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Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds

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Abstract

Indigenous peoples in Australia, the United States and Canada are significantly overrepresented as defendants in criminal trials and yet vastly underrepresented on juries in criminal trials. This means that all-white juries mostly determine the guilt of Indigenous defendants or white defendants responsible for harming Indigenous victims. In this article, we explore cases in which Indigenous defendants have perceived that an all-white jury's prejudice against Indigenous people would prevent them receiving a fair trial. It focuses on Indigenous defendants (often facing charges in relation to protesting against white racism) challenging the array of all-white juries. Across these cases, Australian courts rely on formal notions of fairness in jury selection to dismiss the Indigenous defendant's perception of bias and foreclose an inquiry into the potential prejudices of white jurors. We compare the Australian judicial 'colour-blindness' towards all-white juries with that of the United States and Canada. We argue that the tendency for courts in the United States and Canada to question jurors on their biases provides useful lessons for Australian judiciaries, including in relation to the impending trials of Indigenous defendants in Kalgoorlie, Western Australia, accused of committing crimes in response to white racist violence. Nonetheless, across all jurisdictions where there is a challenge to the array based on racial composition, courts consistently uphold all-white juries. We suggest that the judicial view of the racial neutrality of white jury selection misapprehends the substantive biases in jury selection and the injustice perceived by defendants in having a white jury adjudicate an alleged crime that is committed in circumstances involving protest against white prejudice.

Keywords

Jury composition; jury challenges; perceptions of bias; Indigenous protest; African-American protest; racism; critical whiteness theory; critical race theory.

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Introduction

Indigenous people are significantly overrepresented as defendants in criminal trials and in prisons and yet vastly underrepresented on juries in criminal trials in Australia, the United States and Canada. In Australia, for instance, thirty one per cent of all cases that proceed to trial involve Indigenous defendants, amounting to about 40,000 Indigenous defendants across the three states of New South Wales, Queensland, South Australia (but excluding Victoria, Western Australia and Tasmania)and including the Northern Territory (but not the Australian Capital Territory) (Australian Bureau of Statistics 2015: Table 9). Of these, approximately 1200 cases will involve Indigenous defendants tried for indictable offences in higher courts. Juries will preside over most indictable offences to enable the offender's peers to hear the evidence and decide if she or he is guilty or not guilty of a serious crime based on the facts (see, for example, *Criminal Procedure Act 1986* (NSW) s 131).

However, an Indigenous accused who proceeds to trial will rarely encounter Indigenous jurors on the jury, given that Indigenous people constitute less than 0.5 per cent of jurors (New South Wales Law Reform Commission 2009: 12). The incidence of over-representation of Indigenous people as defendants in criminal trials and under-representation as jurors is equally startling in Canada and resulted in a national inquiry into the problem (Iacobucci 2013). In some Australian jurisdictions, such as the Northern Territory, there is a particularly vast disparity between the proportion of the population that are Indigenous (30 per cent) and the proportion of Indigenous jurors, given that these jurors, even when eligible, rarely make it on to jury (Goldflam 2011a: 37). This could be explained in part by the high rate of disqualifications (25 per cent) in the Northern Territory due to the existence of criminal records (Goldflam 2011a: 35). The Australian Law Reform Commission (1986: [590]) described the fact that Indigenous people 'so seldom appear on juries' as a 'matter for concern'. The Law Reform Commission of Western Australia (Hands and Williams 2010: 34) highlighted the injustice of Indigenous juror under-representation.

There are structural impediments that preclude Indigenous people from being called for jury service and empaneled on juries, which lead to the underrepresentation of Indigenous jurors. Indigenous people, among others, can be excluded from jury selection during the following stages: compiling jury lists (by only including people registered on electoral rolls and living in jury districts near major cities or towns); peremptory challenges (when a set number of persons, without reason, may be set aside); challenges for cause (when persons are removed for a reason); and prosecutorial vetting (for example, identifying whether the prospective juror has a disqualifying criminal record) (Chesterman 1999: 78; Horan and Goodman-Delahunty 2010: 173; Israel 2000: 100; Queensland Law Reform Commission 2011: 357).

Each Australian jurisdiction has its own common law rules and legislation for compiling jury lists, with the mutual effect of Indigenous under-representation on juries. The general approach is for jurors to be drawn from the pool of adults registered on the electoral roll and resident in jury districts (see *Juries Act* (NT); *Jury Act 1899* (Tas); *Juries Act 1927* (SA); *Juries Act 1957* (WA); *Juries Act 1967* (ACT); *Jury Act 1977* (NSW); *Jury Act 1995* (Qld); *Juries Act 2000* (Vic)). The reasons for under-representation are, first, federally maintained electoral rolls exclude a large number of Indigenous people who may be otherwise listed on Centrelink or health records, which are also the responsibility of the federal government (Northern Territory Law Reform Committee 2013: 19-20). Second, jury districts are located in areas in which higher courts sit, which are proximate to cities and towns rather than remote communities. For example, in the Northern Territory, juries sit in Darwin and Alice Springs, and very occasionally in Katherine. This has the effect of excluding up to 50 per cent of Northern Territory's Indigenous population which lives in regional and remote areas (Northern Territory Law Reform Committee 2013: 21).

Within the enlisted pool, persons may be disqualified for having a criminal record, an illness, being mentally unfit, or having caring responsibilities (for example, *Juries Act* (NT) s 10, *Jury Act*

1977 (NSW) Schedules 1 & 2). In relation to criminal records, this will be a more significant basis for exclusion from jury service for Indigenous people than non-Indigenous people given that they are disproportionately criminalised. In *R v Woods & Williams* ([2010] NTSC 69: 24), a case involving two Indigenous defendants accused of murder, evidence was adduced that, of the 350 people selected for jury service, 25 per cent of them were disqualified due to their criminal records.

The eligibility of Indigenous people for jury service may also be affected by Indigenous peoples' relative lack of access to reliable and expedient postal services; greater caring responsibilities; difficulties in speaking or reading in Standard English in some areas (La Canna 2014); or disproportionate chronic health problems, including hearing loss (which the High Court of Australia has ruled can lawfully result in disqualification in *Lyons v State of Queensland* [2016] HCA 38). Indigenous people also seek to be excused at greater rates due to a conflict of interest with an Indigenous defendant, the 'negative consequences' for the juror in her/his community following jury duty (Goodman-Delahunty et al. 2008: 164), or negative experiences with the criminal justice system (Frankland 2004: 57). These factors ought to persuade legislators to carefully consider disqualification criteria for jury selection and structural and cultural barriers to Indigenous participation on juries.

