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MEMBERS OF THE JURY PANEL, LET ME INSTRUCT YOU: DON'T BE A RACIST

Can a mandatory jury instruction offset anti-Black racism when the accused or complainant of an offence is African Nova Scotian?

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Mostly everyone harbours bias, and this bias tends to exist deep-down within one's psyche, likely rendering the holder of the bias unaware of its existence. Unconscious bias is a significant problem in jury trials as it can ultimately lead to a wrongful conviction. Due to the prevalence of anti-Black racism in Canada, this risk is exacerbated when the accused is of African descent. This paper will explore the current jury process and its flaws to determine that a specialized mandatory jury instruction can be used to offset unconscious anti-Black bias of jurors when the accused or complainant of a crime is African Nova Scotian.

Keywords: jury instruction, jury trial, judicial notice, challenge for cause, peremptory challenge, anti-Black bias, racism, African Nova Scotian, jurors, trial

I. Introduction:

Canada's jury selection process starts with the presumption that jurors are not biased and impartial. This colour-blind approach hides racial dimensions and minimizes the active role the law takes in perpetuating white supremacy.[1] Starting from the presumption of impartiality arguably highlights the defining aspect of anti-Black racism in Canadian society which is the denial of its existence.[2]

The province of Nova Scotia has been shaped by slavery and segregation, where the courts are both responsible for maintaining and challenging its legality.[3] Anti-Black racism is pervasive in Nova Scotia and is perpetuated throughout the province's criminal justice system.

[1] Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419 at 410. [*Williams*]
[2] *Ibid* at page 422.
[3] *Ibid* at page 428.

Historically, African Nova Scotians have not received equal benefit of the law, nor the chance to participate in its administration, and in some cases, the result of their exclusion has been deadly.[4] Black people are "among the primary victims of the evils of racism", and this negative impact is a prevailing issue in our current society.[5] This paper will analyze whether the implementation of a mandatory specialized instruction to a jury when the accused or complainant is African Nova Scotian can offset anti-Black racism.

A jury of twelve randomly selected individuals, representing a cross-section of society is responsible for hearing evidence and then rendering a verdict, usually for the most serious offences. If the jury is certain that the accused is guilty beyond a reasonable doubt, the accused will be convicted of the offence. This decision determines whether a person will walk out of the courtroom free or will be subjected to a prison sentence. Allowing jurors with an unexamined bias to determine the guilt of the accused is a significant risk, as reliance on said bias could ultimately lead to a wrongful conviction.

The scope of this paper will be limited to anti-Black racism within the criminal justice system and the relevant rules surrounding the jury process. There are currently several safeguards in place to combat anti-Black racism in trials such as: randomness in jury selection, challenges for cause, the strict requirements for judicial notice, and the elimination of peremptory challenges, however, they are all inadequate to address the unconscious race-based bias of jury members. Throughout this paper I will assess these safeguards and demonstrate their ineffectiveness and ultimately determine whether a mandatory specialized jury instruction can help a juror overcome their anti-Black bias.

[4] *Ibid* at page 430.
[5] *R v Anderson*, 2021 NSCA 62 at para 7.

II. History and "Jurymandering" (1796-1943):

Nova Scotia's history reveals the experience of oppression and anti-Black racism faced by African Nova Scotians. The War of 1812 between the United States and Britain resulted in significant migration to Nova Scotia of Black Loyalists and people who were escaping enslavement.[6] The Black Loyalists were promised freedom and land in Nova Scotia if they sided with the British during the war, but the land they received was typically small, barren, and inadequate for self-sustained development.[7] Upon their arrival in Nova Scotia, they settled into the predominantly African Nova Scotian communities of Preston, Hammonds Plains, Beechville, Porter's Lake, Lucasville Road, and the Windsor area, all of these communities are a short distance away from the urban core of Halifax.[8] As the demographic makeup of Nova Scotia changed, so did its legislation, as a reaction to the influx of African Nova Scotians, provincial legislation was amended to increase barriers and restrictions on who could serve as jurors, this was done with the goal to exclude racialized persons. [9]

During the 19th century, jury legislation in the Maritimes required jurors to be male, between the age of twenty-one and sixty-five, and be a resident of the province.[10] However, compared to the other Maritime provinces, Nova Scotia had the most restrictive provisions in its Juries Act, as a way to gate-keep who could serve as a Juror.[11] The manner in which the boundary lines were drawn to establish who was an eligible juror within the Halifax county reflected the exclusions of areas with a predominantly Black population.[12] It was a requirement

[6] Barrington Walker, *The African Canadian Legal Odyssey: Historical Essay*s, (Toronto: University of Toronto Press, 2012) at page 224. [*Walker*].
[7] *Ibid.*
[8] Nova Scotia Museum, "War of 1812 Migration" (2001), online: *Virtual Museum Canada* <https://novascotia.ca/museum/blackloyalists/18001900/events1800/war1812.htm>
[9] *Walker*, *supra* note 6.
[10] *Ibid* at page 222.
[11] *Ibid*, at page 223.
[12] *Ibid.*

that jurors for the entire country be drawn from a list of ten polling districts, and to be eligible, potential jurors were required to have a certain amount of real or personal property.[13] The 1890 amendment to the *Juries Act* created a new formula for summoning juries, but it was even more restrictive than the 1827 version of the *Act*.[14]

Examining the new geographic and wealth provisions of the *Juries Act* highlights how their implementation resulted in the exclusion of African Nova Scotians from serving on juries. Firstly, the boundary lines being manipulated to determine who could serve on a jury was a form of Gerrymandering. Gerrymandering is a term coined by an American politician that refers to the manipulation of boundary lines to favour one party or class.[15] This was essentially a form of that, except with juries; "jurymandering". The new provisions represented the first documented example of jurymandering in Canada.[16]

