.

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1156 potential jurors.[25] Typically, although not always, the triers were sworn in and their role and duties were explained to them along the lines of the five-item instructions described above. That is, they were told that their role was to decide on the acceptability of potential jurors, that their decision was to be unanimous and made on the balance of probabilities, that they could retire to the jury room to confer, and that they should advise the court if they were unable to reach a unanimous decision. Further, triers were given instruction on how to make their determination of acceptability. Most cases provided instructions very similar to the following:

> You have been selected as triers in this case. It is your task to listen to the answer(s) you will hear and decide whether or not the person is acceptable as a juror in this case.
>
> An acceptable juror is a person who would likely approach jury duty with an open mind and decide the case solely on the evidence given at trial and the legal instructions given by the trial judge. A person who is not likely to approach jury duty in that way is not acceptable.
>
> If you conclude that the person is likely impartial, you must find that person "acceptable." If not, you must find that person "not acceptable." You decide, based on those answers, whether or not the person is acceptable or not acceptable as a juror in this case.

In all but five of the trials observed, the jury panel was asked to leave the courtroom while the individual jurors answered the challenge question. Once sworn in,[26] the potential juror was then asked the challenge question, typically some variant of, *"would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the defendant is Black (or East Indian or Vietnamese or South American)?"*

6. Potential juror responses to challenge question

Approximately 6.5% of the prospective jurors indicated that their ability to judge the case "without bias, prejudice, or partiality" would be affected by the race of the defendant (i.e., responded with a 'yes' to the challenge question), leaving 93.5% reporting that they would be able to do so (responded with 'no'). There was substantial variation in responses across cases, with some cases having 0% report bias and other cases having 17% express bias. Most remarkably, in four of the five cases in which the jurors responded to the challenge question in the presence of the entire jury panel, no juror reported bias, thus suggesting that the presence of other potential jurors in the courtroom may have had more of an inhibitory effect on jurors' willingness to self-report racial bias.

One case in the data set, *R. v. Joseph & Parris*, employed a multiple choice response format, allowing them a glimpse into the impact that this format might have on jurors' decisions. As discussed earlier, there is some debate in the case law about the acceptability of this modified response option. In this particular trial, 125 jurors answered the challenge question. Their responses revealed an interesting pattern. Only 5.6% of the potential jurors answered in the affirmative (i.e., indicating that their ability to judge the case fairly would be affected by the race of the accused), while 60.8% reported that they would be unaffected by the race of the accused. Just over 30% were unsure of how race might affect their decisions; 15.2% reported that they "might be able to judge the case fairly", and 18.4% reported that they "did not know if they would be able to judge the case fairly.

[25] The remaining panel was divided randomly into groups of 20 people, with two individuals selected from the first group to act as triers.

[26] Each potential juror was sworn in individually; 69.32% of jurors chose to swear on the Christian Bible, 28.33% chose to make a non-religious solemn affirmation, and 2.35% chose to swear on a holy book other than the Bible (e.g., the Koran, Gita).

These results are in stark contrast to the response pattern observed under the simple yes/no response format, where 93.5% reported impartiality.

7. Triers' decisions of juror acceptability

Following jurors' response to the challenge, triers rendered their determination of acceptability. Just what impact did the jurors' response have on the triers? Would jurors' self-assessments be taken for their word? Where the potential juror reported that they would be able to judge the case impartially, 14% were still deemed unacceptable and thus excluded by triers. Thus, although only about 10% reported potential bias, 20% were excluded by the triers. It is unclear what motivated the decision of triers to reject potential jurors who reported that they would be able to judge the case fairly, but the authors offer some suggestions given the patterns that emerged in the data. Triers were more likely to exclude potential jurors in trials involving violent crimes compared to trials involving non-violent crimes, thus suggesting that triers may have imposed a higher threshold for acceptability in violent offences. In addition, it appeared that triers were more likely to exclude potential jurors who evidenced language difficulties or whose initial request to be excused for personal reasons had been denied by the judge.[27] In many other cases, there was no clear reason for the unacceptability of the potential juror, and it seemed likely that the person's demeanour, personality, or other visible features were the basis of the exclusion.[28]