If the jury signifies the 'democratic integrity' and 'conscience' of the criminal justice system, as its foundational principles purport (see Hunter 2005: 318; Israel 1998: 37), then the question has to be asked 'whose conscience is being invoked'? Given that Indigenous defendants cannot expect a jury of Indigenous peers, can we expect Indigenous Australians to have confidence that they will receive a fair trial? The following sections demonstrate the perception among Indigenous defendants that they will not receive a fair trial where the panel of peers comprises white persons, particularly where the alleged crime pertains to a response to white racism. Their challenges to the array of all-white juries pivot on the idea that there will be prejudice among these jurors, particularly where racial divides and tensions are relevant to the charges they face. The response by courts in key Australia cases has been to reject such challenges based on the notion that jury selection is racially blind and procedurally fair, irrespective of the constitutive character of the jury. They hold that to challenge an all-white jury constitutes a race-based intervention that interferes with good governance.

We argue that these decisions reveal a judicial acceptance of the 'normalcy of whiteness' (Williams 1997: 7). In doing so, we draw on Critical Whiteness or Race Theory (CRT), which has its genesis in the United States (for example, Bell 1992, 1995; Delgado 1989; Harris 1993) and has been adapted by Australian scholars to analyse Indigenous postcolonial experiences (Behrendt 2001; Moreton-Robinson 2004, 2007; Watson 2005). CRT points to the continuing spectre of institutional racism that accepts white perspectives as racially normative (see Harris 1993: 1714; Moreton-Robinson 2003: 23). CRT scholar Cheryl Harris (1993: 1768) states that maintaining the norm of 'whiteness' and 'colorblindness' denies the 'historical context of white domination and Black subordination'. This was also recognised by the Royal Commission into Aboriginal Deaths in Custody (1991: [10.3.1]) when it noted that Europeans 'define the world in their terms' while failing to see their own subjectivity. The same assumptions lie at the heart of the judicial belief that the 'lay juror', who is typically white, has an objective worldview and is racially neutral.

The opening section of this article explores judicial rationales for maintaining the existing institution of the jury in Australia, which is predicated on a defendant being tried by a panel of peers. We point to cases in which Indigenous defendants perceive the under-representation of Indigenous jurors as impairing a fair trial. They regard white jurors as prone to racism against Indigenous people and as lacking the capacity to understand the Indigenous person's standpoint.

The second section outlines the judicial reasoning in dismissing Indigenous challenges to all-white juries in leading Australian cases, based on formal equality in jury selection and empanelment. We argue that this approach overlooks the structural barriers that preclude the empanelment of Indigenous jurors (notably the higher proportion of Indigenous people who have a criminal record and the under-representation of Indigenous people on electoral rolls) (Goldflam 2011a: 37; Horan 2008: 32). It also ignores the Indigenous person's perception that a white jury will not deliver justice, especially where a political and media campaign has been adverse to the Indigenous defendant.

In the third section, we compare Australian court decisions on challenges to the array of all-white juries with those of the Canadian and United States Supreme Courts. While these overseas courts have handed down similar reasoning in challenges to the array, this section identifies their more proactive efforts to address racial prejudice among jurors through challenges for cause and peremptory challenges.

The concluding section raises some red flags for the trials of protesters who were responding to the racism underpinning the killing of 14-year-old Indigenous boy Elijah Doughty in 2016 in Kalgoorlie.² It points to the utility of adopting the United States procedure of interrogating jurors on their potential racism, which has taken root since the Ferguson uprising in response to police shooting of African American teenager Michael Brown. It concludes that judiciaries need to eschew their colour-blind approach to all-white juries and address the Indigenous defendant's perception of a miscarriage of justice in challenges to the array.

Legally neutral white juries and Indigenous perceptions of prejudice

The premise of the Australian jury system is that defendants accused of serious crimes have the right to be tried by their peers to ascertain the 'truth in questions of fact' (*Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330: 375). The jury is intended to project the norms of society. So vital is the role of the jury to the Australian legal system that it is one of the few explicit rights contained in the Australian Constitution under s 80, and has been referred to by Griffith CJ of the High Court of Australia as 'a fundamental law of the Commonwealth' (*R v Snow* 1915 20 CLR 315: 316). The High Court in *Kingswell v The Queen* (1985 159 CLR 264: [5]) endorsed the statement of the United States Supreme Court in *Duncan v Louisiana* (1968 391 US 145: 156) that the jury reflects:

a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. (*Kingswell v The Queen* (1985 159 CLR 264: [5]; see also *Magna Carta 1215* (Runnymede, England): Ch. 39)

An essential feature of trial by jury is that juries be comprised of a 'representative' section of the community, according to the High Court ruling in *Cheatle v The Queen* (1993 177 CLR 541: [4]). Although originally this included only propertied men, by 1900, when juries were established across Australia, juror qualifications were relaxed to include females and those without property (Castles 1982; Evatt 1936). However, it was not until the 1960s that Indigenous people (through changes to state and territory voting laws) were listed on the electoral roll and were eligible to serve on juries. This very short history of Indigenous peoples' eligibility for jury duty is thus set against a much longer history of Indigenous exclusion.

The *Cheatle* principle of representative jury has never ensured that the accused be tried by a jury reflecting the gender, class or cultural representation of the local community. Rather, an accused

person is 'entitled to be tried by an independent and impartial jury selected in accordance with the law' (*R v Walker* (1989) 2 Qd R 79; *R v Woods & Williams* [2010] NTSC 69: 24). The principle does, nonetheless, establish the expectation that, on the whole, juries will include representation of racial minorities (Parliament of Victoria Law Reform Committee 1997: [1.20]; Queensland Law Reform Commission 2011: 68). Contrary to such an expectation, it has been argued that juries in Australia are, at best, 'moderately representative' (Freiberg 1988: 113) and, in the case of Indigenous Australians, not representative at all (Goldflam 2011a: 37; Hands, Williams and Davies 2006: 188).