The drafters of the *Juries Act* amendments only selected districts that were located in the "most affluent and predominantly white areas of the downtown core and residential south end".[17] Therefore, the boundary lines excluded the areas where a significant amount of African Nova Scotians lived. Furthermore, the 1864 amendment to the *Juries Act* required different property requirements to sit on a jury in Halifax county as compared to other counties in the province.[18] This was another legislative mechanism used to ensure the "economic dominance" of the middle and upper class within the jury system.[19] This change led to the further exclusion of a large proportion of the African Nova Scotian population who could not demonstrate the requisite

[13] *Walker*, *supra* note 6 at page 223..
[14] *Ibid,* at page 225.
[15] The Oxford English Dictionary, 2nd ed, sub verbo "Gerrymandering".
[16] *Walker*, *supra* note 6, at page 226.
[17] *Ibid,* at page 225.
[18] *Ibid.*
[19] *Ibid.*

wealth levels to sit on a jury.[20] Therefore, the amendments had a significant detrimental impact to African Nova Scotians, that effectively inhibited them from appearing before a jury of their peers from 1890 until 1943.[21]

III. How Jury Selection Works Today:

Although the *Juries Act* has since improved, there have been very few improvements to the amount of diverse representation in juror panels. Every year thousands of names are randomly selected from the Nova Scotia Health Registration List by a computer program and then submitted to the Department of Justice.[22] Then the Jury coordinator for each district prepares the jury lists, by randomly drawing names from a database of the names provided to the Department of Justice.[23] The jury list is then used to create the jury roll.[24] However, this list is not representative of the entire population, as certain people are excused from serving on juries. For example, if a person has been convicted of a crime and has been sentenced to two or more years in prison, they are disqualified.[25] The jury system relies on the presumption that the randomness of juror selection is akin to representativeness, however, in practice this is not the case.

Many contributing factors result in the lack of diversity among jurors, such as the overrepresentation of African Nova Scotians in the criminal justice system. African Nova Scotians make up around 2.4% of the population, yet a recent *Freedom of Information Act*

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[20] *Walker*, *supra* note 6 at page 225.
[21] *Williams*, *supra* note 1 at page 429.
[22] The Courts of Nova Scotia, "Jury Duty Information", online: *The Courts of Nova Scotia* <https://www.courts.ns.ca/Jury_Duty/jury_duty_home.htm>
[23] *Juries Act*, SNS 1998, c. 16, at s 7 (1).
[24] *Ibid.*
[25] *Ibid* at s 4 (e).

request revealed that 13% of persons currently incarcerated in Nova Scotia's prisons are Black.[26] The over-policing and over-charging of African Nova Scotians in the criminal justice system, has resulted in a disproportionately high number of African Nova Scotians in prison. Because charges lead to criminal records, there are many African Nova Scotians who are deemed ineligible to sit on a jury. Therefore, when an African Nova Scotian accused is at trial, the jury call will likely not represent the community they are from. The reality of compiling a jury when taking into account disqualifications is that an accused is not likely to end up with a jury of their peers hearing and deciding their case that represents a cross-section of their community. Statistically, it is very possible that a racialized accused will have an all-white jury, especially with the recent elimination of peremptory challenges.

IV. The Elimination of Peremptory Challenges:

Before their elimination peremptory challenges were used to excuse a juror based solely on their appearance. This was problematic when the victim of a crime was a visible minority, as the defence could excuse any visible minority from a jury for no valid reason or based on false assumptions like perceived juror sympathy. In 2019, peremptory challenges were eliminated by Parliament passing Bill C-75. This bill was passed in response to public outcry following the *Gerald Stanley* case. In this trial an all-white jury acquitted Gerald Stanley, a white man, for the murder and manslaughter of Colton Bushie, who was a Cree man, after the defence used five of his peremptory challenges to remove all visibly Indigenous persons from sitting on the jury.[27]

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[26] Greg Mercer, "Nova Scotia Still Faces a Disturbing Problem with Racism, a Problem that can be Traced back Centuries in the Province", *The Globe and Mail*, (24 January 2020), online: <https://www.theglobeandmail.com/canada/article-nova-scotia-still-faces-a-disturbing-problem-with-racism/> [*Mercer*].

[27] Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 12th ed (Toronto: Emond Publishing, 2020) at page 317. [*Roach*].

Although the elimination of peremptory challenges is beneficial when the victim of a crime is racialized, it has adverse effects when the accused is a visible minority.

Peremptory challenges have been recognized as a way that the accused can participate in their trial by increasing the jury's representativeness and enhancing their perception of trial fairness, as these challenges allowed the accused to select jurors based on some of the characteristics that are most important to them.[28] Parliament's complete abolishment of peremptory challenges has essentially deprived the accused person the ability to choose a jury that they perceive as representative.[29] Peremptory challenges were problematic when they were used discriminatorily, however, Parliament likely could have reformed their use in a way that would have impaired a racialized accused's ability to increase representativeness in their trial less. The Black Lawyer's Association of Canada submitted a factum to the Supreme Court of Canada arguing in support of peremptory challenges and highlighted how for a Black accused the elimination exacerbates systemic racism for them, which is the very issue the elimination of these challenges was meant to fix.[30] The complete elimination of peremptory challenges further restricts a Black accused person from participating in Canada's predominantly white justice system.[31] The consequence of Bill C-75 is thus an increased likelihood that an African Canadian accused will face an all-white jury.

