

ERRING ON THE SIDE OF IGNORANCE: CHALLENGES FOR CAUSE TWENTY YEARS AFTER *PARKS*

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In 1993, Doherty JA of the Ontario Court of Appeal crafted what was perhaps the most significant decision on racism in the Canadian criminal justice system of that decade. The twentieth anniversary of the groundbreaking decision in Parks offers an opportune moment to review the case law on challenges for cause to determine to what extent we have advanced the discussion on racism in criminal justice. Are we now more likely to recognize and respond to the harm of racial prejudice in the criminal trials of racialized accused? Have understandings of racism become more sophisticated and nuanced in the context of challenges for cause? In particular, how has the Parks question evolved to reflect the complex and elusive forms of contemporary prejudice in Canada, including subconscious racism? In this article, I argue that the progress we have made in examining the racial prejudices of prospective jurors has been negligible. While some individual judges have engaged in thoughtful and insightful analyses, the vast majority do not grapple with the insidiousness of racism in any meaningful way and reject attempts to deepen the inquiry.

En 1993, le juge Doherty de la Cour d'appel de l'Ontario a rendu sans doute la décision la plus importante sur le racisme au sein du système de justice pénale canadien de la décennie en question. Le 20e anniversaire de cette décision révolutionnaire dans l'affaire Parks offre l'occasion idéale de passer en revue la jurisprudence portant sur les demandes de récusation motivée afin de déterminer dans quelle mesure nous avons fait avancer le débat concernant le racisme dans le système de justice pénale.

Sommes-nous dorénavant plus aptes à reconnaître et à réagir au tort que peuvent causer les préjugés raciaux dans le contexte de procès criminels vis-à-vis des accusés appartenant à des groupes racialisés? Les façons dont on conçoit le racisme ont-elles évolué et sont-elles devenues plus nuancées dans le contexte de demandes de récusation motivée? En particulier, la question entourant l'affaire Parks a-t-elle évolué en conséquence du racisme plus complexe et difficile à cerner qui existe de nos jours, notamment le racisme engendré inconsciemment. Dans le présent article, j'avance que les progrès réalisés relativement à l'examen

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que l'on fait des préjugés raciaux des jurés éventuels ne sont que minimes. Bien que certains juges en aient fait une analyse réfléchie et perspicace, la grande majorité d'entre eux n'abordent pas de façon approfondie la nature insidieuse du racisme et rejettent toute tentative d'examen plus poussé.

1. Introduction

In 1993, Doherty JA of the Ontario Court of Appeal crafted what was perhaps the most significant decision of that decade on racism in the Canadian criminal justice system. Like most consequential judgments, *R v Parks*¹ has its share of flaws. Nonetheless, in recognizing that the appellant should have been allowed to question prospective jurors on racial prejudices that might affect their impartiality, Doherty JA initiated an overdue discussion on racism in the administration of criminal law and the justice system's obligation to grapple with it. His sharp indictment of anti-Black racism and his recognition of its insidious manifestations were arguably as important to the development of criminal law as was his finding that Black accused in Metropolitan Toronto should be permitted to challenge prospective jurors for racial partiality.

The *Parks* case sparked a flurry of challenges for cause based on racial prejudice and a baffling range of interpretations by trial judges in response. Not surprisingly, provincial appellate courts and the Supreme Court of Canada in *R v Williams*² and *R v Spence*³ were asked to clarify the availability and scope of race-based challenges. While the law on juror screening appears to be forging ahead, in reality it has remained relatively motionless.

The twentieth anniversary of the groundbreaking decision in *Parks* offers an opportune moment to review the case law on challenges for cause to determine to what extent we have advanced Doherty JA's critical discussion on racism in criminal justice. Are we now more likely to recognize and respond to the harm of racial prejudice in the criminal trials of racialized accused? Have understandings of racism become more sophisticated and nuanced in the context of challenges for cause as they have outside of the criminal justice system? In particular, how has the *Parks* question evolved to reflect the complex and elusive forms of contemporary prejudice in Canada, including subconscious racism?

¹ *R v Parks* (1993), 15 OR (3d) 324 (CA) [*Parks*], leave to appeal to SCC refused, [1993] SCCA No 481.

² *R v Williams*, [1998] 1 SCR 1128 [*Williams*].

³ *R v Spence*, [2005] SCC 71, 3 SCR 458 [*Spence*].

A true commitment to preventing (or more realistically, minimizing) racial bias in jury decision-making requires more than a token recognition by our courts of the existence of racism.⁴ While the *Parks* decision offered a commendable starting point for the inquiry into juror partiality based on race, it is not sufficient. At best, the question(s) permitted in *Parks* may weed out overtly racist jurors who are aware of their prejudice and willing to disclose it in a public setting. It does little, however, to uncover the subconscious racism that may taint a juror's impartiality in a myriad of ways.

In this paper, I argue that the progress we have made in examining the racial prejudices of prospective jurors has been negligible. While some individual judges have engaged in thoughtful and insightful analyses, the vast majority do not grapple with the insidiousness of racism in any meaningful way and preclude attempts to deepen the inquiry. I suggest that there are a number of reasons why trial judges appear resistant to more nuanced considerations of racial prejudice. First, and not surprisingly, many trial judges are uncomfortable discussing race and racism, as is evident in the sentiments they express in their judgments and the reasons they offer for rejecting challenge for cause requests. Second, many judges still operate under misconceptions about the nature of racism. While they may acknowledge the existence and relevance of subconscious racism, their decisions often reflect an understanding of racial prejudice as conscious and explicit. In denying racialized accused persons the opportunity to expand the *Parks* inquiry beyond an examination of conscious prejudices, many trial judges cling to a narrow and static interpretation of *Parks* and the appellate decisions that have followed, thus perpetuating the possibility of racial partiality in juror decision-making and

⁴ Certainly, inadequate screening is not the only obstacle to ensuring that a jury operates effectively. A jury must also be representative. As L'Heureux-Dubé J noted in *R v Sherratt*, [1991] 1 SCR 509 at 525 [*Sherratt*]:

The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.

The acute under-representation of Aboriginal persons, particularly in the jury pool, reflects systemic failures that must be remedied if Aboriginal accused persons, who continue to be incarcerated at alarming rates, are to receive a trial that is both fair and perceived to be fair; see *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Toronto: Attorney General of Ontario, February 2013). See also *R v Kokopenace*, 2013 ONCA 389, 115 OR (3d) 481 in which the Ontario Court of Appeal ordered a new trial for an Aboriginal man convicted of manslaughter because of irregularities in the Kenora jury roll that failed to ensure adequate representation of on-reserve Aboriginal residents.

realizing the very risk that challenges for cause were supposed to avert. By not providing trial judges with more direction, appellate courts have facilitated an inconsistent approach to challenges for cause in this context.

After providing a brief overview of *Parks* and other appellate case law on race-based challenges for cause, I will examine the initial reticence of trial judges to allow such challenges and the consequent need for clear and compelling appellate intervention on this question. Next, I will explore how this early resistance to examining racial biases has resurfaced in the types of questions that trial judges are willing to permit in what are now more routine challenges for cause. Unfortunately, appellate courts have provided less guidance on this matter. While they may eloquently describe the dangers of subconscious racism, they fail to incorporate such considerations into their decisions and neglect to correct trial judges who do the same. Rather, appellate courts afford a high level of discretion to trial judges in their determinations relating to challenges for cause, making such decisions difficult to review.⁵ Our (predominantly white)⁶ judiciary, however, like the general population, will avoid engaging with issues of race and racism if given the choice, even when repeatedly told to “err on the side of caution” in evaluating challenge for cause requests.⁷ This avoidance was proven in the aftermath of *Parks*. Appellate courts, as a result, need to set higher, carefully informed, and purposive anti-racism standards to which trial judges must adhere. While it may seem

⁵ See e.g. *R v Barnes* (1999), 46 OR (3d) 116 (CA) at para 30.

⁶ Although the government does not keep statistics on the number of racialized appointments to the bench, a survey published in *The Globe and Mail* in 2012 found that of 100 federal appointments over a three-and-a-half year period, only two judges were racialized; see Kirk Makin, “The colour of justice,” *The Globe and Mail* (18 April 2012) A1. To follow up on this study, Rosemary Cairns Way examined federal appointments of new judges from April 14, 2012 to May 1, 2014. Of the 107 initial appointments during this time, she established that one judge was racialized and 90 were white (she was unable to determine the identity of the remaining 16); see Rosemary Cairns Way, “Deliberate Disregard: Judicial Appointments under the Harper Government” 65 *Sup Ct L Rev* [forthcoming in 2014]. Similarly, based on his research, former BC judge B William Sundhu estimated that as of October 2010, only 50 to 60 judges in Canada were racialized of approximately 2100 trial and appellate level judges in total (less than 3 per cent). In BC, fewer than 6 provincial court judges of a total of 104 were racialized and no racialized judges were appointed between 2001 and 2008; see Balwinder William Sundhu, *Terrorism Trials and the Judiciary: Does Diversity Matter?* (Masters of International Human Rights Law thesis, University of Oxford Kellogg College, 2009) [unpublished] at 28-29, 31, online: <<http://www.billsundhu.ca/old/sites/default/files/pdfs/MHRL-MLJ.pdf>>. From 2009 to 2012, 30 of the 31 federally-appointed judges in the same province were white; see Marjorie Griffin Cohen and Donna Martinson, “Who’s the judge? Reform is needed to the Supreme Court appointment process to ensure minorities and women are represented,” *The Vancouver Sun* (22 October 2012) A9).