In contrast, where the potential jurors reported that they would be affected by the race of the defendant, all but nine were deemed unacceptable by triers. The fact that any of these jurors were accepted is intriguing, and challenges the assertion made in *R. v. Parks* that a trier would be "virtually compelled" to reject any potential juror that reported bias (*R. v. Parks* 1993, para. 38). In addition, this finding invokes the observations made by the Ontario Court of Appeal in *R. v. Hindessa* (2013), where the defendant appealed from conviction on the basis that the triers had accepted a juror who answered the challenge question in the affirmative. Beyond the concern that a biased juror made it to the jury, the defence argued that the triers' acceptance of such a juror might suggest that the triers themselves were biased. The court disagreed, concluding that the triers' determination of acceptability is based not only on the potential juror's response to the challenge question, but also on his or her demeanour and behaviour (*R. v. Hindessa* 2013).[29] The mere response of "yes" or "no" is thus not determinative of partiality in the eyes of the court; rather, it appears that courts seem to expect that triers will rely on non-verbal behaviour when deciding on the acceptability of a potential juror and do not question the accuracy of their decision making. The findings of the field analysis suggest that this may indeed be the case, as many ostensibly unbiased jurors were excluded for no discernible reason.

In the *Joseph & Parris* case, which employed the multiple-choice response format, triers excluded all jurors who reported that they would not be able to judge the

[27] For example, where a self-employed person was concerned about losing two weeks of income, the triers found this person unacceptable despite any indication of bias in their response.

[28] In one case, *R. v. Nguyen, Tu & Nguyen*, it appeared that triers were excluding multiple potential jurors for no apparent reason. The Crown attorney expressed concern that the triers were basing their decisions on "extraneous things, whether it has something to do with what she looks like, or what she is about, or what she does for a living…they are only to decide this challenge based on the evidence they hear under oath." Transcript of *R. v. Nguyen, Tu, & Nguyen*, October 19, 2009, unpublished, at p. 175.

[29] Similarly, in *R. v. Cardinal* (2005), the Alberta Court of Appeal considered whether a potential juror who responded in the affirmative to the challenge question (i.e., reported that they would be unable to judge the case fairly) might be considered appropriate for jury duty. The trial judge had improperly excluded several jurors before triers were able to make their decision about appropriateness. The Crown submitted that the judge's errors were moot, as defence counsel would have excluded them by exercise of peremptory challenge. The Court disagreed, commenting that "it is possible a potential juror's body language, hesitation, and tone of voice could lead triers for cause and ultimately defence counsel to accept a person who answers 'yes' to a question such as was used in this challenge for cause, even if a judge would not" (*R. v. Cardinal* 2005, para. 14).

case fairly, and accepted all but two of the jurors who reported that they would be able to judge the fairly. However, triers rejected about two-thirds of jurors who reported that they "did not know" if they could judge the case fairly, and rejected about half of the jurors who thought they "might" be able to judge the case fairly. Thus, it appeared that the triers were sensitive to the differential response formats, but just how they made this discernment is unclear (perhaps relying even more heavily on tone of voice or non-verbal behaviour).

8. Counsel use of peremptory challenges

In general, the defence exercised a greater number of peremptory challenges than did the Crown, such that defence used an average of 11 challenges per defendant, whereas the Crown exercised an average of 7 challenges per defendant. Where a potential juror had been deemed acceptable by the triers, both defence and Crown lawyers still retained the right to exclude the juror through use of a peremptory challenge (assuming they had not all been utilized). Across the 23 trials, no juror who reported bias survived the peremptory challenge stage. That is, where a potential juror responded to the challenge in the affirmative and was not excluded by the triers, either defence or Crown counsel would do so by use of a peremptory challenge.

