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Racism on the Canadian Jury Panel: A Deeper Look into Aboriginal Bias

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Research that tracks the treatment of nonwhite individuals within the criminal justice system has raised alarming reason for concern. More specifically, research showing prejudice within the jury selection process and internalized biases from the jury panel should be held at higher esteem. Members of the jury represent the People in a way that the members of the judicial system cannot. Diversity on the jury serves to display the true representative nature of the populous. Racial diversity can affect what the jury sees, and how they interpret it. Society as a whole benefit when every juror is conscious of the role they play in preserving an effective judicial system.

Canada and the United States differ in their legal particulars, but the general operation remains the same. A major difference lies in the fact that Canadian juries are formed on the basis of criminal cases, but rarely for less serious and civil suits. However, Americans have petit and grand juries that operate similarly to Canadian criminal court cases. The literature review of American cases of racism usually mention the *Batson* trial (1986). As this is a revolutionary case, expansion seems necessary.

Batson v. Kentucky

James Kirkland Batson was convicted of burglary in Kentucky in 1986 (Batson v. Kentucky, 1986). During the peremptory process – which involves potential juror exclusion without reason or cause – the prosecutor Joe Guttmann challenged six individuals – four of whom were black – and the final jury was composed of 12 white jurors. Kirkland was sentenced, despite the efforts of the defense lawyer, who moved to discharge the entire jury panel. Leong (2010) "…addresses the concern that, in the prevailing paradigm of *Batson* litigation, virtually no factual investigation takes place" (p. 1573). The criminal defense lawyer

on his case continued his appeal to the United States Supreme Court, which requested he prove systematic exclusion in his community. After a lengthy process, the Court ruled in *Batson*'s favor and inevitably lowered the burden of proof that a defendant must meet to declare discrimination. The Court also held that the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury. Furthermore, a "state's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" (Powell, 1986, n.p.). If racially diverse juries are truly essential to fairness, then prosecutors should be extending their mandates above and beyond Batson, instead of simply adhering to the minimal requirements (Taslitz, 2012).

United States

The sixth amendment to the United States Constitution guarantees defendants the right to a fair trial by an impartial jury (U.S. Const. amend. VI). The pool from which the members are drawn must be representative of the community, but the challenging task is the selection process of the interviews. "Because attorneys are expected to win cases, however, their motivation to select unbiased jurors is cause for concern" (Norton, Sommers & Brauner, 2007, p. 467).

As stated earlier, protecting clients and receiving the best possible outcome for them is driving the decisions in the jury challenge process. After all, it has been established that a "…methodologically diverse body of research indicates that racial and ethnic bias against nonwhite defendants continues to affect criminal case outcomes" (Lynch & Haney, 2011, p. 69). Although many legal proceedings in Canada operate differently than their southern neighbor, a pattern of systematic discrimination is still prevalent in Canadian society.

Canada

In Canada, race relations between White and Indigenous people "have been characterized by years of subordination and oppression" (McManus, Maeder & Yamamoto, 2018, p. 284). One major emphasis of this was the attempt by the Canadian settler state and Christian churches

to remove Indigenous rights to land, language, spirituality and governance. As such, Indigenous children were taken from their homes in a process known as the '60s Scoop' (MacDonald & Gillis, 2017, p. 36). The authors of this article also believe that this process of systematic removal is directly linked to the extremely high rates of Indigenous imprisonment in our Canadian Justice System. Statistics Canada (2017) states that Aboriginal adults make up the greatest proportion of admissions to custody in Manitoba and Saskatchewan – at 74% and 76% respectively. A recent trip to the Bowden Institution in Alberta was informative about the statistics at their prison; the coordination manager stated that roughly 80% of their inmates are Status First Nations.

Canadian Juries

In Canada, up to sixty thousand Canadians serve on jury panels each year (Law Commission of Canada, 2001). A guarantee of the justice system is the right have an impartial trial by a jury of our peers. Furthermore, section 11(d) of the Charter guarantees that anyone charged with an offense is presumed innocent until guilt can be proven (Canadian Charter of Rights and Freedoms, 1982). The Criminal Code conforms to the standards in the Charter of Rights and Freedoms.