⁷ See *Williams*, *supra* note 2 at para 22; *Parks*, *supra* note 1 at 351.

counterintuitive, lower courts ultimately need less discretion in determining whether and how to address racism in its many forms, not more. Otherwise, racial challenges for cause will remain merely symbolic and will do little to prevent racism from tainting the decision-making process and compromising the integrity of the criminal justice system.

Hundreds of decisions on challenges for cause based on racial prejudice have been reported since *Parks*. It is impossible to review all of them in this space. Rather, I have selected decisions for analysis that highlight some of the inconsistencies in how jurors are screened for racial partiality. I do not suggest that my inclusions are exhaustive or that they portray a complete picture of the case law on challenges for cause. My intention instead is to expose some of the troubling ways in which courts are responding to racism in this context.

2. *R v Parks*

The *Parks* case is well-known, but a short review may be helpful nonetheless. *Parks*, a Black drug dealer, was accused of the second-degree murder of a white cocaine user. In light of section 638(1)(b) of the *Criminal Code*,⁸ which provides an accused or prosecutor the right to challenge on the ground that “a juror is not indifferent between the Queen and the accused,” counsel for *Parks* requested that prospective jurors be asked the following question concerning racial prejudice:

Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?⁹

Counsel for *Parks* led no evidence to support this challenge, relying instead on the notoriety of racism in Toronto. His request to challenge for cause was rejected by the trial judge, who held that jurors were presumed to be impartial and could be trusted to decide the case based on the evidence and not personal prejudices. That presumption, a corner-stone of the jury system, had been well-established and also applied in the context of racial prejudices. The jury convicted *Parks* of manslaughter.

In quashing the conviction and ordering a new trial, Doherty JA held that *Parks* was denied his statutory right to challenge for cause. A modified version of the question suggested by the accused (nationality and

⁸ RSC 1985, c C-48.

⁹ *Parks*, *supra* note 1 at 331. The accused also sought to ask a question concerning the involvement of people in this case with cocaine and other drugs. This was rejected by both the trial judge and the Court of Appeal.

immigration status were not considered relevant in the circumstances) should have been posed to prospective jurors.¹⁰ Anti-Black racism was widespread in Toronto and could influence decision-making by jurors, particularly in a context such as this one in which a Black was accused alleged of interracial violence against a white person in the course of criminal drug activity. The question proposed by counsel for the accused properly encompassed both the attitudinal and behavioral components of partiality; racial bias was only an issue if it would lead a juror to discriminate against the Black accused in the verdict.¹¹

In reaching his conclusions, Doherty JA relied on a number of reports and studies that supported the “grim reality” of anti-Black racism in Toronto and Canada at large.¹² His oft-cited passage noted:

That racism is manifested in three ways. There are those who expressly espouse racist views as part of a personal credo. There are others who subconsciously hold negative attitudes towards black persons based on stereotypical assumptions concerning persons of colour. Finally, and perhaps most pervasively, racism exists within the interstices of our institutions. This systemic racism is a product of individual attitudes and beliefs concerning blacks and it fosters and legitimizes those assumptions and stereotypes.¹³

The numerous government initiatives targeted at understanding and eliminating racism in the province of Ontario and the perceptions of racialized groups who experience racial discrimination in society, particularly in the context of the criminal justice system, led to an inevitable conclusion in Doherty JA’s view:

Racism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism.¹⁴

¹⁰ In some cases following *Parks*, trial judges have permitted an inquiry that includes an accused person’s Jamaican origins. For example, in *R v McLeod*, 2005 ABQB 846, 393 AR 1 at para 23, Slatter J allowed the accused, two black men of Jamaican origin, to ask prospective jurors: “Do you believe that black Jamaican men, as a group, are more likely to be violent than other persons generally?” Similarly, Trafford J recognized widespread stereotypes that link Jamaican men to crime, and in particular, to drug offences; see *R v Kerr* (1995), 42 CR (4th) 118 (Ct J (Gen Div)).

¹¹ *Parks*, *supra* note 1 at 337.

¹² *Ibid* at 338-41.

¹³ *Ibid* at 338.

¹⁴ *Ibid* at 342.

In response to the trial judge's reliance on the presumption that post-jury selection safeguards would be effective in preventing racial prejudices from tainting the verdict, Doherty JA emphasized the unique challenges of purging racial biases that "rest on unstated and unchallenged assumptions learned over a lifetime."¹⁵ Unlike pre-trial publicity, "attitudes which are engrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing."¹⁶

Interestingly, Doherty JA's compelling commentary on the dangers of subconscious racism established the need for challenges for cause based on racial partiality, but did not address how the question or questions should have been framed. Rather, his analysis was largely limited to the propriety of such challenges given the realities of widespread anti-Black prejudice and the extent to which the proposed question conformed to the requirements of *R v Sherratt*.¹⁷ He offered no opinion on the adequacy of the question to address the subconscious biases that he cautioned against throughout his judgment. He did, however, acknowledge that other factors may also increase the risk of racially biased verdicts and should be incorporated into the challenge by the trial judge accordingly.

Ultimately, while the analysis surrounding the pervasiveness of racism and the importance of permitting challenges for cause based on racial partiality was thoughtful, well-researched and incisive, the question itself attracted little attention from the Court. Thus, the "*Parks* question" on which we rely so heavily today was the result of one lawyer's proposal that succeeded without expert evidence or supporting materials.

The *Parks* decision firmly established the availability of challenges for cause based on racial partiality in the case of Black accused in Metropolitan Toronto. The judgment was widely considered groundbreaking, an important recognition by the judiciary of the pernicious effects of racism in the criminal justice process. While the decision was embraced by defence lawyers and criminal law scholars as a positive development in the protection of an accused's fair trial rights, some criticized Doherty JA for unduly narrowing the geographic region to Toronto, particularly when many of the reports and studies he cited were far broader in scope.¹⁸ In the next section, I will examine how trial judges responded to *Parks* immediately after its release to assess the validity of this critique.

¹⁵ *Ibid* at 343.

¹⁶ *Ibid* at 343-44.

¹⁷ *Supra* note 4.

¹⁸ See e.g. Kent Roach, "Challenges for Cause and Racial Discrimination" (1995) 37 *Crim LQ* 410 at 413-14.

A) *Judicial Reactions to Parks in Ontario*

The *Parks* decision received a lukewarm – at times, even hostile – reception by many trial judges in Ontario, particularly in areas outside of Metropolitan Toronto. Many trial judges were quick to distinguish *Parks* on the basis that widespread prejudice against Blacks did not exist in their communities.¹⁹ For these judges, even the relatively low threshold affirmed in *Parks* – whether there was a realistic potential for the existence of partiality²⁰ – was not established.

In some of these cases, judges were bewildered that a challenge for cause would even be pursued in their region. For example, in *R v Hoshing*, McCart J described the “racial atmosphere” in Toronto that generated the *Parks* decision as being “light years away from London, and indeed, most of the rest of Ontario outside of Toronto.”²¹ He explained:

From my 22 years experience on the bench here in London, I have never experienced, nor have I heard of a criminal jury trial being influenced adversely by the colour or racial origin of an accused person. Simply put, what might be an appropriate determination in Toronto, really, in my view, has no application here in London.²²

Almost identical reasoning was offered by Lane J in *R v Wilson* for refusing a challenge for cause in Whitby, a town less than 45 minutes away from Toronto. In that case, the judge remarked that in his fourteen years on the bench, he had “never yet seen a jury that came back with a verdict ... that was influenced at all by prejudice, in this jurisdiction,” concluding that the “racial problem” in his area was not as pronounced as in Metropolitan Toronto.²³

How evidence of racism in a jury verdict would have become known to either McCart J or Lane J was unclear, particularly since it is illegal for jurors to disclose their deliberations.²⁴ As the Supreme Court of Canada

¹⁹ David Tanovich also discusses this response in his work; see “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 Sup Ct L Rev (2d) 655 at 671.

²⁰ *Parks*, *supra* note 1 at 335.

²¹ *R v Hoshing*, [1995] OJ No 4699 (QL) at para 1 (Ct J (Gen Div)) [*Hoshing*], rev’d [1997] OJ No 1060 (QL) (CA). The Crown conceded that a new trial was necessary to allow a challenge for cause in accordance with *Parks*.

²² *Ibid* at para 2.

²³ *R v Wilson* (1996), 29 OR (3d) 97 at 99 [*Wilson*].