The 'peers' that Indigenous Australians often face in a jury rarely come from the community in which they belong. For the institution of the jury to function as a moral conscience and for it to gain the confidence of Indigenous people, it is imperative that Indigenous people believe that the jury is capable of understanding their moral and ethical worldview and the circumstances in which they live. Otherwise, the jury lacks legitimacy for Indigenous defendants where a white jury is determining guilt or for Indigenous victims where the accused is white. Purdy and McGlade (2001: 105) observed that a series of decisions by all-white juries acquitting white defendants who had killed Indigenous victims was evidence of prejudice (also see Eggleston 1976: 144-148). Commenting on the British imposition of the jury system on its colonies, Vogler (2001: 525) states that 'to the colonised' the jury 'often represented little more than arbitrary authority and racism'. This perception of white juries determining the guilt of coloured peoples led to the demise of the jury institution in India and most of Africa (Vogler 2001: 549).

Indigenous Australians before the courts (as defendants or victims), and their families, and communities, have expressed that all-white juries routinely try their people and do so with bias. This view emerged in the criminal trial of Senior Sergeant Christopher Hurley. This police officer was charged with manslaughter and assault following the death of 36-year-old Indigenous man Mulrunji Doomadgee in a police cell on 19 November 2004. A coroner and independent inquiry found that arresting officer Hurley caused Mulrunji's death when, 45 minutes after his arrest, Mulrunji died with a cleaved liver, broken ribs, a ruptured portal vein and a haemorrhaging pancreas (Tedmanson 2008: 154). The Palm Island Indigenous community had little confidence that justice would be delivered when an all-white jury was empaneled to decide the case. This was confirmed when it took less than four hours to determine that Hurley was not guilty (Marriner 2009). Lex Wotton, a Palm Islander activist for justice for Mulrunji, criticised the all-white jury process. He stated in a public address following Hurley's acquittal, 'Justice has a colour and it is white' (quoted in Marriner 2007).

Six days later, Lex Wotton was sentenced for 'inciting a riot' due to his involvement in protests to the racist violence against Mulrunji and the prejudicial police investigation. He told a meeting on Palm Island some years later that he was 'already deemed guilty' before his trial by an 'all-white' jury (Elks 2011: 3). This was also the fate of many other Palm Islanders protesting against the injustice of Mulrunji's death (Anthony 2008: 469; Graham 2008a: 1). An author of this paper, who had carriage of Wotton's defence, recalls that, at the moment that the jury verdict was delivered in open Court, supporters of Mr Wotton in the public gallery protested with words to the effect of 'what do you expect, white judge, white jury, white lawyers'. Chris Graham (2008b), a former editor of a number of Indigenous newspapers, encapsulated the different outcomes flowing from a white jury depending on the colour of the accused:

Now here's the wash-up.

Chris Hurley—a white cop—was tried by an all-white jury, overseen by a white judge on a charge of manslaughter. He got off.

Lex Wotton—a black man—was also tried by an all-white jury, overseen by a white judge on a charge of rioting with destruction. He's facing life.

Richard Frankland (2004: 57), a prominent member of the Gourditchmara nation in Victoria, articulates that the jury and court institutions are detached from Indigenous peoples' lives. He wrote that neither himself nor any of his family had ever been called for jury service (Frankland 2004: 50). These experiences contribute to Indigenous peoples' perceptions that they will not receive a fair trial where there is an all-white jury. Such views ground legal challenges to the array of an all-white jury, which is outlined in the following section.

Judicial colour-blindness in Indigenous challenges to white juries

The first reported case of an Indigenous defendant challenging the jury array involved overt racism by the prosecution in vetting Indigenous jurors and set a high bar for the type of explicitly racist act required to found a successful challenge. *R v Smith* (1981 3 ALB 81) is authority for the fact that a court has the discretion to discharge the entire jury where it may give rise to the perception of prejudice.³ The widely cited Bourke District Court case in 1981 involved the prosecution lodging three peremptory challenges to Indigenous jurors, resulting in an all-white jury.⁴ The Court allowed Smith's application to discharge the all-white jury (Rees 1981: 11). Martin J accepted that the prosecution had the 'absolute right' to challenge Indigenous people on the jury without providing a reason, but told the court that 'justice must not only be done, it must *appear* quite clearly to be done' (emphasis added, quoted in Rees 1981: 11). The judge raised concerns that allowing the current jury to hear the trial would mean 'some members of our community, of our country, may think that appearances suggest that justice is not being done' (Rees 1981: 11).

The court in *R v Smith* validated the perception of bias because the prosecution was assertive in excluding jurors based on their Aboriginality. However, courts are unwilling to accommodate Indigenous defendants who perceive bias where an all-white jury has been empaneled based on random selection, because courts regard this as a fair process without discriminatory intent (see critique by Flagg 1993: 954). Critical Race Theorists have observed that challenges to racism are more effective when the focus is on racist individuals or events rather than on systemic racism that is hidden in institutions and their practices. Morrison (1992: 17) provides the metaphor of seeing the white fish (blatant racism) without seeing the whiteness of the fishbowl (dominant racial discourses and understandings). Courts are impervious to the fishbowl as long as the fish (legal actors and legislative provisions) appear neutral.

The New South Wales Supreme Court and Court of Appeal in *Binge v Bennett* (1988 13 NSWLR 578) relied on the position that fairness in jury selection was assured by the legislated procedure. The courts dismissed the defendants' perception that the likely outcome of an all-white jury would give rise to racial prejudice in their highly politicised trial. *Binge v Bennett* involved 16 Gomeri people, from Toomelah and Boggabilla (northern New South Wales), who were charged with riot offences (as a result of protesting against racist violence and discriminatory treatment in social services). The defendants sought to avoid an all-white jury by applying to the court for their case to be relocated from the site of the racial conflict, Goondiwindi, Queensland (directly adjacent to the border town of Boggabilla), to New South Wales (where a mixed jury was more likely). This followed the defendants' unsuccessful application to the court that it had no jurisdiction over Gomeri people because they had not ceded sovereignty (Anon. 1987a: 9, 1987b: 3). The backdrop to their charges were protests in Goondiwindi in January 1987 involving hundreds of local and nearby Toomelah and Boggabilla Indigenous residents. The protests were a response to violent attacks by white people on Indigenous victims that had been ignored by the police, as well as to the exclusion of Indigenous residents from housing, clean water, health care, education and employment (Anon. 1987c: 2, 1987d: 1, 10; Maher 1987: 2). The protests led to an inquiry by the Human Rights and Equal Opportunity Commission (HREOC) (1988, see Anon. 1987d: 2) that found racism in schools, service delivery and among white residents who threatened Indigenous residents' safety (HREOC 2008: 3-4, 53-54).