Peremptory challenge is a law written in the criminal code as a right of attorneys to exempt members of the random jury selection process with a valid and lawful reason when determining their competency. Sometimes, this challenge process is referred to as 'voir dire'. The idea behind this challenge is to safeguard the judicial process and ensure fairness in the legal proceedings. This right of challenge has limitations by the criminal code of wherever the trial is to take place. The Canadian Criminal code states that twenty challenges are allotted for high treason, twelve for a maximum penalty of over five years, and four challenges with a penalty less than five years. One can extend these challenges (by one) if the judge orders additional jurors on the stand (Criminal Code, 1985).

To believe that in Canada, any citizen of legal age may be selected and considered for jury duty, is a bit misleading. In fact, the legal system requires that random names be selected from the Provincial licensing database, within a certain proximity of the courthouse.

Unfortunately, this excludes individuals not fortunate enough to have a form of legal government identification, or those persons residing in rural communities outside the scope of the courthouse. Another cause for underrepresentation is the disqualification of languages outside of the official French and English tongues used in courtrooms.

Oftentimes, these processes exclude a large portion of the Aboriginal population. This is unsurprising given the unique history of race relations in Canada, which saw the gross mistreatment of Indigenous peoples (McManus, Maeder & Yamaoto, 2018). Canada has traditionally exempted Indigenous languages from jury service (Israel, 2003). Very little attention has been given to the potential impact these practices have had on Native American people (Israel, 2003), and the problems that occur in the challenge process have been considerably underplayed. Although the provincial governments designate the laws regarding administration of justice, the federal level deals with Indigenous peoples and the lands reserved for them. In British Columbia for example, the Jury Act of 1996 does not specify how the jury panel should be selected, and the sheriff holds discretion in determining the selection process (Israel, 2003). This process results in uninformed selection that is not at all random. In Alberta, the sheriff randomly selects the potential jurors, but is not required to ensure the list supplied contains a fair representativeness of the community. Even if the jury selection list were to be compiled from postal codes, Indian Crown reserves remain excluded from the scope of selection, as most courts reside outside Indigenous communities. In the Northwest Territories, for example, the list is normally drawn from within thirty kilometers from the court (Israel, 2003). Such exclusions may negate the right to a fair and impartial trial made up of a representation of the community.

Attending the selection process is an obligatory part of the selection process. It allows an individual to exercise their legal right to aid in the outcome of a trial by peers. There are a number of reasons that an individual may be excused from this right during the selection process. It is written in the legal code that the prosecutor or defence council may excuse a potential juror for valid reasons (Criminal Code). However, as the wealth of research in the area of racial jury selection shows, that law is not always the canon of practice.

Schuller, Erentzen, Vo and Li (2015) write that after the prospective juror responds to the question, "…the task of the two triers is to determine whether that individual will be accepted as

a juror" (p. 408). Canadian jurors are put through a tried and tested method that must involve the unanimous approval of the triers', defense and crown in order to be accepted for the jury position (*Figure 1*. p. 409). If any one of these three makes a challenge, the juror is excused from the trial. The question asked during this process is some variant of whether or not the potential juror believes that they would be able to judge the evidence prevented without prejudice or bias, and the race of the individual is also mentioned. Additionally, the defendant is always present during this challenge procedure. This process may interfere with the potential juror's ability to be open and honest. Lawyers on both sides of a case want the best possible outcome for their clients. Therefore, they are prone to challenge potential jurors that they feel might not give them a desired outcome.

Generally, jurors do not know why they have been struck, which side struck them, and are unaware of the larger peremptory strike pattern through which discrimination sometimes becomes clear (Leong, 2010). Leong (2010) states that "peremptory strikes based on stereotypes do violence to individual identity" (p. 1575). A venire person struck by race suffers a personal and unjust humiliation. Furthermore, exclusion from the jury also represents exclusion of group membership, which shatters the opinion that the jury represents the voice of all the people (Taslitz, 2012).

The use of unrestricted peremptory challenges was in place for almost 200 years (Norton, Sommers & Brauner, 2007). Many judges and scholars have advocated for the broad-spectrum abolition of peremptory challenges all together (Hoffamn, 1997). They feel that this inhibits the representativeness of the general population and does more harm outweighs the benefits. Further, if the challenge process actually achieves what it intends to, we would not still be seeing this much prejudice on the jury panel. However, Sommers (2006) argues "…that the voir dire is more than just a method for identifying unsuitable jurors", but an opportunity to socialize citizens regarding their role as acting officers of the courtroom (p. 601). Thinking practically, even if voir dire is unable to identify biases in jurors, is reminds them that there is importance on rendering judgements free of prejudice.