²⁴ *Criminal Code*, *supra* note 8, s 649. A juror, or party assisting a juror with a physical disability, who “discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court” is guilty of a summary offence.

noted in *R v Pan*; *R v Sawyer*, “Not only is it impossible to ascertain whether a particular jury has acted in accordance with its oath and the requirements of the law, but we cannot measure in any meaningful way whether the procedures that we have in place to ensure that it does function properly are effective.”²⁵ Even with this information, it would be practically impossible to assess the influence of racial prejudice given the realities of subconscious racism as outlined in detail by Doherty JA in *Parks*. Both judges appeared to be suggesting that they had never witnessed an overt expression of racism by a juror, which is not surprising. Their position may have derived from a general doubt about the extent of racism in Ontarian society at large, a position likely informed by a lack of direct experience with racial prejudice as (presumably) white, male judges. Their remarks reflected a belief that racism, to the extent that it was a problem, could be isolated to Toronto, despite the numerous studies and reports that suggested otherwise. Instead of extending *Parks* beyond Toronto, McCart J preferred the reasoning of the BC trial court in *Williams*, which accepted that widespread prejudice against Aboriginals existed, but held there was no realistic possibility that jurors would be unable to put aside their racial biases.²⁶

Another less explicitly defensive but still troubling attempt to distinguish Toronto racism was apparent in *R v Ecclestone*.²⁷ In that case, a Black accused was refused a challenge for cause in the accidental shooting of his brother. MacDougall J found that unlike in Toronto, the evidentiary basis for anti-Black racism in the bordering Durham region where the charges were laid was not established. MacDougall J made this finding despite a telephone poll conducted under the supervision of Frances Henry²⁸ that revealed widespread prejudice. The Court discounted this evidence on the basis that Henry was not qualified to conduct polls on racist attitudes.²⁹ Moreover, MacDougall J determined that the circumstances in *Parks* were significantly different in that the alleged crime by Ecclestone was not interracial in nature and included no accusation of illegal drugs or violence.³⁰ For these reasons, a challenge

²⁵ *R v Pan*; *R v Sawyer*, [2001] 2 SCR 344 at para 102 [*Pan and Sawyer*].

²⁶ *Hoshing*, *supra* note 21 at para 4. For a helpful comparison of the Ontario Court of Appeal’s decision in *Parks* and the trial judgment in *Williams*, see Roach, *supra* note 18.

²⁷ *R v Ecclestone*, [1996] OJ No 497 (QL) (Ct J (Gen Div)) [*Ecclestone*]. In an earlier application, the accused unsuccessfully argued that Doherty JA’s conclusions also applied to the Durham Region given that it borders on Toronto (at para 7).

²⁸ Henry, a professor emerita of anthropology, is a widely recognized expert on racism.

²⁹ *Ecclestone*, *supra* note 27 at para 12.

³⁰ *Ibid* at para 19.

was not necessary. Any potential bias, according to the trial judge, would be cleansed through the usual jury safeguards.³¹

In some cases, trial judges reluctantly allowed a challenge for cause on racial partiality to proceed, but took pains to explain that they were not conceding racism was prevalent in their community. In one such case, Cusinato J pondered whether Doherty JA's findings should extend to Windsor given that a number of sources he relied on recognized racism as a problem throughout Ontario, although he specifically identified Toronto in his conclusions.³² Holding that *Parks* did not establish an automatic right for racialized accused to challenge for cause, Cusinato J stated: "Although Windsor is a Border City, many blacks have been located in this area for more than a century when they were first transported from the United States through the underground railway to escape slavery."³³ He contrasts this history to Toronto, where he speculates the problems of racism "may result from the rapid migration of many ethnic cultures and a failure of the populous (sic) to assimilate with these new cultures."³⁴ Unlike Toronto, "there are many locations in Ontario where there may be no suggestion that racial prejudice is a reality."³⁵

His comments on Windsor's history of Black migration offer important insights into his understanding of Canadian racism. They romanticize Windsor as a site of racial harmony and perpetuate a Canadian narrative of racial and cultural tolerance that positions us as a nation as superior to our neighbours to the south.³⁶ Racism is conceptualized as a product of cultural differences rather than domination, capable of being overcome as individuals live and interact with one another peacefully. Consequently, racial bias is perceived as a problem of interpersonal relations, not institutional or subconscious racism. Despite his reservations about the existence of widespread racial prejudice in Windsor, Cusinato J did permit the challenge for cause for administrative efficiency and "out of an abundance of caution."³⁷

³¹ *Ibid* at para 22.

³² *R v Rucker*, [1996] OJ No 5470 (QL) (Ct J (Gen Div)) [*Rucker*].

³³ *Ibid* at para 39.

³⁴ *Ibid* at para 40.

³⁵ *Ibid* at para 47.

³⁶ Osler J expressed a similar sentiment in a case that pre-dated *Parks*. Noting that "in our land" we were largely free of widespread racism, he warned: "[T]o permit challenges of this kind to go forward simply on the ground that man is prejudiced and that black and white may frequently be prejudiced against each other is to admit to a weakness in our nation and in our community which I do not propose to acknowledge;" see *R v Crosby* (1979), 49 CCC (2d) 255 at 255-256 (Ont HCJ).

³⁷ *Rucker*, *supra* note 32 at paras 41, 43.

The Ontario Court of Appeal ultimately settled the geographic scope of *Parks* when it declared in *Wilson*: “It is unrealistic and illogical to assume that anti-black attitudes stop at the borders of Metropolitan Toronto.”³⁸ In holding that Lane J improperly “relied upon his own personal observation and experience” and erred in denying Wilson a challenge for cause based on racial bias, the Ontario Court of Appeal clarified that any Black accused in Ontario should be permitted to challenge prospective jurors for racial partiality and that geographical distinctions “should not form the basis for a judicial exercise of discretion to refuse the challenge.”³⁹

B) Application of Parks to Other Racialized Communities

Confusion also surrounded the application of *Parks* to accused persons from other (non-Black) racialized communities. Some judges granted a challenge for cause without evidence. For example, Farley J in *R v Satkunanathan* declared that “no one should be a victim of the evil of racism in the courtroom” and allowed an accused of Tamil origin to challenge prospective jurors despite concerns about the weak evidentiary foundation presented to the court.⁴⁰ In another case also involving an accused of South Asian origin, Donnelly J similarly held that a *Parks* question would be beneficial, even without an evidentiary basis.⁴¹

Conflicting authority from the Ontario Court of Appeal failed to clarify whether *Parks* applied only to Black accused. In 1996, in *R v Alli*, Doherty JA cautioned against recognizing an extension of *Parks* to other racialized communities absent an evidentiary foundation.⁴² In his view, the trial judge did not err in exercising his discretion to refuse the challenge for cause without such evidence (nor would he have erred had he permitted the challenge). Two years later, however, with the benefit of the Supreme Court of Canada’s decision in *Williams*, the Ontario Court of Appeal took judicial notice in *R v Koh* of widespread racism against all “visible minorities” in Ontario that would give rise to a realistic potential for partiality in challenges for cause.⁴³ Before this clarification in *Koh*, trial judges in Ontario approached this determination in varied and inconsistent ways.

³⁸ *Wilson*, *supra* note 23 at 102.

³⁹ *Ibid* at 103.

⁴⁰ *R v Satkunanathan*, [1996] OJ No 1951 (QL) (Ct J (Gen Div)).

⁴¹ *R v Sood*, [1997] OJ No 5386 (QL) (Ct J (Gen Div)).

⁴² *R v Alli* (1996), 110 CCC (3d) 283 at 285 (Ont CA) [*Alli*]. Interestingly, Doherty JA warned against the type of judicial intervention he pursued in *Parks*.

⁴³ *R v Koh* (1998), 42 OR (3d) 668 (CA) [*Koh*].

The trial judge in *Koh*, in contrast to a decision by a different judge of the same court released a few months earlier,⁴⁴ rejected a challenge for cause because widespread racism against persons of Asian origin had not been established by the accused.⁴⁵ In his decision, Whealy J⁴⁶ made a number of problematic statements about the nature of racism targeted at persons of Asian origin. His analysis turned on a distinction (later called arbitrary by the Court of Appeal) between “racial prejudice in a social sense,” which included barriers in housing and employment, and “racial bias in the judicial setting of a jury trial.”⁴⁷ The former was framed as a milder form of discrimination (it “may *only* mean that one favours one’s own race in preference to others”), whereas the latter indicated a willingness to act on those prejudices.⁴⁸ In Whealy J’s view, there was insufficient evidence to establish “a social level of prejudice against ‘Asians’ or ‘Chinese’ so great as to raise an apprehension of bias in the judicial setting.”⁴⁹ While a “noticeable and substantial Oriental-looking resident population” resided in Toronto, members of this community “seemed to be judged individually and not [sic] are classed as a race.”⁵⁰

In a strongly-worded decision overturning the trial judgment, the Ontario Court of Appeal declared that “racism is omnipresent” and the “notorious fact” of racism should permit any accused person who was a member of a “visible racial minority” to bring a challenge for cause based on racial partiality in Ontario.⁵¹ “The potential for racism,” Finlayson JA explained, “pervades all cases involving minority accused.”⁵² Acknowledging the paucity of evidence on racial bias and the difficulties in measuring racism, he suggested that requiring every racialized accused to adduce evidence of racism against their communities would be

⁴⁴ *R v Ho*, [1996] OJ No 5344 (QL) (Ct J (Gen Div)) [*Ho*]. Watt J recognized at para 47 that racism “is not confined to anti-black racism. Racism exists in relation to persons of Asian/Chinese origin” and “its influence is as, insidious in the one case, as it is in the other.” See also *R v Duong*, [1998] OJ No 5985 (QL) (Ct J (Gen Div)) [*Duong*], a later case that accepted an evidentiary foundation for anti-Asian racism.