V. Challenge for Cause:

The over-representation of African Canadians in the criminal justice system further makes it evident that the current jury selection process and trial safeguards are not adequately

[28] *R v Chouhan,* [2020] 2021 SCC 26 (Factum of the Intervenor The Advocates' Society at para 23).
[29] *Ibid.*
[30] *R v Chouhan,* [2020] 2021 SCC 26 (Factum of the Intervenor Canadian Association of Black Lawyers at para 3).
[31] *Ibid* at para 1.

eliminating bias and anti-Black racism. Presently, "candidates for jury duty are presumed to be indifferent or impartial and to displace this presumption, concerns must be raised before jury challenges can be made".[32] The presumption of partiality is based on the belief that any views and prejudices held by jurors can be set aside upon proper instruction from the trial judge on their requisite duties.[33] The presumption of impartiality is only displaced when potential bias is clear and obvious, which is addressed by pre-trial screening or when a party to the trial shows reason to suspect "the jury array may possess biases that cannot be set aside".[34] A party can challenge a juror under section 638 (1)(b) of the *Criminal Code* if a juror is not impartial.[35] If a challenge is permitted, the party can ask questions to the prospective juror to determine whether they can act impartially.

The *Parks* decision resulted in the right to challenge prospective jurors for cause by questioning whether their ability to judge evidence without bias would be affected by the fact that the accused of an offence was Black and the complainant was white.[36] The *Parks* case established that there is a "realistic possibility" a juror could be affected in performing their role due to the influence of racial bias.[37] However, the *Parks* decision did not go far enough to catch the subconscious bias of prospective jurors. This is because an allowable challenge for cause is typically only a yes or no question and would therefore only catch overt racism.

For example, a basic adaptation of the *Parks* question: Is your ability to judge the evidence without bias, prejudice, or partiality affected by the fact that the accused is an African Nova Scotian man, and the complainant is a white man? Yes or No.

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[32] *R v William*, [1998] 1 SCR 1128. [*William*]
[33] *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 at para 26 [*Find*].
[34] *Ibid.*
[35] *Criminal Code*, RSC 1985 c C-46.
[36] Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at page 114. [*Aylward*]
[37] *Ibid* at page 116.

The *Parks* decision relies on the presumption that prospective jurors are aware of their bias and when questioned about it, would publicly admit to their racism. However, it is not socially acceptable to be a racist, so people may easily lie publicly about the views they hold privately. By contrast, the United States jury system presumes all jury members are suspicious, and all prospective jurors receive extensive questioning, often highly personal questions, as a way to select a jury that will decide the case impartially.[38] The Canadian system only allows very limited questions and this makes it difficult to fully understand the prospective juror's lifestyle and personal experiences, which arguably makes it harder to expose possible racial prejudice.[39] Therefore, starting from a presumption that jurors must prove their adequacy and allowing more personal questions may be a better method for catching the unconscious bias of jurors. However, before the larger changes can be made, a mandatory jury instruction can be used to address unconscious bias.

The *Parks* decision has been widely interpreted to mean that when an accused makes a challenge for cause based on a perceived racial bias, they do not need to bring evidence to justify the challenge because the court can take judicial notice on the existence of anti-Black racism in Canada.[40] Although the court in the case of *Parks* used a "Critical Race Litigation" strategy to deal with the issue of racial bias in jury selection, this decision has been frequently criticized as being too narrow in its scope, and therefore inadequate.[41]

This manner of questioning prospective jurors to uncover bias was further critiqued in the recent Ontario Superior Court decision *R v Johnson*.[42] The accused in this case requested that the

[38] *Find*, *supra* note 33.
[39] *Aylward*, *supra* note 36 at page 118.
[40] *Aylward*, *supra* note 36 at page 118.
[41] *Ibid* at page 114.
[42] *R v Johnson*, 2020 ONSC 3673. [*Johnson*]

simple yes or no questions permitted by the *Parks* decision be modified to allow multiple-choice questions.[43] In this decision, *Parks* was examined as not capturing the contemporary understanding of racism and racial bias that exists in Canadian society today.[44] The current understanding of racism is that unconscious racial bias can and does exist in otherwise "good" people.[45] Racist attitudes can exist deep within one's psyche, for this reason, potential jurors may not be consciously aware of them, as these beliefs may have been taught or acquired over a long period of time.[46] The holder of implicit anti-Black bias may base their beliefs on views that are unstated, or unchallenged assumptions that they have learned throughout their life, and thus honestly believe that they are unbiased because they have never been put into a situation to examine their beliefs before.[47] Therefore, a juror could easily say no to a challenge for cause question, even if they did harbour anti-Black bias because they are not consciously aware of their bias.[48] The court in this decision highlights the dangers of allowing jurors with unexplored racial biases as it may hinder their ability to render a verdict impartially, which could lead to a wrongful conviction.[49]

The court in *Johnson* concludes that multiple-choice questions are a better and more effective alternative to the *Parks* question to help determine whether a prospective juror could judge evidence impartially.[50] Allowing more open-ended questions does, however, go against traditional concerns of trials judges about respecting the privacy of jurors and trial efficacy, as they have limited the number of questions asked about racial bias in the past.[51] Although this is

[43] *Johnson, supra* note 42.
[44] *Ibid* at para 9.
[45] *Ibid* at para 10.
[46] *Ibid.*
[47] *Johnson, supra* note 42 at para 10.
[48] *Ibid* at para 15.
[49] *Ibid* at para 16.
[50] *Ibid* at para 17.
[51] *Roach, supra* note 27, at page 324.

an Ontario superior court decision and not binding on judges in Nova Scotia, it is persuasive, and judges should consider multiple-choice questions to uncover implicit bias of prospective jurors.