To support their application for relocation of the trial in *Binge v Bennett* (1988: 585), the 16 defendants tendered 35 affidavits stating they would not receive a fair trial. This was due to the racial prejudice in Goondiwindi—in part due to Queensland government ministers and officials publicly impugning the defendants—that would bias the jury against the Indigenous protesters (see Anon. 1987f: 9, 1987g: 2, 1987h: 10, 1987i: 6). The defendants also pointed to the absence of Indigenous people on juries and jury panels in Queensland, due to jury list arrangements and the ‘regular practice’ of the Crown vetting Indigenous jurors (*Binge v Bennett* 1988: 585). The Court of Criminal Appeal and, when the matter was remitted, the Supreme Court did not accept the defendant’s perception that all-white juries were unfair. They viewed Indigenous exclusion from juries in Queensland as a product of an impartial jury selection process that does not ‘discriminate against Aboriginal peoples’, but reflects their incompatible ‘education, lifestyle and attitudes’ (*Binge v Bennett* 1988: 598, *Binge v Bennett* 1989 42 A Crim R 93: 105, 107). The courts upheld the position that racism requires overt acts—such as the deliberate vetting of Indigenous jurors (*Binge v Bennett* 1988: 598)—that can be seen by courts, and rejected the idea that racism exists where it is only seen by Indigenous people, the victims of the racism. Related to this, Indigenous exclusion from juries, according to the courts, is due to Indigenous peoples’ deficits rather than deficits in the legal system.

The Australian Capital Territory Supreme Court adopted a similar reasoning in *R v Buzzacott* (2004 149 A Crim R 320). This case concerned 58-year-old Kevin Buzzacott, an Arabunna Elder, activist and law custodian from South Australia, who lodged a challenge to the all-white jury composition. Buzzacott was facing a prosecution for allegedly stealing a bronze Coat of Arms from outside Parliament House in Canberra as part of a political protest on the thirtieth anniversary of the Aboriginal Tent Embassy in the federal capital⁵ in 2002 (Anon. 2002a: 12). Buzzacott asserted that he was exercising his claim of right to take back his peoples’ sacred totems—the Emu and the Kangaroo—which appeared on the Coat of Arms (Anon. 2002b: 7; Naylor 2005: 6). The Australian Government used the totem symbols without Aboriginal consent, which is a breach of Aboriginal law, Buzzacott contended (Anon. 2002c: 2, 2005a: 11). Buzzacott agreed to return the plaque on the condition that a meeting with the Government or the Crown was arranged to discuss national reconciliation (Boogs 2002a: 1; Brook 2002: 2; Seale 2005: 10; Taylor 2002: 7). Buzzacott felt that he had to take the plaque to have his cause noticed by governments, explaining that ‘desperate people take desperate measures’ (quoted in Madigan 2002: 7; see also Anon. 2002d: 2).

During the committal, Buzzacott submitted that Indigenous people had not ceded sovereignty and the court had no jurisdiction over him (Anon. 2004a: 4). Furthermore, a white jury would not ensure a fair trial (*R v Buzzacott* 2004: 327). Buzzacott maintained that white jurors would be biased against him and his cause, and he had a right to a jury of peers, which would comprise Indigenous Elders. Buzzacott pointed to the adverse media publicity around the case and explained that white people would not understand the Aboriginal justice issues before the court. His counsel noted:

Given the level of ignorance of Aboriginal Justice issues in the non-Aboriginal community—and the level of hatred of Aboriginal Rights in the non-Aboriginal community—and the nationwide saturation media publicity on the coat of arms theft shock horror by the non-Aboriginal community, it will be impossible for Kevin Buzzacott, Arabunna, to receive a fair trial from a jury of non Aborigines [sic]. (*R v Buzzacott* 2004: 327)

Indicative of white responses to Buzzacott’s alleged theft were not only the adverse media reports (see Bolt 2002: 19; Boogs 2002b; Probyn 2002: 20) but also condemning letters by the public in national newspapers. One letter stated, ‘IF the Aborigines want to take “their” animals off the coat of arms, do it. And what if we take all their money back, too? It’s white Australians’ money’ (Cook 2002: 18). Another reader wrote, ‘WHO does Kevin Buzzacott think he is fooling? His ancestors,

if he is a full-blooded Aborigine, ate kangaroos and emus' (Peyton 2002: 18). Van Order (2002: 16) commented, 'KANGAROOS and emus are not Aboriginal objects, they're Australian animals. I am an Australian and not an invader. Kevin Buzzacott, get real!' Finally, a letter mocked Buzzacott by claiming \$20,000 compensation from him because Buzzacott's totems hit his vehicle (Fauser 2002: 32).

The Supreme Court did not perceive the potential for a white jury to be prejudicial against Kevin Buzzacott. It reasoned that the jury panel was assembled by 'the normal random process for choosing jurors' from the electoral roll, which was the mechanism for ensuring a broadly representative jury (*R v Buzzacott* 2004: 327-328). The Court held that 'the right to trial by a jury of one's peers does not mean that an accused person can demand that the jury panel be comprised solely of persons of a particular racial, ethnic, social or gender group' (*R v Buzzacott* 2004: 327). It failed to consider Buzzacott's perception that his peoples' continuing sovereignty could not be understood by white people's worldviews, or the prejudicial role that the media played in relation to the trial. Rather, the Court maintained that to override a legislative process that produces a racially neutral outcome would be racially discriminatory.⁶ Rakhi Ruparelia (2013: 298) has identified this reasoning in Canada where courts reject defendants' claims of racial bias because it threatens the 'dominant cultural scripts' of racial invisibility. Instead, courts regard coloured peoples' challenges to jurors or juries based on race as 'racist' because it makes hidden racial issues visible.