⁴⁵ *Koh*, *supra* note 43 at 673.

⁴⁶ Interestingly, Whealy J was the judge who expelled a Black member of the public from his courtroom after he refused to remove his kufi (a headdress) on the basis that it was an expression of his Muslim faith. The Ontario Court of Appeal stated that the “the trial judge erred in excluding certain members of the public from the courtroom,” and in the process “may well have inadvertently created the impression of an insensitivity as to the rights of minority groups,” see *R v Laws* (1998), 41 OR (3d) 499 at 508 (CA).

⁴⁷ *Koh*, *supra* note 43 at 672.

⁴⁸ *Ibid* [emphasis added].

⁴⁹ *Ibid* at 673.

⁵⁰ *Ibid* at 674.

⁵¹ *Ibid* at 677-79.

⁵² *Ibid* at 677.

inconsistent with the right to be tried by an impartial tribunal guaranteed by section 11(d) of the *Charter*.⁵³ Finlayson JA eloquently pondered the role of the judiciary in recognizing racism:

Having satisfied ourselves that blacks and Asian/Chinese qualify as victims of prejudice, must we now embark on a judicial journey through other racial territory? Can we not accept all visible minorities as eligible for this minimal protection or must Tamils, East Indians, Japanese, Koreans, Arabs and others come forward in this demeaning process wherein they ask for judicial recognition that they are victims of racial prejudice?⁵⁴

This passage invokes two valuable considerations. First, that the protection offered through a challenge for cause based on racial prejudice is indeed “minimal.” Jury screening is only one site of racial bias in a criminal justice system saturated with racism. Moreover, permitting a challenge for cause can in no way ensure that a verdict will be immune from racial bias, as McLachlin J later noted in *Williams*.⁵⁵ That trial judges would resist providing such minimal protection to racialized accused is telling. Second, the Court acknowledges that the requirement to prove racism as a condition to being granted this minimal protection is “demeaning.” This insight recognizes that having to convince a predominantly white judiciary of the existence and relevance of racism is humiliating and harmful. Finlayson JA’s comments affirm that racialized persons in the criminal justice system should be treated with dignity, not contempt.

The interventions of the Ontario Court of Appeal in *Wilson* and *Koh* were appropriate and necessary. They recognized that discretion was being exercised arbitrarily and improperly in this context by trial judges to the detriment of racialized accused and that this inclination required correction. The judicial notice taken in both judgments reflects frustration with the reluctance of trial judges to expand the application of *Parks* in an incremental manner as required. In many ways, *Wilson* and *Koh* were ideal cases to advance the reach of *Parks* given the glaring misconceptions about racism that both trial judges displayed in their reasoning and their heavy reliance on personal, uninformed understandings of racial prejudice. The decisions demanded a strong and clear response on appeal, one that would dampen trial judge resistance and resolve inconsistent approaches to challenges for cause based on racial bias.⁵⁶ Curtailing trial judges’

⁵³ *Ibid* at 681.

⁵⁴ *Ibid*.

⁵⁵ *Williams*, *supra* note 2 at para 50.

⁵⁶ Even after *Koh*, the Court of Appeal had to contend with a trial decision that denied an accused person a challenge for cause on the basis that he had not established an evidentiary foundation of widespread prejudice against persons of Asian origin. The

discretion in determining the scope of *Parks* in Ontario enhanced the administration of justice.

3. *R v Williams*

While Ontario slowly advanced its law on challenges for cause based on racial prejudice, several other jurisdictions rejected such challenges altogether. For example, trial level and appellate courts routinely denied that *Parks* should be applied in British Columbia.⁵⁷ Some courts recognized that widespread prejudice against racialized persons existed in British Columbia, but held that this prejudice could be put aside by a properly instructed jury in accordance with its oath. Thus, no realistic potential for partiality existed.⁵⁸

The BC Court of Appeal affirmed this approach in *R v Williams*.⁵⁹ The accused in that case was an Aboriginal man charged with robbing a pizza parlour in Victoria, during the course of which he threatened a white employee. Williams sought to ask prospective jurors the following questions:

- 1) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian?
- 2) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the person charged is an Indian and the complainant is white?⁶⁰

The Court of Appeal held that before the presumption of impartiality could be displaced, an accused would have to adduce evidence that jurors would be unable to put aside their racial prejudices. The Supreme Court of Canada, in a rare decision on racism, overturned this finding and held that the reasoning of the lower courts included a number of errors that set the evidentiary threshold impermissibly high.

Court held that the trial judge had improperly relied on *Alli* instead of *Koh*, and ordered a new trial; see *R v VP* (1999), 124 OAC 54 (CA).

⁵⁷ See e.g. *R v Drakes* (1998), 103 BCAC 143 (CA) at para 9.

⁵⁸ See e.g. *R v Williams* (1994), 90 CCC (3d) 194 (BC SC). This approach was taken by some courts in Quebec as well; see e.g. *R c Mankwe* (1997), 12 CR (5th) 273 (CS Qc).

⁵⁹ *R v Williams* (1996), 106 CCC (3d) 215 (BC CA).

⁶⁰ *Williams*, *supra* note 2 at para 3.

Like *Parks*, *Williams* has attracted significant attention over the years.⁶¹ Several passages relating to subconscious racism are worth highlighting. According to McLachlin J, to presume as the lower courts did that judicial cleansing would adequately prevent racial prejudices from interfering with the solemn duty of jurors “is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it.”⁶² Referring to the work of Neil Vidmar and to Doherty JA’s judgment in *Parks*, she acknowledged that deeply embedded “preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals” are not easily displaced.⁶³ She remarked:

Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined.⁶⁴

Like the Ontario Court of Appeal’s decision in *Parks*, the Supreme Court of Canada made several important pronouncements about the nature of subconscious racism and the challenges in identifying and neutralizing its impact in jury decision-making. McLachlin J provided helpful instruction on the complex ways in which racial prejudice may affect a juror, including the assessment of credibility, the interpretation of evidence, and the devaluation of members of the accused’s racial community and stereotypical assumptions about their links to crime.⁶⁵ The Court also provided direction, however, that seemed to contradict its warnings about the insidious nature of racism. While McLachlin J recognized, for instance, that “some prospective jurors, in a community where prejudice against people of the accused’s race is widespread, may be both prejudiced and unable to identify completely or free themselves from the effects of those prejudices,”⁶⁶ she offered no insights into how the blunt and limited traditional *Parks* inquiry asking jurors to assess their own racial prejudice and their ability to set it aside would address these concerns. To the contrary, she supported a contained investigation into racial prejudice. She cited with approval the practice of the first trial judge (who declared a

⁶¹ See e.g. David M Tanovich, “The Future of the Challenge for Cause in the Wake of *Williams*” (1998) 15 CR (5th) 250.

⁶² *Williams*, *supra* note 2 at para 21.

⁶³ *Ibid.*

⁶⁴ *Ibid* at para 22.

⁶⁵ *Ibid* at para 28.

⁶⁶ *Ibid* at para 38.

mistrial), in permitting only “two questions, subject to a few tightly controlled subsidiary questions.”⁶⁷ In other words, the Court acknowledged the dangers of subconscious racism, but ultimately cautioned against a fuller examination of potential biases that would expose manifestations of racism in this form. These messages are difficult to reconcile.