VI. *Charter* Applicability:

Section 11(f) of the *Charter* grants a person charged with an offence where the maximum punishment is imprisonment for five years or more the right to be tried by a jury.[52] Juries are considered to add a constitutional safeguard to the trial process since the decision of a jury must be unanimous.[53] A guilty verdict will thus mean the prosecution convinced twelve random individuals of the defendant's guilt instead of just one judge. However, there may be situations in which it would be advantageous for an accused to waive their right to a trial by jury. For example, when the accused is a racialized person and they do not believe the jury will be a reflection of the community they come from. Given the high probability of an African Nova Scotian having an all-white jury, it may be advantageous to have a judge-alone trial. However, an accused waiving their right to a jury trial under section 11(f) does not guarantee a trial by judge alone.[54] When the accused waives their right to a jury trial, the *Criminal Code* provisions will then apply.[55] The accused, therefore, does not have a constitutional right to a judge alone trial.

Although judges may hold implicit harmful biases as well, the accused may rather take their chances with a judge-only decision rather than a jury trial. Furthermore, with the recent implementation of the Impact of Race and Culture Assessments (IRCAs) reports, trial judges

[52] *Canadian Charter of Rights and Freedoms*, Part 1 of *the Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. [*Charter*]
[53] Government of Canada, "Section 11(f) – Trial by jury" (last modified 1 August 2021), online: *Charterpedia* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11f.html>
[54] *Supra* note 53.
[55] *Ibid.*

must consider the history of racism and marginalization in Nova Scotia that has contributed to shaping the life of the offender during sentencing.[56] There is no doubt that as judges start to read IRCA reports and become better informed on race issues, they will be enlightened to recognize their own biases. IRCA reports are made to equip judges with the ability to view the offender through a "sharply focused lens" while considering both the historic injustices and systemic racism perpetuated against African Nova Scotians alongside the specific offender's life experiences.[57] Therefore, in a lot of circumstances, an accused may prefer a judge alone trial, but because they do not have a constitutional right to a judge-alone trial, it stresses the importance for trial judges to offset anti-Black racism through jury instruction.

The trial judge must use their role to ensure a fair trial, by issuing a specialized jury instruction in every case that comes before them that involves an African Nova Scotian. Leaving it up to counsel to raise a challenge for cause question is not enough to offset anti-Black racism, especially when considering that most lawyers are white and will thus never fully understand the experiences of African Nova Scotians and have a history of avoiding race issues at trial. There needs to be a mandatory jury instruction to help mitigate race-based bias and take away the possibility that the issue of race is left out at trial.

VII. The Unwillingness to Address Race at Trial:

A. The Case of Mr. Antoine Fraser

Mr. Antonine Fraser was a high school teacher, who was African Nova Scotian, and convicted by an all-white jury of sexually touching a former student of his, who was white.[58] Mr.

[56] *Anderso*n, *supra* note 5.
[57] *Ibid*, at para 122.
[58] CBC News, "Veteran defence lawyer chastised", *CBC News* (23 September 2011), online: <https://www.cbc.ca/news/canada/nova-scotia/veteran-defence-lawyer-chastised-1.1094046>

Fraser told his lawyer that he was dissatisfied with the composition of the jury, to which his lawyer responded that he had "gotten lots of Black guys off before with all-white juries.".[59] Mr. Fraser was never advised that he had a right to challenge prospective jurors despite repeated inquires.[60]

The decision was ultimately appealed, and Fraser's lawyer Mr. Lance Scaravalli was later criticized for his incompetence.[61] The court of appeal required Scaravalli to defend his work and concluded that Fraser did not receive a fair trial and that his constitutional right to make a full answer and defence was compromised.[62] The Nova Scotia Court of Appeal held that Fraser was denied his right to effective assistance of counsel because his lawyer did not question any prospective jurors using the question permitted stemming from the *Parks* decision.[63] The Court of Appeal stated that "No informed discussion regarding a challenge for cause in a potentially race-based case can occur without considering 'the Parks issue'".[64] A memo from the Nova Scotia Barristers' Society stated that it found "Mr. Scaravelli appeared to have ignored his client's wishes and instructions throughout the retainer" and that the "file was managed consistently badly".[65] Despite the Nova Scotia Court of Appeal stating that Mr. Scaravelli's incompetence resulted in a miscarriage of justice, he was not punished, and the Barrister's society simply accepted his resignation and Mr. Scaravelli retired from practice.[66]

This case demonstrates that leaving it up to counsel to bring a challenge for cause is not always an effective safeguard against potential anti-Black prejudice of jurors. The lawyer in this

[59] *Supra* note 58
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*
[63] *Supra* note 58.
[64] *R v Fraser*, 2011 NSCA 70 at para 58. [*Fraser*]
[65] Blair Rhodes, "Lance Scaravelli, chastised Halifax lawyer, quits law", *CBC News* (1 October 2013), online: <https://www.cbc.ca/news/canada/nova-scotia/lance-scaravelli-chastised-halifax-lawyer-quits-law-1.1875174>
[66] *Ibid.*

case took no steps to mitigate the risk of juror bias. It should be an official requirement of every trial judge to give an instruction to the jury in every case that involves an African Nova Scotian. This case shows that it is not enough for a racialized accused to rely solely on their lawyer to be their advocate for a fair trial. The trial judge needs to give a mandatory jury instruction to ensure a fair trial, as a means to compensate for juror bias as well as for the ignorance and whiteness of the justice system.

B. The Case of Mr. Nhlanhla Dlamini

On September 19, 2018, Mr. Shawn Wade Haynes shot Mr. Nhlanhla Dlamini (who is of African descent) in the back with a nail gun, while they were both working at a construction site in Abercrombie, Nova Scotia.[67] As a result of the crime, Mr. Dlamini suffered from a punctured lung, spent four days in hospital, and could not work for over a month due to his injuries. Mr. Haynes was convicted of criminal negligence causing bodily harm and assault with a weapon and was sentenced to eighteen months of house arrest for the crime.[68] In this case, the Crown prosecutor Mr. Bill Gorman did not bring up race as an aggravating factor in the charges against Mr. Hynes.[69] The prosecutor submitted that although there were some inferences of race, it was not strong enough to prove beyond a reasonable doubt, despite there being several previous occasions of race-based bullying against Mr. Dlamini.[70] Although this case was decided in a judge-alone trial, it further highlights the resistance of counsel to bring race as an issue into trials.