The Victorian Court of Appeal in its 2004 case of *R v Badenoch* (2004 VSCA 95) also denied a challenge to the array of a white jury because of its racist implications. In this case, an Indigenous defendant from Mildura, in inland Victoria, contended that the absence of an Indigenous person on the jury, despite the substantial proportion of Indigenous people in Mildura, meant that the jury was unrepresentative and the trial would be unfair (*R v Badenoch* 2004: [66]). The court stated that the lack of Indigenous representation did not inhibit a fair trial for the applicant (*R v Badenoch* 2004: [66]). Rather, selection based on 'some ethnic or other discriminatory criteria' would have 'terrible consequences' for fair trials (*R v Badenoch* 2004: [68]). This characterisation redirects the judicial inquiry from the racism perceived by the Indigenous defendant and towards the racism of the Indigenous defendant. Courts fail to ask why an Indigenous person would perceive an all-white jury as racist, which reflects the 'majoritarian privilege of never noticing' oneself as culturally partial (Williams 1997: 7).

The Victorian Court of Appeal in *R v Badenoch* upheld the trial judge's view in dismissing the Indigenous defendant's perception of racism. It asserted that the jury is colour-blind, irrespective of the fact it is all-white or comprised of any other cultural groups. This is because everyone is a member of the same Australian community:

Whether you're an Aboriginal Australian or a European Australian or a Turkish Australian, you're an Australian, you're part of the panel, you're part of the community. (*R v Badenoch* 2004: [67])

In the cases mentioned above, the courts regularly refer to the judgment in *R v Grant & Lovett* (1972 VR 423), which addresses both issues of Aboriginal and class background. Trevor Sydney Lovett, an Aboriginal labourer, made a challenge to the array for not empaneling any working class or Aboriginal persons despite calling 126 jurors for the panel, which created the appearance that the jury was 'not chosen indifferently' nor was 'indifferent or unpartisan' (*R v Grant & Lovett* 1972: 424). In that case, the Victorian Supreme Court held that legislative compliance in assembling a jury list and summoning jurors for service met the requirements for lawful jury empanelment. Where random selection results in a panel that is weighted towards a pattern of occupation or cultural background, there cannot be a 'challenge to the array' of the jury unless it is due to 'some deliberate contriving of the sheriff' or breach of duty (*R v Grant & Lovett* 1972: 425). This requirement of explicit bias and deliberate manipulation sets a high bar for proof of

prejudice. It disregards the Indigenous person's notion of what bias looks like even where the system is upholding the order of things; indeed, because the system is upholding the order of things.

Finally, the most recent case, in 2010, saw Graham Woods and Julian Williams challenge the jury array due to the disproportionality of white people on juries in Alice Springs. They believed that white jurors would be biased against them because of local racial prejudices, which had been fueled by media reports that slandered Indigenous people for violence in Alice Springs (see Goldflam 2011b: 2). This negative publicity had been directed to Woods' and Williams' alleged murder of a well-known white man, Edward Hargraves.⁷ The applicants in *R v Woods & Williams* (2010 NTSC 69) pointed to the vast and systemic under-representation of Indigenous jurors in Alice Springs, including by virtue of a 25 per cent disqualification of jurors who had served a prison sentence. The Full Supreme Court of the Northern Territory Court rejected this evidence, stating that it did not indicate the proportion of Indigenous people affected by this disqualification (*R v Woods & Williams* 2010: [48]), notwithstanding that it would have been in the court's capacity to substantiate the evidence (Horan 2012: 33). It maintained that the jury empanelment process prevented prejudice because it was based on random selection (*R v Woods & Williams* 2010: [62]). So long as the juror could follow judicial direction and act on the evidence, impartiality would be secured (*Woods & Williams v The Queen* 2010 NTSC 36: [13]). The Northern Territory Supreme Court held that the lack of Indigenous jurors was not racially determined, but a product of impartial jury selection that would be disrupted if racial challenges were allowed:

To impose some overriding requirement to the effect that a jury, once randomly selected in this way, has to be racially balanced or proportionate would be the antithesis of an impartially selected jury. (*R v Woods & Williams* 2010: [59])

This faith that the legislative requirements for the empaneling of a jury would give rise to impartiality ignores Indigenous concerns that all-white juries which they commonly face in the Northern Territory—notwithstanding that the Indigenous population is 30 per cent and the Indigenous prison population is 84 per cent—will not produce an outcome in their favour. This perception is especially strong where the victim is non-Indigenous and there is publicised racism against the defendant and his or her Indigenous community. The courts consider 'distortions in social relations' as 'neutral and fair', no matter how 'unequal and unjust' they are in substance, to use Harris' terms (1993: 1768). This 'legitimate order of things' cannot 'legitimately be disturbed' (Harris 1993: 1768).

Because Australian courts, rather than the victims of racism, have claimed to be the authority on what racism looks like (namely, the existence of overt racist acts), they do not pursue inquiries into why the Indigenous defendant perceives bias when presented with an all-white jury and how this may relate to racial divisions outside the courtroom.⁸ This lack of inquiry reinforces the colour-blindness of the system and escalates Indigenous community perceptions of jurors' racial prejudice. This section has demonstrated that whiteness is upheld by the courts in three respects. First, courts claim that the jury system accommodates cultural diversity through formal mechanisms. Second, courts regard Indigenous exclusion as a natural consequence of non-Indigenous people being better placed to serve on juries and Indigenous deficit in 'education, lifestyle and attitudes' (*Binge v Bennett* 1989 42 A Crim R 93: 105). Third, courts perceive the legislated jury process as giving rise to impartiality. These whiteness-privileging approaches normalise whiteness and treat it as preferable. According to Moreton-Robinson (2004: 75), whiteness is based on an 'an invisible regime of power' that is secured through discourse and *a priori* claims to law and governance. The white epistemology of Australian courts is brought into sharp relief when compared to Canadian and United States judicial approaches. In the latter jurisdictions, individual jurors can be confronted on their racial prejudice in peremptory challenges and challenges for cause. However, this has not resulted in upholding challenges to the array due to an absence of non-white jurors.