Furthermore, in its effort to grant trial judges adequate discretion in their work, the Court lost an important opportunity to ensure a meaningful and consistent approach to challenges for cause. It noted that some trial courts had been “conservative”⁶⁸ and asserted that many of the reasons trial judges proffered for rejecting an examination of racial prejudices, such as administrative efficiency, lack of evidentiary foundation, and juror privacy, discounted the accused’s right to an independent and impartial jury under sections 11(d) and 15 of the *Charter*. Moreover, like *Parks*, its judgment recognized the challenges of adducing evidence of racial bias and stressed the low threshold for establishing a realistic potential for partiality. Yet the Court stopped short of accepting an automatic right to challenge for cause for all racialized accused, which in its view, would have been inconsistent with *Sherratt*, a case that considered partiality in the entirely different context of pre-trial publicity. Instead, it suggested that the evidentiary burden on accused persons would lessen as courts continued to take judicial notice of widespread racism against particular communities and that a realistic possibility of partiality could be found even in the absence of such evidence. Nonetheless, the Court concluded that: “Ultimately, it is within the discretion of the trial judge to determine whether widespread racial prejudice in the community, absent specific ‘links’ to the trial, is sufficient to give an ‘air of reality’ to the challenge in the particular circumstances of each case.”⁶⁹ McLachlin J warned, however, that such discretion “must be distinguished from judicial whim” and should be exercised in accordance with section 638(1)(b) of the *Criminal Code* and the evidence.⁷⁰

While there is no doubt that trial judges require discretion to manage their courts, prevent abuses, and ensure just outcomes, case law following *Parks* has demonstrated that the judiciary may be reluctant, ill-equipped, resistant, or even hostile to grappling with racism without ample direction and unless mandated to do so. The Supreme Court of Canada’s decision in *Williams* marked a critical advancement in the law on challenges for cause based on racial bias. Significantly, it also acknowledged widespread prejudice against members of Aboriginal communities and considered the

⁶⁷ *Ibid* at para 55.

⁶⁸ *Ibid* at para 51.

⁶⁹ *Ibid* at para 30.

⁷⁰ *Ibid* at para 14.

profound ways in which racism can infect a criminal jury trial. Like *Parks*, however, it failed to engage with *how* courts should administer the challenge for cause process to address subconscious racism. Moreover, it neglected to address the risks of leaving discretionary spaces open to a judiciary with an inconsistent, and at times shameful, record on issues of racism.

4. *Challenging Racism after Williams*

Trial judges following *Williams* have exercised their discretion in a number of ways. Most trial courts are now willing to permit a challenge for cause based on racial partiality, particularly in the case of Aboriginal and Black accused, although some trial judges remain disinclined.

For example, the trial judge in *R v Denison* denied an Aboriginal man accused of murdering a white woman, his common-law spouse, permission to challenge prospective jurors for racial partiality in Prince George, British Columbia.⁷¹ Wilson J was aware of the Supreme Court of Canada's decision in *Williams* and cited extensively from it. However, his interpretation and application of McLachlin J's judgment was troubling. Emphasizing that she rejected an automatic right to challenge for Aboriginal accused, he noted the following passage from *Williams*:

The relevant community for purposes of the rule is the community from which the jury pool is drawn. That community may or may not have prejudices against aboriginals. It likely would not, for example, in a community where aboriginals are in a majority position. That said, absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level.⁷²

He further highlighted McLachlin J's statement that "the judge should exercise his or her discretion to permit challenges for cause if the accused establishes widespread racial prejudice in the community."⁷³

In addition to the Supreme Court of Canada's judgment in this case, defence counsel had cited a number of decisions from BC, including those of the two lower courts in *Williams* that found widespread prejudice against Aboriginal persons, a conclusion reached by royal commissions

⁷¹ *R v Denison*, [1998] BCJ No 3285 (QL) (BC SC) [*Denison*], rev'd on other grounds [2001] BCCA 703, 52 WCB (2d) 115 (BC CA). The BC Court of Appeal set aside his conviction for first-degree murder and substituted a second-degree murder conviction.

⁷² Cited in *ibid* at para 12.

⁷³ Cited in *ibid* at para 13.

and numerous other studies. The trial judge held, however, that these findings did not apply to Prince George, where he speculated “there is likely a substantially higher proportion of aboriginal people.”⁷⁴ No data was provided to support this perception. Census reports from 1996 and 2001 suggest that Aboriginal persons comprised somewhere between 6.9 per cent and 10 per cent of the Prince George area population during this time.⁷⁵ These numbers fall far short of a “majority position” that, according to McLachlin J, may indicate a lack of prejudice in the community.⁷⁶ Wilson J also failed to grapple with the remainder of McLachlin J’s analysis, which explained that widespread racial prejudice at the provincial or national level (firmly established in *Williams*) may be used to infer prejudice at the community level, absent evidence to the contrary.⁷⁷ Indeed, he did not directly address defence counsel’s argument based on this passage that the Crown, who refused to concede that racial prejudice was a notorious fact in Prince George warranting judicial notice, should bear the burden of demonstrating that provincial and national prejudice against Aboriginals was not replicated in Prince George.

At the crux of his effort to distinguish other cases in British Columbia and to selectively apply *Williams* appeared to be the trial judge’s belief in a type of “reverse” prejudice against whites. While admitting that land claim disputes had given rise to tensions between Aboriginal and non-Aboriginal communities, he remarked:

However, to jump from that proposition to a finding that there is widespread prejudice against native Indians in the Prince George area, so that there would be a realistic possibility for partiality, so that some members of the jury pool may be biased in a way that may impact negatively on the accused, would, in my view, not only be dangerous, but would be arrived at by the application of the very type of stereotypical thinking which the courts are striving to avoid.⁷⁸

This statement implies that any suggestion that (predominantly white) jurors may act in racially biased ways against an Aboriginal accused itself

⁷⁴ *Ibid* at para 14.

⁷⁵ Canada, Statistics Canada, *Profile of Census Divisions and Subdivisions in British Columbia* (1996 Census) (Ottawa: Statistics Canada, 1999) at 358-60; Canada, Statistics Canada, *Profile of Census Divisions and Subdivisions in British Columbia* (2001 Census) vol 1, (Ottawa: Statistics Canada, 2004) at 476-78.

⁷⁶ *Williams*, *supra* note 2 at para 41. Even this suggestion is problematic. The existence of racism does not turn on the number of racialized persons in a community; rather, it is, as Finlayson JA noted in *Koh*, *supra* note 43 at 677, “omnipresent.” This statement disregards the various ways in which racism shapes our institutions and attitudes.

⁷⁷ *Williams*, *supra* note 2 at para 41.

⁷⁸ *Denison*, *supra* note 71 at para 14.

shows bias. In this way, the white majority becomes the victim of racial prejudice, not the racialized accused. In addition to ignoring systems of racial domination that position white and racialized Canadians unequally, the concern that white jurors will be stereotyped through the mere inquiry of partiality undermines the ultimate purpose of such an examination: the fair trial rights of the accused. At no point did Wilson J explore the “danger” of preventing an Aboriginal accused facing a first-degree murder charge from challenging prospective jurors for cause; rather, his concern focused on how a finding of widespread prejudice would affect the white majority. Unfortunately, the challenge for cause holding does not appear to have been raised on appeal.

In another more recent case, Marceau J of the Alberta Court of Queen’s Bench denied an accused woman of Chinese descent the opportunity to challenge prospective jurors for racial prejudice.⁷⁹ The request was rejected on the basis that no evidence was presented concerning racial bias against persons of Chinese origin other than the accused’s own affidavit testifying to her personal experiences of racism. The trial judge proffered race-neutral reasons that could explain most of the incidents she described as examples of racism. “Racial comments,” for instance, could be made to anyone, including those of the “white race.”⁸⁰ Ignoring the larger context of racism, he also noted that these comments could apply “to anyone born and raised in Canada who does not belong to either of the two dominant English or French groups and even there the English might feel discriminated against by the French and the French by the English.”⁸¹ Moreover, that she sometimes encountered surprise that her “people” could speak French did not suggest discrimination, but rather ignorance “about history of the French in the far east.”⁸² Consistent with routine denials of everyday racism by the white majority, he did not find credible her explanation of being refused service because she was of Asian origin, finding this comment “very weak.”⁸³ The only statement in her affidavit that may have provided some evidence of racism, in his view, was her account of being referred to as a “banana” – “yellow on the outside and white on the inside.”⁸⁴ The trial judge, however, appeared to diminish the relevance of even this overt expression of racism when he indicated, without further discussion, that he had never before heard that term.

⁷⁹ *R v Choy*, [2008] ABQB 697, 237 CCC (3d) 362 [*Choy*], aff’d on other grounds [2013] ABCA 114, 89 Alta LR (5th) 401 [*Choy CA*].

⁸⁰ *Ibid* at para 13.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid*.

⁸⁴ *Ibid*.