In one trial in the data set, *R. v. White, Johnson, and Robinson*, it was noted that the defence expressed considerable frustration with the Crown, as in their view, the Crown had exercised a peremptory challenge against all Black jurors, effectively stacking a white jury against the Black defendants. At that point in the challenge proceedings, 130 potential jurors had been called, only four of them Black, and the Crown had excused all four. The trial judge emptied all jurors from the courtroom and discussed the issue at length with both parties, ultimately determining that the defendants' right to a fair trial had not been affected. This finding clashes with the comments made in *R. v. Brown* (1999), where the Ontario Court of Appeal held that it is acceptable to dismiss Black jurors for duty, so long as this is not done in a discriminatory manner.

The field research offers a rare empirical assessment of the challenge for cause. The data revealed that only a very small percentage of potential jurors admitted to harbouring insurmountable racial bias, and this number often dropped to zero when reporting in the presence of the entire jury panel. As well, when given a variety of response options, far fewer jurors reported that they would be able to judge the accused impartially. This suggests that jurors experience pressure to provide a socially desirable response to the challenge question, and raises concerns about the validity of relying on the dichotomized forced-choice responses. In addition, the data demonstrated that the expression of a yes/no answer was not determinative of whether the juror ultimately ended up on the jury, as triers excluded a significant number of jurors who reported they were unbiased.

The issue is perhaps not whether the challenge for cause is valuable, but how we might best ask and allow jurors to answer the challenge question to enhance introspective recognition of one's own bias to increase the effectiveness of the challenge procedure at screening out biased jurors.

8.1. Some juror simulation research on the challenge for cause

In addition to the question whether or not the challenge procedure can successfully identify individuals who would likely demonstrate bias, its impact on the decisions of those who survive the screening of partiality has also been examined. Although it is possible that the challenge for cause procedure may have little impact on jurors' subsequent decisions, it is also possible that participating in this process may have independent effects on subsequent judgments. For instance, research into the selection of jurors for capital offence trials in the United States has demonstrated process effects of the questioning procedure itself (Haney 1984). While some

suggest that participating in the procedure may enhance jurors' ability to remain impartial, a claim asserted in *Parks* and echoed in subsequent decisions,[30] social psychological research and theorizing indicates that it may also result in exaggerated effects (i.e., over or under corrections).

To examine the process effects of a race-based challenge, Schuller *et al*. (2009) conducted a juror simulation in which research participants were provided with a trial summary of a Black defendant who was charged with committing either a race-congruent crime (drug trafficking) or a race-incongruent crime (embezzlement). To gauge the impact of race-based bias across these cases, a White defendant condition was also included. Two different forms of pretrial questioning were contrasted to a Black defendant no challenge condition. In one of these conditions, a close-ended challenge condition that mimicked the standard currently used in Canadian courtrooms, was used. This was contrasted with a more reflective questioning strategy that required participants to first reflect upon *how* their ability to judge the evidence might be affected by the fact that the accused was Black. Consistent with the field study, a minority of prospective jurors responded in the affirmative to the challenge question (18% in the drug trafficking and 15% in the embezzlement case). Examination of the data obtained from those who answered the challenge in the affirmative revealed that these mock jurors were less confident in their ability to remain impartial than those who answered in the negative, but on all other measures (verdict, judgments) they did not differ (Schuller *et al*. 2009, p. 324). Results pertaining to the differential forms of challenge question that were used, however, revealed that Black defendants, regardless of the type of crime committed, were judged more harshly than White defendants. Interestingly, while it appeared that the closed-ended question (as currently used in Canada) was ineffective at deterring one's racial biases, the more reflective strategy was successful at curbing participants' biases, with the Black defendant judged less guilty (similar to the White defendant).