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[67] Blair Rhodes, "Trenton man sentenced to house arrest for 18 months in nail gun shooting", *CBC News* (23 April 2021), online: <https://www.cbc.ca/news/canada/nova-scotia/trenton-man-sentenced-to-house-arrest-for-18-months-in-nail-gun-incident-1.5999675>

[68] *Ibid.*

[69] Brendan Ahern, "Crown opts against presenting race as aggravating factor in Pictou County nail gun shooting case", *Saltwire* (19 September 2019), online: <https://www.saltwire.com/nova-scotia/news/crown-opts-against-presenting-race-as-aggravating-factor-in-pictou-county-nail-gun-shooting-case-354382/> [*Ahern*].

[70] *Ibid.*

VIII. What More Can Be Done:

A. Expand the Scope of Judicial Notice

A judge should take judicial notice of the prevalence of anti-Black racism in Nova Scotia and provide explicit instruction to the jury to dispel any possible stereotypes or prejudices the jury may hold. Judicial notice is when a fact is established without any party needing to bring evidence to prove that fact.

In the case of *Spence*, the accused who was of African descent wanted to question jurors based on racial sympathy, which is the idea that people from one race may be sympathetic towards evidence advanced from the party of the same race.[71] The requested challenge for cause targeting the interracial element of the crime was declined, in this case the accused was African Canadian and the complainant of East Indian origin.[72] The court concluded that the fact that the victim was East Indian did not exacerbate the potential prejudice of prospective jurors and therefore did not require a separate inquiry.[73] The trial judge allowed a challenge for cause on the basis that the accused was Black but deemed the interracial element of the case to be irrelevant.[74] The court cited *Parks* and argued that it allowed for "interracial crime as a potential aggravating circumstance in the minds of a white majority against a visible minority" but that this does not support a general conclusion that race-based sympathy applies to all cases where the parties to a trial are not the same race.[75] The court then goes on to limit the scope in which judicial notice is acceptable.

[71] *R v Spence*, 2005 SCC 71. [*Spence*]
[72] *Ibid.*
[73] *Ibid* at para 77.
[74] *Ibid at* 'on appeal from the court of appeal for Ontario'.
[75] *Ibid.*

Judicial notice of a fact is allowed when it is generally known and accepted within the relevant community that it cannot be reasonably disputed, and social facts can be used to assist in the contextualization of the fact-finding process. The test for whether a social fact can be judicially noted is "whether the alleged fact would be accepted by reasonable people who have properly informed themselves on the topic as not subject to reasonable dispute for the purpose for which it is to be used".[76] The Court argued that taking judicial notice of race-based sympathy would be taking judicial notice "a leap too far."[77] In an attempt to err on the side of caution, the Court was quite possibly erring on the side of ignorance. The Court established that the right to a challenge for cause is not automatic and there must be an air of reality for the challenge to proceed in each case.[78] Justice Binnie criticized the race-centered view of the defence's argument by saying that it would essentially open the flood gates to all sorts of arguments based on multiple areas of discrimination.[79]

Justice Laskin's dissent recognized the reasoning in *Parks* referring to the Donald Marshal Jr. Case, which demonstrated racial discrimination against Black persons and Micmac persons in Nova Scotia's criminal justice system, yet he believed that judicial notice should not be taken for interracial sympathy.[80]

The African Canadian Legal Clinic intervenor was cited by Justice Laskin for their position which urged the Court to fill the evidentiary gap through judicial notice when the complainant is also a member of a visible minority and take judicial notice of "social facts" of different aspects of racism.[81] Justice Laskin advanced the position that the closer the fact is to the

[76] *Spence*, *supra* note 74.
[77] *Ibid* at para 67.
[78] *Ibid* at para 71.
[79] *Ibid* at para 6.
[80] *Ibid* at para 73.
[81] *Ibid* at para 48.

dispositive issue, the more the court has to apply the stricter criteria of what can be judicially noted.[82]

The problem with applying such strict criteria for judicial notice is that each fact thus has to be proven by expert evidence at trial. The costs of an expert at trial could easily be over $5,000+ and access to justice is already a big issue in Nova Scotia, as made evident by the rise in self-represented litigants. The Crown has unlimited financial resources, and this is what the accused is up against. The strict criteria of judicial notice places an undue burden on the accused to prove all of the social facts of the case. The trial judge should instead take judicial notice of the existence of racism and discrimination and its existence beyond just cases with a racialized accused or when there is an African Nova Scotian accused and a white complainant.

The trial judge is tasked with ensuring trial fairness and ensuring the appearance of trial fairness in the eyes of both the accused and minority groups.[83] Nova Scotians must have confidence that the legal system is "fair and unbiased, if this is not believed by a large percent of the population, then the system must accept some responsibility and must begin the process of change".[84] The dissent brings up the Royal Commission in the Donald Marshall case to highlight the importance of the public perception of trial fairness and provides an analysis on the tough job of striking a balance of fairness.[85] However, the strict conservative application of judicial notice may be inhibiting the justice system's ability to change.