After briefly acknowledging *Williams*, Marceau J held, somewhat awkwardly, that “the ground for concluding the racial bias against the Chinese community is so great that the Applicant cannot have a fair trial by jury to have been far from established on a balance of probabilities.”⁸⁵ The threshold he set was contrary to *Williams*, which requires only that there exist a realistic potential for partiality as demonstrated by widespread (or lesser) prejudice against the accused’s racial community, not that the jury would in fact be partial. The trial judge’s approach also contradicted the Supreme Court of Canada’s interpretation of *Williams* in *R v Spence*: “The courts have acknowledged that racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of evidence. Justices have simply taken ‘judicial notice’ of racial prejudice as a social fact not capable of reasonable dispute.”⁸⁶ In reasoning reminiscent of early cases in Ontario following *Parks*, Marceau J. stated:

My own experience over my lifetime in Canada almost all of which was in Alberta is that the Chinese community in Alberta is generally perceived as more law-abiding, responsible and better educated than even the dominant white society and that if there is some prejudice against the Chinese community it is more envy of their success than ingrained prejudice concerning their morals or truthfulness.⁸⁷

Relying on his personal experiences of racism to reject Choy’s challenge for cause could arguably be construed as “judicial whim.” As noted above, McLachlin J in *Williams* warned that judicial discretion must be exercised in consonance with the evidence. Instead, this trial judge invoked a number of stereotypes about persons of Asian origin in his reasoning that served to perpetuate racism in the criminal justice system rather than prevent it. His views that members of the Chinese community were perceived to be successful and respectable, and importantly, “law-abiding,” draws on a number of stereotypes that characterize Asians as the “model minority.”⁸⁸ Such characterizations are often considered harmless, even complimentary, as they paint Asian communities in a positive light rather than a negative one. Marceau J’s observations that the seemingly perceived success of Asians may result in envy and resentment actually support, rather than counter, a finding of widespread prejudice against this community. As

⁸⁵ *Ibid* at para 14.

⁸⁶ *Spence*, *supra* note 3 at para 5.

⁸⁷ *Choy*, *supra* note 79 at para 14.

⁸⁸ For a helpful critique of the “model minority” myth, see Frank H Wu, *Yellow: Race in America Beyond Black and White* (New York: Basic Books, 2002) at 39-77.

Rhoda Yen explains, members of the white majority may blame Asians for achievements that they believe should have been their own,⁸⁹ fueling stereotypical concerns about the “yellow peril” threat.⁹⁰

Moreover, the trial judge’s unsupported impressions of persons of Chinese origin ignore widespread beliefs about the links between Asians, drugs and violent crime, particularly in the context of “Asian gangs.”⁹¹ Indeed, trial courts have recognized that police officers racially profile Asians, especially in relation to marijuana offences and gang-related activity. In *R v Nguyen*, for example, Kruzick J held that an officer who relied on Vietnamese names in the land registry to investigate potential marijuana grow operations used race as a proxy for criminality.⁹² As a woman, racial prejudice regarding violent gang activity may have been less influential for Choy; however, the trial judge did not consider gender in his analysis or generalizations. In any event, stereotypes assuming the

⁸⁹ Rhoda J Yen, “Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case” (2000) 7 *Asian LJ* 1 at 5-6. A similar response to the perceived success of Asian Canadian students was apparent in a controversial article published in *Maclean’s* magazine that attracted widespread attention. The article, originally entitled “Too Asian?,” questioned whether schools like the University of Toronto had become “too Asian,” understood to mean too academically competitive. According to the article, “many white students simply believe that competing with Asians – both Asian Canadians and international students – requires a sacrifice of time and freedom they’re not willing to make;” see Stephanie Findlay and Nicholas Köhler, “Too Asian” *Maclean’s* (Nov 22, 2010) at 76.

⁹⁰ In the American context, Kent Ono and Vincent Pham describe “yellow peril” as “representations of Asians and Asian Americans as threatening to take over, invade, or otherwise negatively Asianize the US nation and its society and culture. Usually, yellow peril discourse constructs an Asian-white dialectic emphasizing the powerful, threatening potential of Asians and Asian Americans, while simultaneously constructing whites as vulnerable, threatened, or otherwise in danger;” see Kent A Ono and Vincent Pham, *Asian Americans and the Media* (Malden, MA: Polity Press, 2009) at 25.

⁹¹ See e.g. *Ho*, *supra* note 44; *R v Cho*, [1998] BCJ No 3159 (QL) (SC) [*Cho*]; Frances Henry and Carol Tator, *Discourses of Domination: Racial Bias in the Canadian English-Language Press* (Toronto: University of Toronto Press, 2002) at 197-201.

⁹² *R v Nguyen*, [2006] OJ No 272 (QL) (Sup Ct J). But see *R v Li*, [2005] OJ No 267 (QL) (Sup Ct J) where the same officer’s practices for identifying marijuana grow operations were held not to constitute racial profiling in relation to another Asian suspect. The Court also recognized racial profiling against Asians in *R v Huang*, [2010] BCJ No 2627 (QL) (Prov Ct). In some cases, police officers have stated their own views on Asians and crime. For example, one officer acknowledged his sense that home invasions were often committed by male Asian gangs; see *R v Yoon*, [2012] BCJ No 765 (QL) at para 34 (Sup Ct).

docility and subservience of Asian women⁹³ could taint the way in which jurors process the evidence at trial, especially if Choy, accused of a violent crime against a child, was viewed as deviant. In a seemingly paradoxical fashion, Asian women are also depicted as “dragon ladies”: cold, strong, distant, domineering, and manipulative.⁹⁴ The dragon lady stereotype should have been of particular concern in a case alleging the abuse and murder of a vulnerable three-year old boy.

Rather than accept the existence of widespread racial prejudice against persons of Asian origin, thoughtfully recognized and explored in a number of cases in other provinces,⁹⁵ the trial judge instead denied or minimized the discrimination faced by Asian Canadians and relied on his own illiteracy in anti-Asian prejudice to preclude a minimal protection against racial bias in the jury’s verdict. He did not apply the “air of reality” test from the Supreme Court of Canada’s decision in *Williams*, nor did he heed its advice to err on the side of caution. Choy, in a widely publicized case, was ultimately convicted of manslaughter in the death of her foster child both times her case was tried, with the second conviction resulting in a six-year sentence of imprisonment. Her appeal on the conviction from her second trial was recently dismissed by the Alberta Court of Appeal.⁹⁶ From the reported decisions available, it does not appear that her counsel from her first trial appealed the challenge for cause decision.

5. *R v Spence: Two Steps Back?*

As the previous discussion demonstrates, many trial judges have required significant coaxing by appellate courts before they have been willing to permit challenges for cause based on racial partiality. Fortunately, such challenges have become more widely accepted in the trials of racialized accused. Trial judges continue to be confused, however, by the scope and content of challenges for cause, a confusion exacerbated by the Supreme Court of Canada in its perplexing and muddled racial analysis in *Spence*.

Spence, a Black man, was accused of robbing a South Asian⁹⁷ pizza delivery man. The trial judge rejected Spence’s request to include the

⁹³ See e.g. Sumi K Cho, “Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong” (1997) 1 J Gender Race & Just 177.

⁹⁴ Yen, *supra* note 89 at 8.

⁹⁵ See e.g. *Ho*, *supra* note 44; *Koh*, *supra* note 43; *Duong*, *supra* note 44. In *Cho*, *supra* note 91, Romilly J, the first Black judge in BC, provided an insightful overview of anti-Chinese racism in BC in determining that a challenge for cause should be permitted.

⁹⁶ *Choy CA*, *supra* note 79.

⁹⁷ The lawyers and courts referred to the complainant as “East Indian.” Given this term’s colonial origins, I prefer to use “South Asian.”

victim's race in the challenge for cause inquiry, mistakenly assuming that the *Parks* question did not permit reference to the complainant's racial background. Spence was not convicted. On appeal, the Crown argued, among other things, that the complainant's race was irrelevant given that he also was racialized. In this case, unlike in others where the interracial nature of the crime was deemed significant, neither the accused nor the complainant was a member of the white majority. Rejecting this argument, Feldman JA writing for the majority of the Ontario Court of Appeal stated:

In my view, it is not only an association of the white majority with the Crown that may result in partiality, but any racist or stereotypical views about the accused or the victim that may influence a potential juror's approach to the assessment of the evidence or to the outcome of the trial, together with an inability by that potential juror to put those views to the side.⁹⁸

Finding that the accused was denied a proper challenge for cause, Feldman JA set aside the conviction and ordered a new trial.

The Supreme Court of Canada disagreed. It held that in the absence of an evidentiary foundation, where the accused and complainant are both racialized a challenge for cause need not include the interraciality of the crime. Curiously, the Court structured its analysis around the following question: "How does racial prejudice *against* East Indians, for which an accused East Indian may be entitled to challenge potential jurors for cause, aggravate or compound potential racial prejudice *against* a black accused? What, if any, is the link?"⁹⁹ To answer this question, the Court focused on the issue of racial sympathy, that is, whether jurors will be more sympathetic to complainants who share the same racial background. In the Court's view, it was not appropriate to take judicial notice of such a race-based sympathy.

In determining that the interracial nature of the crime was not relevant in this context, Binnie J found that the trial judge properly exercised his discretion to conclude that Spence had not demonstrated an air of reality to his claim that the complainant's South Asian identity may compound prejudice against him. The question as framed and the analysis that followed largely ignored any impact that juror racism may have on the complainant. Unlike the decision of Feldman JA at the Court of Appeal, Binnie J considered racial prejudice almost exclusively in relation to the accused, noting only parenthetically that "indeed on the view denounced in *Parks* it [the complainant's South Asian identity] might make the

⁹⁸ *R v Spence* (2004), 73 OR (3d) 81 at para 29 (CA).