These findings were consistent with research conducted in the U.S. by Samuel Sommers (2006). Using a mock jury simulation, Sommers assessed the impact of the American counterpart to the challenge for cause procedure, the *voir dire,* on jury deliberations and decisions in a sexual assault trial involving a Black defendant. Results demonstrated that, in comparison to participants who received a race-neutral pretrial jury selection questionnaire, those who completed the race-relevant *voir dire* were less likely to find the defendant guilty. These findings led Sommers to conclude that "even if voir dire is limited in its ability to identify biased individuals, it may influence prospective jurors by reminding them of the importance of rendering judgments free from prejudice." (Sommers 2006, p. 606) Indeed, Tanovich *et al*. (1997, p. 137–147) suggested that participation in this procedure will elicit a promise from jurors to be fair and to disavow themselves of any biases they may have. This benefit was explicitly noted by Canadian Justice Doherty in the *Parks* decision: "prospective jurors who can arrive at an impartial verdict are sensitized from the outset of the proceedings to the need to confront potential racial bias and ensure that it does not impact on their verdict" (*R. v. Parks* 1993, para. 92).

Moreover, rather than simply asking participants if their ability to judge the case fairly would be affected by race, as in the Canadian procedure, the less restrictive questioning format of the *voir dire* might open up the possibility to the prospective juror that they actually could be biased, thereby potentially resulting in a deeper analysis of the extent of this bias. While it is true that a more reflective strategy of challenge may not necessarily result in more valid insight into one's own biases (Nisbett and Wilson 1977, Wilson 2002), it instructs people to consider *how* bias can influence their judgments and so might orient them more toward the process of correction rather than a simple denial of prejudice.

[30] E.g., *R. v. Koh, Lu & Lim* (1998).

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9. Conclusion

The Canadian challenge for cause procedure is unique in the world in its use of triers (i.e., lay persons or co-jurors) to make decisions about juror impartiality. The field research we described provides a unique examination of how this occurs in the courtroom, and is the most detailed description of juror responses, trier acceptance rates, and counsel exercise of peremptory challenges following the challenge. The data revealed that only a small minority of potential jurors reported that they would be unable to judge the case impartially due to the defendant's race. While heartening, there is no evidence that those responding in the affirmative would in fact be biased nor is there any evidence to suggest that the remaining jurors (i.e., those that responded in the negative) would render their decisions without any influence of racial bias.[31] Much psychological research, however, suggests that people are quite unable to predict or recognize the ways that racial bias can affect them.[32] Moreover, the accuracy of jurors' self-reported bias is not known, and it is possible that many felt pressure to report impartiality due to social desirability demands. This possibility is strengthened by the finding that essentially no juror in the field research was willing to report bias when doing so in the presence of the jury panel in the courtroom. Similarly, when given a multiple choice response option that effectively "watered down" the expression of bias, far fewer jurors stated that they would be unbiased.

The challenge for cause is a central, albeit unusual, procedure employed by the courts to screen for racial bias in trials involving non-White defendants. The importance of its function cannot be overstated, but whether it currently does operate to exclude jurors who harbor racial biases is unknown. It is difficult to recognize one's own prejudice, and even more difficult to admit to it in open court. It is perhaps more difficult yet to recognize it in another person, which raises concerns about the use of triers in the challenge process. Putting aside the adequacy of a simple yes/no as the record upon which to make such a determination, there exists a wealth of research suggesting that people (whether trained or untrained) are not much better than chance in assessing whether someone is truthful or not.[33]

Further research that attempts to assess comprehension and understanding of the challenge question is clearly warranted, as well as research into how triers render their judgments. In-lab simulations that enable systematic examination of the various variables that influence the reliability of the procedure (e.g., presence of others, form of the question(s), response format) would provide some data to evaluate its effectiveness. As it now stands, the combined effect of both the limited basis for the determination and the frailties of human judgment suggest that the challenge procedure may be more ceremonial than actually useful for weeding out biased jurors.

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[31] Similarly Schuller *et al*. (2009) found no evidence that differential responses to the challenge question had an impact on verdict decision.
[32] See, for example, Dovidio *et al*. (1997).
[33] See, for example, a meta-analysis of 384 studies where it was determined that the overall accuracy rate in detecting deception was only 54% (Bond and DePaulo 2006, 2008).

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