Canada and the United States: Interrogating visible juror racism

While, in Australia, challenges for cause are exceptional because there is a lack of information on juror prejudice (McCrimmon 2000: 137),⁹ in Canada and the United States, they are routine. Challenges to individual jurors are informed by the trial judge, defence or prosecution questioning all 12 jurors on racial prejudice at the pre-trial stage. This process seeks to gauge 'hidden bias' (Brown 2000: 478; Weems 1984: 344). To be successful, challenges for cause in Canada merely require an 'air of reality' of potential bias (Alberta Law Reform Institute 2007: 4; *R v Sherratt* [1991] 1 SCR 509: 536). In Australia questioning jurors for partiality is not available during a peremptory challenge, whereas in the United States there is a right to *voir dire* prospective jurors in the exercise of peremptory challenges (Hands and Williams 2010: 59). The questioning process, nonetheless, tends to be aimed at identifying overt racism rather than implicit bias. Despite this divergent approach in challenges for cause and peremptory challenges, judicial attitudes converge across the three jurisdictions in relation to challenges to the array. They all uphold the legitimacy of a legislated selection process that produces an all-white jury.

Canadian challenges for cause based on racial prejudice

Racial prejudice is grounds for challenging jurors for cause in Canada, following the decision of *R v Parks* (1993 15 OR (3rd) 324 (CA)). Counsel can question jurors on racial biases that might affect their partiality and, if a juror exhibits bias, she or he can be excluded from the jury. However, for such questioning to proceed, the court must accept the accused's evidence that widespread racism exists in the relevant community (Ruparelia 2013: 283). This has had the effect of denying juror questioning where there is a perception of low-levels of white racism, including due to the existence of a relatively small but sizeable (between 6.9 and 10 per cent) First Nations population in the local community (*R v Denison* [1998] BCJ No 3285 (QL) (BC SC): [14], cited in Ruparelia 2013: 284). Criticising this type of interpretation, McLachlin J remarked in *R v Williams* (1996, 106 CCC (3d) 215 (BC CA): [22]) that this does not come to terms with deeply ingrained racism that is not readily discernible and which cannot be remedied with 'instructions from the judge or other safeguards' after jury selection. The judge suggests that 'the better policy is to err on the side of caution and permit [jury] prejudices to be examined' (*R v Williams* 1996: [22]).

An additional condition for challenging jurors on the grounds of racial prejudice, which flows from the *Parks* decision, is that jurors demonstrate an awareness of their racist attitudes and a willingness to acknowledge them in public (Petersen 1993: 169; Roach 2013: 418, 2015: 213). Current forms of juror questioning in Canada do not uncover subconscious or implicit racism,¹⁰ and only 'weed out overtly racist jurors' (Ruparelia 2013: 269). Jurors who may not be critical of cultural minorities may, nonetheless, have contrary worldviews that prejudice them against minorities. Despite this limitation, there are grounds for extending this questioning procedure in jury selection to Australia. McCrimmon (2000: 143) notes that 'one thing is certain: if potential jurors are not questioned, lack of impartiality cannot be exposed'.

Canada: Failure of challenges to the array of all-white juries

In Canada, like Australia, there is an over-representation of Indigenous people as defendants and victims in courts and yet a substantial under-representation of Indigenous jurors (Peterson 1993: 149; Sheley 2016: 1). This has led to perceptions that fair trials will not be guaranteed for Indigenous people who tend to be tried by predominantly white jurors. Nishnawbi Aski Deputy Grand Chief Alvin Fiddler, who intervened in the *Kokopenace* case, recently articulated this perception:

It's our community members that are filling those jails. It's our community members that are interacting with the police, and yet in terms of being part of the justice system, they're not there. (Fiddler quoted in Porter 2015)

Reasons for widespread white juries include disqualification of persons with a criminal record, which has a disproportionate impact on persons of colour (see Iacobucci 2013: [33]; Sheley 2016: 1; Tanovich 2008: 662-663). In the Canadian case of *R v Kokopenace* (2013 ONCA 389), the First Nations defendant challenged the array of a jury based on its racial composition. Despite First Nations reserve residents constituting over 30 per cent of the local population, there were no First Nations people on Kokopenace's jury. This was attributed *inter alia* to First Nations people not being able to receive jury summons because they were sent to anonymous post office boxes on reserves (*R v Kokopenace* 2015: [19]-[20]). Clifford Kokopenace alleged that the process for selecting the jury had not 'ensured representative inclusion of Aboriginal on-reserve residents' (*R v Kokopenace* 2013: [2]), thus violating the right to a representative and impartial jury under the *Canadian Charter of Rights and Freedoms* s 11 (*Constitution Act 1982* (CA), Pt I) and the *Juries Act*, RSO 1990 (CA) c. J.3. The Ontario Court of Appeal held that it was relevant that there had *not* been 'reasonable efforts to seek to provide a fair opportunity for the distinctive perspectives of Aboriginal on-reserve residents' (*R v Kokopenace* 2013: [50]). Therefore, the jury was 'improperly constituted' and it could not 'serve as the conscience of the community' (*R v Kokopenace* 2013: [2], [31], [50], [277]). The issue of under-representation of First Nations jurors provoked a review of this problem (Iacobucci 2013). Ensuing recommendations focused on addressing practical problems in the jury notification system as well as the 'fundamental systemic' barriers to First Nations participation (Iacobucci 2013: [44], [56]).

Nonetheless, the Supreme Court of Canada in *R v Kokopenace* ([2015] 2 SCR 398) overturned this ruling following a Crown appeal. The Majority espoused a similar reasoning to Australian Supreme Courts, by conceiving that 'jury representativeness' was assured through the process of compiling the jury list and 'not its ultimate composition' (*R v Kokopenace* 2015: [2], [40], [158]). The Court recognised that First Nations peoples were unable to receive jury summons on reserves (*R v Kokopenace* 2015: [19]-[20]) but, nonetheless, considered that the state had made reasonable efforts to compile the jury list and to deliver notices without the 'deliberate exclusion' of First Nations people (*R v Kokopenace* 2015: [66]). This requirement for deliberate exclusion to ground a successful challenge accords with the 2015 decision of the Edmonton Court of Queen's Bench. It denied a challenge by First Nations man Jeremy Newborn to an all-white jury on the basis that the Alberta legislation unconstitutionally excluded jurors for possessing a criminal record, which had a disproportionate impact on First Nations people. The Court determined that there was no evidence of deliberate discrimination and that excluding jurors with criminal records was nonetheless 'reasonable and acceptable' to prevent partiality (*R v Newborn*, 2016 ABQB 13: [30]).