An African Nova Scotian is most often met with a courtroom filled with white jurors, lawyers, and judges—"an image that does not reflect the multiracial makeup of Canada".[86] Given

[82] *Spence*, *supra* note 71, at para 61.
[83] *Ibid* at para 75.
[84] *Ibid* at para 73.
[85] *Ibid.*
[86] *Roach, supra* note 27 at page 256.

the whiteness of the justice system, and the plethora of recent evidence of the over-policing of Black persons and over sentencing of Black offenders, the strict requirements of judicial notice may be hindering a Black accused's access to a fair trial, free from bias. Evidence rules should be adapted to combat the discrimination engrained throughout the justice system; this would be acceptable under Section 15(2) of the *Charter* as the changes would be for an amelioration purpose, for persons who are disadvantaged because of race.[87]

The *Williams* decision reaching the Supreme Court of Canada shows that the Supreme Court now recognizes race issues require judicial considerations. In the *Williams* decision, the court held that trial judges should be more open to addressing that there is a "realistic potential for partiality" when the challenge is based on attitudes about race. This decision stated that judicial notice can be taken for widespread prejudice within a community, and that it is proven by events of indisputable accuracy, therefore there is no need for an accused to prove this with evidence.[88] The *William* decision takes a liberal approach to judicial notice and states that is it better to risk allowing what may be unnecessary challenges than to risk prohibiting unnecessary challenges.[89] However, the *Spence* decision has shown that the court does not want the prejudice exception to extend beyond the accused or extend to other types of prejudice.

Although judicial notice of the presence of anti-Black racism in Canada has been taken for years now, the current warnings the trial judges are giving do not go far enough to counter the stigma and potential bias of jury members. The current post-jury selection safeguards in place are insufficient, as possible deep ingrained prejudices held by jurors go unexamined.[90]

B. Mandatory Jury Instruction:

[87] *Charter*, *supra* note 52 at s 15(2).
[88] *William*, *supra* note 32 at para 41.
[89] *Ibid* at para 22.
[90] Ibid.

During jury trials, the judge has the responsibility of setting out the law in plain and understandable terms and how the jury must apply the law when assessing the facts of the case.[91] The trial judge must "explain the critical evidence and the law, and relate them to the essential issues in plain, understandable language".[92] The purpose of the jury instruction is to help the jury reach a verdict that follows the law.[93] Judge's instruction should always be given in a manner that a layperson can easily understand.[94] Model jury instructions can be used to reduce the chances of case dismissals that result from improper jury instruction, and thus as a result increase the efficiency of the court system.[95]

As emphasized in the recent Supreme Court decision of *Barton* it is the trial judge's responsibility to ensure a fair trial and when appropriate it is their responsibility to provide more than just a generic warning to caution the jury against the potential for reliance on improper bias, assumptions or stereotypes.[96] As underscored in this case there is no "magic formula" to how a jury instruction is created, and trial judges should exercise their discretion on how to tailor their instructions to the particular case at bar, preferably after appropriate consultation with the Crown and defence.[97]

The case of *Barton* is about the murder and sexual assault of Ms. Cindy Gladue who was an Indigenous woman and a sex worker. The trial judge, in this case, allowed Ms. Gladue to be referred to as a "Native girl" and a "Native prostitute", without providing the jury with any instruction to guard against the potential prejudicial reasoning used for describing Ms. Gladue,

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[91] *R v Daley*, 2007 SCC 53 at para 32. [*Daley*].
[92] *Ibid* at para 57.
[93] Canadian Judicial Council, "Jury instructions and their purpose" (2021), online: <https://cjc-ccm.ca/en/what-we-do/jury-instructions>
[94] *Ibid.*
[95] *Supra* note 94.
[96] *R v Barton*, 2019 SCC 33 at para 200. [*Barton*]
[97] *Ibid* at para 201.

the victim, in this way.[98] Throughout the trial Ms. Gladue was dehumanized and her dignity was completely disrespected.[99]

In 2015, after the trial, the jury acquitted Barton on the first-degree murder charge. This decision was appealed by the Crown on the basis that the trial judge had made mistakes. On appeal the joint intervenors argued that the trial judge erred by not properly instructing the jury regarding the law of consent.[100] The Alberta Court of Appeal drew from the intervenors' reasoning in its decision to overturn Barton's acquittal.[101] The Albert Court of Appeal decided that Barton's acquittal resulted from judicial error and discrimination in the trial process.[102] Barton appealed this decision and the case was then brought to the Supreme Court in 2019. The Supreme Court ordered a re-trial for Barton, and strongly condemned the racist stereotypes that were used against Ms. Gladue throughout the first trial.[103] Over ten years after Ms. Gladue was killed, in February 2021, a second jury convicted Barton and he was sentenced to twelve and a half years for manslaughter.[104]

The law stemming from the Supreme Court decision is that "in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges will be advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls".[105] The court emphasizes that such an instruction must not "privilege the rights of the complainant over

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[98] *Barton*, at Wagner C.J. (dissenting in part).
[99] Leaf, "R. v. Barton (2017, 2019), (2020), online: *LEAF Women's Legal Education & Action Fun* <https://www.leaf.ca/case_summary/r-v-barton-2017-2019/> [*Leaf*]
[100] Saad Gaya, "R v Barton: Interventions to Determine the Role of Interventions" (19 October 2018), online: *The Court* <http://www.thecourt.ca/r-v-barton-interventions-to-determine-the-role-of-interventions/> [*Gaya*]
[101] *Leaf, supra* note 100.
[102] *Ibid.*
[103] *Ibid.*
[104] Janice Johnston, "'Justice was served,' says Cindy Gladue's mother after Bradley Barton sentenced to 12½ years for manslaughter" (27 July 2021), online: *CBC News* <https://www.cbc.ca/news/canada/edmonton/bradley-barton-sentencing-1.6118846>
[105] *Barton, supra* note 97 at para 7.

the accused".[106] The objective of the instruction is to identify specific biases, prejudices, and stereotypes that may arise in the case at bar and attempt to remove them from the jury's deliberation and ensure the discussion proceeds in a fair, balanced way, as to not prejudice the accused.[107] It is recommended that following *Barton*, jury instructions should clearly explain "the subtle cognitive phenomenon of implicit bias … in a manner that promotes self-awareness" to provide jurors with motivation needed to confront their racial prejudice.[108]

The need for a more specialized jury instruction to address subconscious bias is further made evident by the recent changes to the model jury instruction supported by the National Judicial Institute. In November 2021, it revised its general anti-bias model jury instruction to include the recommendations stemming from *Barton*. Although the results of the revised model instruction remain to be seen, it supports the idea that in certain circumstances judges need to modify their instruction beyond a generic warning.