⁹⁹ *Spence*, *supra* note 3 at para 2 [emphasis in the original].

complainant a less sympathetic figure, or less worthy of belief.”¹⁰⁰ Precisely on this basis, the Crown should have supported Spence’s request (or even have initiated its own challenge), instead of opposing it. Section 638(1)(b) of the *Criminal Code* provides the accused *and* the prosecutor the opportunity to challenge a juror on the ground that “a juror is not indifferent between the Queen and the accused.” Instead, the Crown only concerned itself with the interests of the complainant in its unsubstantiated assertion that questions requiring the (racialized) victim to identify her racial background would be intrusive.¹⁰¹ By focusing on the impact of the complainant’s racial background on the accused, both the Crown and the Court ignored the myriad ways in which racial prejudice may influence jury decision-making, dangers that were recognized and cautioned against in *Williams*.¹⁰²

In fairness to the Court, its judgment was in part a response to the misguided arguments of the lawyers for the appellant and the respondent, who emphasized the issue of intraracial partiality (suggesting that South Asian jurors may have a natural sympathy for the complainant based on a shared racial identity). This, however, was the wrong basis from which to demonstrate the necessity of a challenge that included the interracial nature of the crime. Rather, a more complete *Parks* question was crucial because the racial backgrounds of the accused and the complainant are *always* relevant. As the African Canadian Legal Clinic suggested in its capacity as intervener, racial prejudice works in complicated, covert, and diffused ways that may value or devalue complainants and accused based on their racial and cultural identity, or that may lead jurors to interpret testimony in a manner that is consistent with their preconceived racial notions.¹⁰³ Our concern should not be limited to the biases of South Asian jurors,¹⁰⁴ but should extend to the deeply held prejudices that any member of the jury may have about Blacks, South Asians, or any other racial group, whether positive or negative. Put differently, we should be equally concerned about the white juror who will judge the complainant (or accused) more or less favourably based on his racial identity. Guarding against the constant risk of racial bias requires vigilance, or in the Court’s own words, erring on the side of caution.

¹⁰⁰ *Ibid* at para 3.

¹⁰¹ *Spence*, *supra* note 3 (Factum of the Appellant at para 57).

¹⁰² *Williams*, *supra* note 2 at paras 28-29.

¹⁰³ *Spence*, *supra* note 3 (Factum of the Intervener at paras 25-34).

¹⁰⁴ With the exception of the intervener, the relationship between South Asian and Black communities was not explored by either the lawyers or judges in *Spence*. I would argue that racial prejudice against Black persons is a “notorious fact” in South Asian communities, one that could potentially warrant judicial notice. Moreover, anyone familiar with the “Asian” expulsion from Uganda would know that tensions between these communities have a long history.

Like the significant appellate decisions on challenges for cause that preceded it, the Supreme Court of Canada in *Spence* made several important declarations about the “social fact” of racial prejudice and its potential influence on juror decision-making.¹⁰⁵ Yet its analysis and conclusions reflected little understanding of the nature and manifestations of racism and racial prejudice, and instead reinforced a white norm in the judicial evaluation of racial prejudice. Thus, absent an evidentiary foundation that is difficult to establish, the Court suggested that attention to the interracial nature of the crime is required only when the complainant is white, thereby obscuring the impact of racial prejudice in other contexts. Moreover, the Court expressed no appreciable concern for the racialized complainant. Rather than developing our jurisprudence on challenges for cause, the decision in *Spence* was a regression, casting doubt on the previously approved and long-standing practice of identifying the interracial nature of the crime. The judgment also exemplifies the extent to which trial judges will be given discretion – even when they misapprehend the law.

In *Spence*, the Supreme Court of Canada let slip an important occasion to clarify the law surrounding challenges for cause and to offer trial judges meaningful guidance on screening for insidious forms of racial partiality. Perhaps most disappointing is that the Court missed a pivotal opportunity to model a thoughtful and critical analysis on racism and to educate the judiciary, legal profession, and public, especially given that very few cases at the Supreme Court of Canada address racism directly.

6. Less is More, More or Less: Uncovering Subconscious Racism

While most trial judges now permit racialized accused to challenge jurors, resistance to addressing racism in their courtrooms is taking new forms. In particular, efforts by accused to expand the scope of questioning beyond the traditional *Parks/Williams* inquiry to uncover less explicit forms of racism have been largely unsuccessful. In other words, many trial judges restrict an accused’s examination of prospective jurors to a bare minimum, despite frequent concessions that the *Parks* question could be improved upon.

As many researchers have acknowledged, the traditional *Parks* question is limited. As expert witnesses Brian Lowery and Scot Wortley both testified in *R v Douse*, the question is ineffective because it is simplistic and invites a socially acceptable response. Indeed, Wortley referred to it as a “terrible question” that does not identify individuals who

¹⁰⁵ *Spence*, *supra* note 3 at para 5.

may be unaware of their own biases.¹⁰⁶ Even if people were conscious of their racial prejudices, few would be willing to admit their racism in public.¹⁰⁷ Henry has also questioned the usefulness of the *Parks* question in exploring subconscious biases in her expert testimony and scholarly work.¹⁰⁸ For those who harbour more subtle forms of racial prejudice, “[a] series of relevant questions leading to a ‘punch line’ question would be more desirable than a one-shot.”¹⁰⁹ Similarly, Regina Schuller *et al* cast doubt on the efficacy of screening for racial prejudice using the closed-ended *Parks* question in a recent empirical study of mock jurors that found anti-Black bias still influenced decision-making.¹¹⁰ The psychologists who conducted this study suggested a more reflective process may help to sensitize prospective jurors to their prejudice.

Despite concerns raised by both experts and courts, trial judges often reject attempts to expand the questioning of prospective jurors beyond the basic *Parks* question. Mirroring the reasoning of early decisions that resisted race-based challenges for cause, many trial judges cite the lack of an evidentiary foundation to deny more nuanced questions. In these cases, trial judges demand proof that modifying the standard *Parks* question would result in a more effective mechanism for identifying partiality, even when the proposed modifications are minor.

For example, defence counsel in several cases sought to introduce a multiple-choice answer to the standard *Parks* question. Thus, instead of asking a yes or no question, the accused requested that prospective jurors be asked a version of the following inquiry allowed in *Douse*:

Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black [person] and the

¹⁰⁶ *R v Douse* (2009), 246 CCC (3d) 227 at para 105 (Ont Sup Ct) [*Douse*].

¹⁰⁷ In her study of 17 Ontario criminal cases, Regina Schuller found that very few prospective jurors (ranging from 0 to 14 per cent) indicated that they would be unable to put aside their racial biases. Some of these jurors were still judged unacceptable by the triers, particularly when they paused or expressed difficulty with the language. This statistic is cited in Regina Schuller and Neil Vidmar, “The Canadian Criminal Jury” (2011) 86 Chi-Kent L Rev 497 at 522-23.

¹⁰⁸ She has testified to this effect in a number of cases. See e.g. *R v Griffis*, [1993] OJ No 3314 (QL) (Ct J (Gen Div)) [*Griffis*]; *R v McKenzie*, [2001] OJ No 4858 (QL) (Sup Ct) [*McKenzie*].

¹⁰⁹ Miriam Henry and Frances Henry, “A Challenge to Discriminatory Justice: The Parks Decision in Perspective” (1996) 38 Crim LQ 333 at 348.

¹¹⁰ Regina A Schuller, Veronica Kazoleas and Kerry Kawakami, “The Impact of Prejudicial Screening Procedures on Racial Bias in the Courtroom” (2009) 33 Law Hum Behav 320.

victim is a white woman? Which answer most accurately reflects your answer to that question:

- (a) I would not be able to judge the case fairly.
- (b) I might be able to judge the case fairly.
- (c) I would be able to judge the case fairly.
- (d) I do not know if I would be able to judge the case fairly.¹¹¹

Durno J in *Douse* permitted this slight alteration to the *Parks* question, but rejected a more sophisticated proposal to identify racial partiality. The multiple-choice approach accepted by Durno J received a mixed reception in subsequent cases. Some judges, like Pardu J in *R v Valentine*, recognized that “a simple yes or no answer to the *Parks* question and degree of hesitation before answering provide a scant basis for the triers to assess racial bias.”¹¹² Another positive response came from McCombs J, who found that the subtlety of subconscious racism was reflected in the distinctions between the answers.¹¹³

In contrast, trial judges in *R v Johnson*¹¹⁴ and *R v Stewart*¹¹⁵ held that an evidentiary foundation supporting multiple-choice answers must be established to permit a change to the standard *Parks* question, a foundation that was not evident in *Douse*. Bewilderingly, Nordheimer J in *Johnson* suggested (and Kitley J in *Stewart* agreed) that the traditional inquiry may actually be *more* effective in revealing subconscious bias given that jurors sometimes do not limit themselves to a yes or no answer. Nordheimer J noted that many prospective jurors spontaneously elaborate on their response, whereas they may limit themselves to one of the available choices in the proposed format.¹¹⁶ This perspective was also adopted by Strathy J in *R v Barnes*, in which he noted that “the open-ended *Parks* question gives prospective jurors more scope for true self-reflection and assessment than the straight-jacketed multiple choice questions proposed in *Douse*.”¹¹⁷ It was unclear from their analyses why jurors would not offer clarifications or elaborations in the multiple-choice context as well.