Returning to the judgment in *R v Kokopenace* (2015: [140]), the Supreme Court also declined to consider how underlying social issues contribute to the under-representation of First Nations jurors or how the under-representation created an appearance of prejudice. Beyond providing a 'fair opportunity' for broad jury participation through reasonable compiling of the jury roll, there was no right to a representative jury (*R v Kokopenace* 2015: [2]).¹¹ The Supreme Court held that a successful challenge required the state's efforts in delivering jury notices to be 'so deficient' that it created the appearance of partiality (*R v Kokopenace* 2015: [50]). Merely failing to send jury notices to specific addresses did not constitute such a deficiency. Cromwell J in dissent regarded that the state perpetuated 'systemic problems' facing Indigenous people in the justice system and, by 'turning a blind eye', it failed to make 'reasonable efforts' to overcome them, which placed it in breach of the accused's right to a representative jury (*R v Kokopenace* 2015: [285]-[286]).

United States Supreme Court rejection of racial exclusion in peremptory challenges

In the United States, the jurisprudence covers applications to dissolve juries where prosecutorial peremptory challenges have excluded jurors from an ethnic minority, particularly African Americans. These challenges to the array resonate with the Australian case of *R v Smith* (1981), detailed above, where the judge discharged the jury due to the appearance of prejudice when the

prosecution excluded all Indigenous jurors. The United States Supreme Court has held that the use of peremptory challenges to exclude non-white jurors is discriminatory and unlawful. In the 1970s, prosecutors peremptorily challenged approximately 80 per cent of African American jurors in parts of Missouri (see *United States v Carter*, 528 F 2d 844, 848 (CA 8 1975)), Louisiana (see *United States v McDaniels*, 379 F Supp 1243 (ED La 1974)) and South Carolina (see *McKinney v Walker*, 394 F Supp 1015, 1017-1018 (SC 1974)).

Following the Supreme Court decision of *Batson v Kentucky* (1986 476 US 79), courts accept that the use of peremptory challenges to ensure a certain race participation in the jurors is a violation of the Constitution and is prohibited in court proceedings. The *Batson v Kentucky* (1986: 84) ruling proclaimed that the 'deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violated the Equal Protection Clause'. It was concerned to identify 'purposeful discrimination' in which 'a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available' (*Batson v Kentucky* 1986: 93). Consequently, prosecutors who peremptorily strike out a non-white juror must demonstrate that it was for race-neutral reasons, where the defendant alleges racial motivation. However, Amdur (2015) states that judges tend to accept prosecutors' reasons except in the most 'egregious strikes'. These can include because the non-white juror is 'too young, too old, married, single, uneducated, too educated, employed, unemployed', which Amdur (2015) describes as 'farcical'. It perpetuates the disproportionate strikes to African Americans jurors compared with white jurors, with the disparity in some states such as Louisiana being as high as threefold (Grosso 2012: 1539).

In a recent case of an egregious strike (*Foster v Chatman, Warden* (2016) 578 US), the Supreme Court upheld its decision in *Batson v Kentucky* (1986). Timothy Foster was accused of capital murder in Georgia. Before his trial, the prosecutor struck all four prospective African American jurors (*Foster v Chatman* 2016: 3). Defence lawyers discovered prosecution files that included notes on jury selection that explicitly pointed to the race of all African American jurors as grounds for striking them (*Foster v Chatman* 2016: 5). The Supreme Court held that Foster had established 'purposeful discrimination' and that the prosecutor's race-neutral reasons were merely pre-textual (*Foster v Chatman* 2016: 23). However, in the absence of evidence of the explicit race motivation of prosecutors, the judgment does not provide safeguards to prevent the striking of non-white jurors for ostensibly race-neutral reasons.

United States voir dire of jurors for prejudice

In the United States the *voir dire* provides a defendant or the prosecution and/or the judge an opportunity to question jurors for the possibility of racial prejudice (see *Turner v Murray* (1986) 476 US 28: 36-37). Questioning prospective jurors upholds the 'petitioner's constitutional right to an impartial jury' (*Turner v Murray* 1986: 36). Parties seek to identify bias among individual jurors to inform their exercise of peremptory challenges or challenges for cause, rather than relying on stereotypes to disqualify jurors (Lyon 2012: 765-767). The *voir dire* is also a vehicle for prompting jurors to 'think more critically about [racial] issues' by planting seeds in the minds of jurors that the defendant's minority race could be part of the reason that they are accused (Grine and Coward 2014: 8-9). Therefore, in the United States, the *voir dire* is an opportunity to confront the issues of implicit bias and race salience (calling attention to race) as part of an educative and self-awareness process for prospective jurors (Lee 2015: 846-847), which studies suggest reduce juror's racial bias (see Schuller et al. 2009; Sommers and Ellsworth 2003: 1027). Lee (2015: 847) argues that it is more useful to do this during the *voir dire* rather than 'waiting until just before the jury deliberates' to undo the effects of racial bias in the trial (see also Sommers and Ellsworth 2001: 210).

The need to confront jurors on racial bias has been an issue in relation to the trials emerging from the protests against racist police violence in Ferguson, Missouri on 9 August 2014. The uprising

was in response to the shooting of 18-year-old Michael Brown, an unarmed African American teenager, by a white police officer, 28-year-old Darren Wilson. The killing brought forward a deep racial division in society that was reflected in the 'diametrically opposed accounts' in national debates (Lee 2015: 843). One was that Officer Wilson shot Brown for no reason and continued shooting after Brown turned around with his hands in the air, which was confirmed by Brown's friend and witness, Dorian Johnson. The other was that Officer Wilson shot Brown in self-defence after a scuffle, which was Wilson's version. Polls taken shortly after the shooting showed a racial divide in public opinion over whether the officer was justified in shooting Brown, with 57 per cent of African Americans saying they believed the shooting was unjustified and only 18 per cent of whites sharing this opinion (Lee 2015: 844). When protests erupted in Ferguson over the shooting, the police responded with a heavy-handed display of force and, again, 'public opinion was split over whether the protesters or the police acted inappropriately' (Lee 2015: 844).