IX. Sample Jury Instruction: based on the example in the *Barton* decision and general anti-bias instructions[109]:

A. For when Accused is African Nova Scotian:

Although no one gave evidence, African Nova Scotians are disproportionately overrepresented in the criminal justice system. They make up under 3% of the population yet 13% of the persons currently incarcerated in Nova Scotia are Black.[110] African Nova Scotians

[106] *Barton*, *supra* note 97 at para 7.
[107] *Ibid.*
[108] Scott Franks, "Barton jury instructions may raise racial prejudice", *CBA/ABC National* (5 June 2019), online: https://nationalmagazine.ca/en-ca/articles/law/in-depth/2019/barton-jury-instructions-may-raise-racial-prejudic [*Franks*].
[109] National Judicial Institute, "1.1.1 General Anti-Bias Instructions", *National Judicial Institute* (November 2021), online: < https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/preliminary-instructions/instructions-to-the-jury-panel/general-anti-bias-instructions/> [*NJI*].
[110] *Mercer*, *supra* note 26.

are policed more and receive harsher sentences than white perpetrators, this is because of the presence of racism that exists in individuals as well as systemically and institutionally. Anti-Black racism is engrained throughout our society and institutions, the justice system is no exception, you must treat this as fact.

It would be understandable if one or more of you came to this trial with assumptions as to what kind of person may be a victim of this offence, or what kind of person may be a perpetrator. However, you must leave behind any such assumptions about the nature of the offence. Experience tells the court that there is no one way in which an offence happens, and that any person, any gender, any ethnicity, any race can be a perpetrator of an offence, a person that is African Nova Scotian is not more likely to commit an offence than a person that is not African Nova Scotian. This offence can take place in any circumstance, between all kinds of different people.

Therefore, as a juror you must be impartial, you must approach this trial with an open mind and leave behind any preconceived ideas you had about the offence, the witnesses, the accused or the defense.[111]

Everybody holds beliefs and assumptions that shape how we perceive the world around us, these perceptions can create biases for or against others based on personal characteristics such as race, ethnicity or gender.[112] We may be self-aware of some of these biases, and unaware of others. Even if we believe we are unbiased, our lived experiences create a filter and lens for how we see others and what they say.[113] These biases are unconscious and may be based on stereotypical feelings one has about a certain group of people, or traits associated with that

[111] *NJI*, *supra* note 110.
[112] *Ibid.*
[113] *Ibid.*

group.[114] All humans experience biases they are unaware of, but theses biases can be overcome through self-reflection and introspection.[115]

B. <u>When the complainant is an African Nova Scotian* (add to instruction):</u>

*The victim of this crime is African Nova Scotian. It is equally important that you leave behind any assumptions about the characteristics, nature, and behaviour of people who are African Nova Scotia. Experience tells the courts that certain assumptions people make about people of different races or gender, including generalizations about African Nova Scotians, are unsound and unfair. Everyone in this country is entitled to have their actions assessed as an individual and not on the basis of assumptions attributed to them because of their gender, race, or class.

Therefore, I instruct you as a matter of law that you must approach this case dispassionately, putting aside any view as to what you might or might not have expected to hear, and especially putting aside any views that are consciously or subconsciously rooted in anti-Black racism.

Stereotypes, prejudice, and bias of African Nova Scotian persons are baseless, untrue, and must be given zero value and zero weight when making your decision. You must make your judgment strictly on the evidence you will hear from the witnesses.

To help identify and set aside unconscious bias, you can:

1. “Take your time to reflect carefully and thoughtfully about the evidence."[116]
2. "Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the

[114] *NJI*, *supra* note 110.
[115] *Ibid.*
[116] *Ibid.*

people involved in this case were from different backgrounds, for example, [richer or poorer, different gender or race] would you still view them, and the evidence, the same way?"[117]

3. "Listen to one another. You all have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects of hidden biases. Help one another to identify and resist the effect of unconscious bias."[118]
4. "Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes."[119]

X. How A Mandatory Jury Instruction Can Help:

Due to the high probability of an African Nova Scotian facing an all-white jury, compounded with the elimination of peremptory challenges and current challenge for cause questions being insufficient to address implicit bias, there is a need for a jury instruction to go beyond a generic warning as an attempt to offset anti-Black racism. Various research studies support the inference that instruction can be useful to counter implicit bias if the instructed person is sufficiently motivated.

Research stemming from mock jury trials shows that when race is made a salient issue at trial, a jury is less likely to convict a Black defendant.[120] In contrast, participants who were not informed that race could be an issue in the case were more likely to convict a Black defendant

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[117] *NJI*, *supra* note 110
[118] *Ibid.*
[119] *Ibid.*
[120] Regina A. Schuller et al., "Challenge for Cause: Bias Screening Procedures and Their Application in a Canadian Courtroom" (2015) 21:4 Psychology, Public Policy, and Law at page 410, online: <http://ezproxy.library.dal.ca/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=pdh&AN=2015-40864-001&site=ehost-live> [*Schuller*].