Thirteen hundred and ninety-two prospective jurors challenged by the defense from Ontario court cases were used as participants for this Schuller et al. (2015) study. In every case, the wording of the challenge question involved the participants' race (as black, East Indian, person of color or Vietnamese). A table showing participant's responses was analyzed for self-assessment of their own potential biases. Most of the time, assessments of an unbiased nature were given. Sensibly, potential jurors were less likely to feel they could judge without bias when the crime was violent. The researchers point out that while these results are heartening, there is no actual evidence that individuals who self-assess as impartial are indeed unbiased. The real challenge is the individual's ability to accurately gauge how their prejudice might affect their decision-making. Taslitz (2012) raises the interesting observation that "a color-blind man cannot see purple" (p. 1702) but through experience, and not merely biology we are affected by what we see.

A 2018 study conducted by McManus, Maeder and Yamamoto sought to understand whether participants would discriminate against Black or Indigenous defendants and whether racially charged media affects juror decision making (p. 274). Two hundred ten Canadian jury-eligible participants in this study were recruited via online forum, 27 of which were excluded based on incorrect attention checks. A 3 (Defendant race: White, Black or Indigenous) x 3 (Media article: Specific, General, Neutral) between-subjects design was used. The participants were randomly assigned to an article from the Canadian Press that they are asked to review as a distracter task. Following the article, they are asked to play the role of juror and read one of three transcripts where the race of the defendant was manipulated. The conditions were manipulated by means of stereotypical names and photographs. The juror questionnaire asked them to render a verdict (guilty or not guilty) and a recommendation for punishment (none to maximum punishment allowed by law). The study found that the type of article read affected mock jurors' sentencing decisions for Black and Indigenous defendants. Furthermore, for the Indigenous defendant, any mention of race in media (general or specific) resulted in harsher recommended sentences relative to no mention of race.

Proposed Method

As discussed above, it is established that bias in the jury selection process is an unresolved concern of the American and Canadian judicial systems. Looking past the problems in the jury selection procedure, an internalized prejudice exists on the jury panel. Past research has focused on racial biases, but very little on the Native American peoples specifically. For hundreds of years, stereotypes and prejudice around this demographic has remained prevalent. A mock jury study provides for a realistic examination of individual interpretations of evidence that closely mirrors a real life courtroom setting. In the following proposed study, it is hypothesized that a prejudiced view of Aboriginals in the courtroom setting will be revealed.

Participants

The proposed study will include five hundred participants, obtained outside of a college or university setting. Students will not be rejected or discouraged from participation in this study, but a more representative sample of a typical jury is necessary in assuring validity in a courtroom setting. The sample will include an equal number of men and women (250 each) of legal voting age. Ideally, the sample will also include *relatively* equal distribution across different ethnicities (100 Caucasian, 100 Black or African American, 100 East Indian, 100 Native American, and 100 East Asian). To recruit participants, a large venue such as a shopping center in a large metropolis (such as Edmonton, Alberta) would be an ideal location to collect diverse responses. Individuals will be approached and asked to participate in an anonymous fifteen-to-twenty-minute study in order to be eligible to enter a draw to win $500. Demographics that include participants' age, gender and ethnicity will be collected in order to ensure purposive sampling for this study.

Design

This study involves random assignment into one of two groups. Group 1 – the control group – will listen to an audio recording of a trial (Dependent Variable) that has been created for the purposes of the study. Group 2 will be exposed to the same audio tape as Group 1 but will be privy to additional information about the suspects' ethnicity and background information

(Independent Variable). The physical description of the suspect(s) will not be provided, and their voice will never be heard.

Materials

The materials required for this study include audio recording equipment and paper scripts in order to make the audio tape. A clip board, headphones, and pen are needed for the participants use during the study process. An informed consent sheet which outlines the ethical protocol related to this study, along with any written ethical procedures relevant to the nature of the research experiment. Additionally, scrap paper and a closed box with a hole cut in the top for participants names when eligible into the draw.