Following the Ferguson incidents, scholars and practitioners have come out to advocate for race salience during the *voir dire* for the Ferguson protesters.¹² In order to help flush out juror bias against the African American defendants, they implored lawyers and judges to interrogate jurors for unconscious racial bias (Brayer 2015: 164, 166). They recognised that juries are not immune from views about police relations with African Americans and silence on race can perpetuate juror racism:

If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client. (Joy 2015: 180)

Interrogating jurors for implicit bias requires something other than an unhelpful closed-ended question like, 'Are you going to be biased against the defendant because of his race?' Direct questions fail to uncover deep-seated, hidden biases that inform perceptions of Ferguson and are linked to national anxieties surrounding the tragedy of Michael Brown. (Forman 2015: 171-172). Hidden bias can be better exposed in the jury selection phase through 'a series of open-ended questions educating jurors about implicit bias' that encourage jurors 'to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence' (Lee 2015: 846-847).

Conclusion: From Ferguson to Kalgoorlie – the need to address jury prejudice

It has been widely stated that a 'trial is won or lost when the jury is selected' because 'jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case' (Covington 1985: 576, quoted in Lee 2015: 847). This reflects the sentiment of Indigenous defendants and Indigenous victims of white perpetrators when their trials are adjudicated by an all-white jury. While the Canadian and United States jury selection processes reflect an awareness of the effects of racial bias on jurors, and have put in place some safeguards, they have not redressed this through setting aside the array of all-white juries. There are, nonetheless, lessons to be learnt from their procedures of questioning jurors on racial bias, which recognise that racial fault lines outside the courthouse seep into the jury room.

These racial fault lines are just as apparent in Australia, as highlighted in the cases of *Binge v Bennett* (1988, 1989) and *R v Buzzacott* (2004), and relating to the pending trials of protesters charged in Kalgoorlie, Western Australia following the killing of Indigenous boy Elijah Doughty by a white man who rammed his vehicle into Elijah. In Kalgoorlie, a division has emerged due to white vigilantism, which encourages the 'hunting down' of Indigenous children so they won't be able to 'breed again' (quoted in Purtill 2016; see also Menagh 2016; Stockwell 2016). Vigilantes accuse Indigenous children of stealing their property on their Facebook page 'Kalgoorlie Crimes Whinge and Whine', and applaud the killing of Elijah (for example, '[a]bout time someone took it into their own hands hope it happens again'; quoted in Purtill 2016; also see Tomlin 2016). In

opposition to this vigilantism, protesters have rallied around the #JusticeForElijah tag, which built on the momentum of Ferguson and the #BlackLivesMatter movement. Indigenous justice ('just us') advocates have drawn attention to the racially-inspired killing of Elijah and highlight the racism in mainstream media outlets and social media, which wrongly accuse Elijah of stealing the bike he was riding when killed (Bainbridge 2016; Behrendt 2016).

The Indigenous community have raised fears about white juries adjudicating the cases of Indigenous protesters who were rallying against the racist killing of Elijah, regarding it as impossible that they will be heard by an impartial jury. For Kalgoorlie's Indigenous community, the failings of a white jury is apparent in the injustice of their not-guilty verdicts for white assailants responsible for the deaths of 14-year-old Elijah Doughty, 16-year-old John Pat from Roeburne, Western Australia (1983) and Mulrunji Doomadgee on Palm Island, Queensland (2007) (Editors 2016; Jensen 2017; Wahlquist 2016; also see Purdy 1994: 42). The protesters were charged with disorderly conduct, property damage and assault of police (Anon. 2016b; NITV News 2016). The media and Western Australian Government characterise the protest as a 'race riot', 'lynch mob justice' and 'chaos' (Anon. 2016a; Menagh 2016; Perpetch and Bembridge 2016). Perhaps symbolic of their fears of jury bias, protesters targeted the jury room of the Kalgoorlie courthouse (Wahlquist 2016). This division highlights the need to confront jurors on racial prejudice.

However, weeding out individual white jurors alone is unlikely to nullify Indigenous perceptions of all-white jury prejudice. By rejecting challenges to the array of all-white juries across Australia, the United States and Canada, courts maintain the whiteness of the jury institution and colour-blind assumptions that jury selection processes are neutral and fair for Indigenous people. They fail to address the appearance of partiality against Indigenous defendants, and Indigenous victims of a white accused, that flows from the systemic underrepresentation of non-white jurors on jury panels. By dismissing the possibility of unconscious bias, courts reinforce the racial fault lines that systemically favour white people.

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² The white accused who caused the death of Elijah Doughty was found not guilty of manslaughter by a white jury in July 2017 (Anon. 2017; Jensen 2017).

³ The court exercised its discretion pursuant to the *Jury Act 1977* (NSW) s 53C.

⁴ Bourke is a small town in north-western New South Wales of under 3000 people. Thirty per cent of its population are Indigenous.

⁵ Indigenous activists established the Tent Embassy outside Old Parliament House on 26 January 1972 – which Aboriginal people regard as 'Invasion Day' because it marks the beginning of British colonisation – to demonstrate against government policies and assert Aboriginal sovereignty. See Foley et al. 2013.

⁶ Ultimately the all-white jury rejected Buzzacott's claim of right submission and found him guilty of theft (Anon. 2005b: 11).

⁷ The Supreme Court in *Woods & Williams v The Queen* (2010 NTSC 36: [17]) declined to determine the jury challenge and application for trial relocation on the grounds of prejudicial publicity. This contrasts other decisions (for example, *Tuckiar v The Queen* 1934 52 CLR 335: 337, 347, 355; *Wotton v DPP* 2006 QDC 202: 5-6; also see Burgess 2009).

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- ⁸ The all-white jury may be regarded as one episode of a series of racially-charged interactions with the justice system (Glowczewski and Wotton 2008: 4-5).
- ⁹ The information available to lawyers is usually only name and occupation of each juror (Hands and Williams 2009: 26, 32, Victorian Law Reform Commission 2013: 32).
- ¹⁰ Kang et al. (2012: 1129) note that implicit biases 'function automatically' including 'in ways that the person would not endorse as appropriate if he or she did have conscious awareness'. They are not 'consciously accessible' and therefore difficult to remedy.
- ¹¹ Also see *Cyr v Saskatchewan (Attorney General)* (2014 SJ 126) in which the Saskatchewan Court of Queen's Bench held that efforts to include First Nations people on the jury were in conformity with legislation irrespective of the absence of First Nations jurors.
- ¹² Given that Officer Wilson was not indicted, he did not have to face a trial where this could have been an issue for jurors.

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