and viewed the evidence against them to be stronger than jurors who were told to be aware of race.[121] The research suggests that addressing race as an issue in the course of the trial, required jurors to think about race, and the jurors taking consideration of racial bias may have reminded jurors of the importance of their duty to render judgments free from prejudice.[122] Various empirical studies have been conducted that produced results that suggest when white jurors are not reminded or pressured by "situational cues" to avoid relying on prejudice, they often "let their guard down and demonstrate bias".[123] Even subtly reminding mock jurors that race might be an issue in the case showed to have a significant impact on jurors, because when reminded they viewed the defendant as no more aggressive or violent than a white defendant.[124] Subsequent studies have investigated further into the empirical findings from *Sommers* and their findings support the hypothesis that when racial issues are not blatantly raised at trial, jurors are more likely to demonstrate racial bias.[125]

The prevailing issue of counsels' avoidance to bring race into a trial can be mitigated with a mandatory jury instruction. The unwillingness to address race in the course of a trial can further be seen in the case of Viola Desmond, where she was arrested for refusing to leave the whites-only section of the Roseland theatre in New Glasgow, and then charged with a tax offence.[126]Viola Desmond was charged with defrauding the provincial government when it was clear that the real offence was her violating an implicit rule that Black persons had to sit in the

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[121] *Schuller*, supra note 120..
[122] *Ibid.*
[123] Samuel R. Sommers & Phoebe C. Ellsworth, "WHITE JUROR BIAS An Investigation of Prejudice Against Black Defendants in the American Courtroom" (2001) 7:1 Psychology, Public Policy, and Law at page 209, online: <https://web-p-ebscohost-com.ezproxy.library.dal.ca/ehost/pdfviewer/pdfviewer?vid=1&sid=235cb533-410f-42aa-80a0-17101122e2fd%40redis> [*Sommers*].
[124] *Ibid* at pages 212 and 213.
[125] *Ibid* at page 225.
[126] Russell Bingham, "Viola Desmond", *The Canadian Encyclopedia* (last edited 16 April 2021), online: <https://www.thecanadianencyclopedia.ca/en/article/viola-desmond>

balcony seats.[127] Although Viola Desmond's case happened in 1946, the avoidance of bringing the issue of race into trial can still be seen today. Recently, in the case of Mr. Nhlanhla Dlamini, as previously mentioned, the Nova Scotia prosecutor was unwilling to consider race as an aggravating factor, as he claimed it would be too difficult to prove.[128]

Traditional arguments in support of current trial safeguards are that the oath or affirmation taken by juries will signify the seriousness of their role and bind their consciousness to not rely on prejudicial opinions. Racial prejudices are often held subconsciously deep within one's psyche, and they cannot be easily left aside even if someone is actively trying to do so, therefore it cannot just be assumed that a generic judicial instruction to act impartially will effectively offset race-based prejudice.[129] However, if jurors are properly motivated and race is made a saliant issue at trial, there is some evidence to support that people can compensate and or overcome their implicit biases.[130] Therefore, a mandatory jury instruction will ensure race is made a saliant issue at trial, and as the research suggests will reduce the likelihood of jurors relying on their implicit bias when rendering a verdict.

XI. Potential Problems:

The main risks associated with having a specialized jury instruction is the chance of prejudicing the other party or that an improper instruction can lead to a retrial. Anyone in a jury trial that is charged with a criminal offence is entitled to a "properly, not perfectly, instructed jury."[131] Jury instructions must be "even-handed" and "fair and balanced" or they risk

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[127] *Supra* note 126.
[128] *Ahern*, supra note 69.
[129] *William*, *supra* note 32 at para 21.
[130] Jeffrey J. Rachlinski et al., "ARTICLE: DOES UNCONSCIOUS RACIAL BIAS AFFECT TRIAL JUDGES?", (March, 2009), 84 Notre Dame L. Rev. 1195, Online:
<https://advance-lexis com.ezproxy.library.dal.ca/api/document?collection=analytical-materials&id=urn:contentItem:4W75-3VS0-00CT-S0YG-00000-00&context=1516831>
[131] *R v P.J.B.*, 2012 ONCA 730 at para 41.

undermining the jury system.[132] If there is a realistic possibility that the instructions given by the trial judge, when assessed in the context of the charge as a whole, may have misled the jury, there may be cause for a new trial.[133] However, jury instructions are not measured by a standard of perfection.

There is also the problem that a jury instruction might have the opposite effect of what the research suggests. A special instruction to offset anti-Black racism relies on the assumption that it would motivate jurors to be non-prejudiced, however, it is impossible to predict what the outcome would be for every juror. A jury instruction that forces someone to confront their own biases may instead provoke hostility and resistance, which would then escalate their demonstrated prejudice.[134] The uncertain effects of informational intervention as a mechanism to offset implicit bias is a relatively recent idea that has been explored over the past decade, and more research will be needed to draw any firm conclusions.[135]

Therefore, the main potential problems are that an improperly instructed jury could lead to a mistrial and the possibility that some jurors may instead have an escalated prejudice when confronted with their biases. Re-trials may be necessary to ensure a fair trial, however, the need for a re-trial should be mitigated as much as possible to a reasonable extent because they are costly, inefficient, and further delay access to justice. Furthermore, there will be instances where jurors are not ideal, meaning not properly motivated to put aside their bias, therefore, instruction is by no means a complete solution.

[132] *R v Largie*, 2010 ONCA 548 at para 127.
[133] *R v Leroux*, 2008 ABCA 9 at para 27.
[134] *Franks*, *supra* note 109.
[135] *Ibid.*

XII. Conclusion:

Requiring a mandatory judicial instruction when a party to a trial is African Nova Scotian aligns with current jurisprudence and would help to ensure race is brought into trial and no longer ignored by the predominantly white justice system. This is a very reasonable step for a trial judge to take and could be implemented relatively quickly with the appropriate consultation of experienced judges, lawyers, and African Nova Scotian persons to create a model specialized jury instruction. This suggestion is not a complete solution to the large systemic changes that need to be made to the jury process, but a specialized jury instruction could potentially help offset some of the implicit anti-Black bias of motivated jurors.

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