Procedure

After the individual has agreed to participate in the study – but before the study commences – each participant will be required to fill out a form that entails his or her age, gender, and ethnicity to ensure purposive sampling. Afterwards, they will be informed of the details of the study, informed of their ethical rights, and a consent form will be signed (which the participants will receive a copy of). As previously stated, an audio recording of a trial will be created for the purposes of this study. This mock recording will simulate courtroom settings and include the voices of a Judge, Prosecuting Lawyer, Defense Lawyer, and an Eyewitness. Note that the defendant is never heard. The description is as follows:

A jewelry storeowner (eyewitness)–referred to by the name of Mr. Smith–receives a call from his security company notifying him that the back entrance alarm of his store has been tripped due to entry. Living only a block away, Mr. Smith arrives at the location before the local police. Inside (a meter away from the back entrance), he finds an unconscious Caucasian man bleeding from a head wound, and another man – also wounded from struggle – standing beside him. The conscious man (referred to by the name of Kelly) asserts that he was walking through the alley and witnessed the now unconscious man entering the premises. Kelly approached the

other man to tell him that he was about to call the police when a struggle broke out between them. The police arrive, and arrest both men and escort them to the hospital for medical attention. After the unconscious man (referred to as Justin) awakens, he tells the police the same story, but proclaims them that *he* was the one who witnessed Kelly break-in and enter the premises. The audio recording depicts Mr. Smith being sworn-in and questioned by the prosecution and defence about his recollection of events. In the process of the break-in, a very expensive stained-glass door (valued at over $5000) was destroyed and Mr. Smith is seeking damages from Kelly, whom he suspects is the most likely suspect. After both sides question Mr. Smith, the audio-recording ends in a recess so the jury can deliberate and come to a decision.

After the audio recording ends, the participants in Group 1 will receive a questionnaire that asks them to assume the position of juror and render a verdict (guilty or not guilty) against Kelly. They are also asked to indicate their confidence level on a five-point scale (0-not confident at all/5—absolutely confident). Group 2 will be given the same questionnaire, but the top of their information sheet will include the first and last name of the defendant (Kelly Crowshoe), their ethnicity (First Nations), and some background information (resides on a local reserve, never been arrested). After completing the questionnaire, participants will be debriefed about the purpose of the study, thanked for their participation, and entered into the draw. The draw information consists of a first name and phone number to further ensure confidentiality. After the data has been collected and the draw is made, all entry forms will be shredded and recycled.

Predicted Results

The predicted result of this proposed study will illuminate prejudice and bias between the two groups. The audiotape was designed to have no affirmative verdict. For Group 1, the results should be split fifty/fifty between guilty and non-guilty verdicts, considering the suspect could have been either man and there is no marked differences between the two. It is suspected that Group 2, privy to more information, will have a higher guilty verdict rate. As stated in the literature review, there has been a long-standing bias against aboriginal individuals in the Canadian legal system, and unfortunately, most of the country. However, it is worth noting that

should the guilty verdicts in Group 2 be less than that of Group 1, an apparent bias would still be present within the mock jurors. A true blind study comparison would ideally have mirrored results to the non-blind sample in order to implicate an unbiased study.

Implications and Conclusions

Taken together, the literature review and the proposed current study raise imperative questions about our judicial system and whether the process can ever be made racially fair. If a juror seems impartial enough to be placed on the panel, past research suggests that a bias still exists. It would appear that sentencing is not merely enforced on the merits of culpability alone. Race, socio-economic class, gender, and other extralegal factors that would normally be inadmissible are affecting the outcome of many court cases. The line between facts and mere inferences is very thin and not often clear. Additionally, these studies serve to highlight important differences in cognitive and emotional processes in relation to present-day racism. In countries like the United States that enact the death penalty, maximum sentencing serves to intensify this already problematic decision-making process. Although some countries have enacted laws to eradicate racism in the courtrooms, the actual matter is a much broader and more elusive concern. The implication of this study will further the growing knowledge that the Aboriginal communities are seriously underrepresented and impartially viewed in North America. Hopefully, this proposal with inspire further research and implement a positive change in the way Native Americans are viewed and treated throughout the judicial systems.

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