¹¹¹ *Douse*, *supra* note 106 at para 281.

¹¹² *R v Valentine*, [2009] OJ No 5961 (QL) at para 11 (Sup Ct J) [*Valentine*].

¹¹³ *R v Lewis*, [2011] OJ No 5927 (QL) at para 5 (Sup Ct J).

¹¹⁴ *R v Johnson*, [2010] OJ No 3970 (QL) (Sup Ct J) [*Johnson*].

¹¹⁵ *R v Stewart*, [2011] OJ No 3354 (QL) (Sup Ct J) [*Stewart*].

¹¹⁶ *Johnson*, *supra* note 114 at paras 5-8.

¹¹⁷ *R v Barnes*, [2012] OJ No 6014 (QL) (Sup Ct J). Strathy J’s repudiation of multiple choice questions in this context stands in sharp contrast to Pardu J’s approach in *Valentine*, *supra* note 112, in which she accepted this form of questioning as preferable to the more limited *Parks* inquiry. Given that both justices were recently appointed to the Ontario Court of Appeal, it will be interesting to see if and how the Court resolves this issue in the future. My thanks to an anonymous reviewer for bringing this point to my attention.

Ultimately, while Nordheimer J (and Strathy J) recognized that challenges for cause based on *Parks* could be improved, “there should be a solid foundation made out for any change before we embark on lengthening or complicating or otherwise altering the established process.”¹¹⁸

Similarly, in *R v Ahmad*, the “Toronto 18” terrorism case, Dawson J rejected multiple-choice answers to the *Parks* question.¹¹⁹ Like his colleagues in *Johnson* and *Stewart*, he noted that jurors were free to offer a more substantial response to the *Parks* question. His particular concerns with allowing multiple-choice answers, however, were focused on other issues, including juror privacy and administrative efficiency. Juror privacy is an unconvincing though frequently-tendered justification for denying more in depth questions regarding racial prejudice. As Dawson J suggested, multiple-choice answers in this context were more “intrusive” to prospective jurors than asking questions about pre-trial publicity in this format.¹²⁰ Such reasoning suggests that a juror’s prejudicial beliefs deserve more protection than an accused person’s right to an impartial jury. As Nordheimer J remarked, however, “[i]f a slightly increased infringement of the privacy of the individual was necessary in order to better determine whether prospective jurors harbour racist attitudes, then, within reason, that infringement would appear to be warranted.”¹²¹ Also not compelling is Dawson J’s speculation that a multiple-choice inquiry would be time-consuming.¹²² The question itself would take little additional time to pose. If the process took longer because potential jurors were more introspective, than this extension should be viewed as a positive development, one that may help to weed out more deeply embedded forms of racism.

More challenging is Dawson J’s suggestion that the multiple-choice format may “lead to perverse results.”¹²³ If the triers, also members of the jury pool, found a prospective juror acceptable even if she responded that she “might” be able to judge the case fairly (option (b)) or that she did not know if she could (option (d)), there would be no recourse to eliminate the juror if the peremptory challenges were already exhausted. The standard *Parks* question was better, in his view, because it “avoids these potential problems.”¹²⁴ A similar concern was raised by the trial judge in *Griffis*, where the accused proposed multiple open-ended questions designed to

¹¹⁸ *Johnson*, *supra* note 114 at para 14.

¹¹⁹ *R v Ahmad*, [2010] OJ No 3341 (QL) (Sup Ct J) [*Ahmad*].

¹²⁰ *Ibid* at para 34.

¹²¹ *Johnson*, *supra* note 114 at para 13.

¹²² *Ahmad*, *supra* note 119 at para 33.

¹²³ *Ibid* at para 32.

¹²⁴ *Ibid*.

uncover more subtle forms of racism. The trial judge agreed that yes or no questions with a socially acceptable answer would likely be ineffective in revealing racial prejudice. Macdonald J rejected some of the more general questions (for example, “Do you think racism is a problem in Canadian society?”), however, on the basis that lay triers may not have the necessary expertise to interpret the answers to complicated questions without instruction.¹²⁵

These concerns are legitimate ones and should be addressed in the *Criminal Code*, which currently provides no assistance with the assessment of responses and no mechanism for addressing a problematic determination by the triers.¹²⁶ After all, the triers are not experts, nor are they themselves routinely screened for racial prejudice.¹²⁷ The solution, however, does not lie in seeking less information about the racial partiality of potential jurors. This approach bolsters the impression that challenges for cause based on racial prejudice are more symbolic than a genuine attempt to secure an impartial jury. Essentially, it is better not to know than to have to address the possibility that racism may infect the jury’s decision. In other words, ignorance is bliss. The choice not to grapple with the complexities of racism is a manifestation of white privilege; wilful ignorance about racial prejudice is not an option that is available to everyone.

Given the mixed judicial response to even this modest variation of the *Parks* question, it is not surprising that many trial courts have precluded more extensive questioning about racial prejudices, often adopting similar rationalizations. In *R v Oliver*, for example, Ferguson J rejected the accused’s request to ask multiple questions. The proposed questions would have explored attitudes about Black persons, including views on their abilities compared to other races, their propensity for violence, whether they should be permitted to come and live in Canada, and so on.¹²⁸ Like the Court in *Ahmad*, Ferguson J was concerned about juror privacy and “embarrassment” in being asked sensitive questions on prejudice. In his

¹²⁵ *Griffis*, *supra* note 108 at para 17.

¹²⁶ *Pan and Sawyer*, *supra* note 25, illustrates another procedural limitation in the criminal justice system’s response to racism. In *Pan*’s case, the deliberations of the jury were protected by juror secrecy rules although the accused argued they had been tainted by racial prejudice.

¹²⁷ Although not required by the *Criminal Code*, some trial judges have screened triers using the same questions that will be posed to prospective jurors; see e.g. *Griffis*, *supra* note 108. See also *Cho*, *supra* note 91 at para 40, in which Romilly J noted that it was “good practice” to investigate the impartiality of triers, although not statutorily mandated. In contrast, Goudge JA held that it is unnecessary to screen triers as they are not determining the guilt or innocence of the accused; see *R v Brown* (2002), 166 CCC (3d) 570 (Ont CA) at para 16.

¹²⁸ *R v Oliver*, [2001] OJ No 6214 (QL) (Sup Ct J) at para 19.

experience, jurors frequently “are visibly discomfited by being asked such a question and on occasion jurors have expressed surprise and offence at being subjected to the process.”¹²⁹ Expanding the questions, in his view, would be too intrusive and could increase juror unease.

Also anxious about unfairness to jurors in *Douse*, Durno J, although willing to allow the *Parks* question to be posed in multiple-choice format as discussed above, feared that inaccurate scores from a more involved survey could result in unjustly dismissing an unbiased juror. He lamented: “For fulfilling their civic duty, there exists a real potential that some individuals will be inaccurately labelled racists in open court.”¹³⁰ Moreover, he was concerned that the additional questions requested by the accused had not been tested in the courtroom setting, suggesting that an evidentiary foundation was necessary before the court would consider an expansion of the traditional inquiry.¹³¹ He preferred the testimony of Crown expert Jonathan Freedman, a psychology professor who suggested that the traditional *Parks* question was adequate, although his expertise did not extend to subconscious racism.

Freedman again testified in *R v Gayle* that a rolled-up *Parks* inquiry – one question that incorporated both the attitudinal and behavioural components – was preferable to the multiple questions advanced by the accused’s expert witnesses because it was an “absolutely straight-forward question” and “not in the least bit ambiguous.”¹³² Because Freedman’s testimony established an adequate factual basis for the trial judge’s decision to reject a fuller examination of racial prejudices, the Court of Appeal held there were no grounds to interfere with his findings even though he did not provide reasons.¹³³ The Court of Appeal, however, acknowledged the importance of exploring subconscious biases and suggested that challenge for cause questions may be improved over time under the guidance of experts. Sharpe JA urged an approach to uncovering racial bias that was “flexible and open-minded” rather than “routine, mechanical or formulaic.”¹³⁴

What constitutes a sufficient evidentiary basis for expanding the scope of *Parks* remains elusive. While often recognizing the dangers of

¹²⁹ *Ibid* at para 16.

¹³⁰ *Douse*, *supra* note 106 at para 245.

¹³¹ *Ibid* at 240.

¹³² *R v Gayle* (2001), 54 OR (3d) 36 at para 29 (CA) [*Gayle*]. Henry and psychology professor Richard Lalonde testified on behalf of the accused. They formulated eight questions to screen for racial partiality.

¹³³ *Ibid* at para 33.

¹³⁴ *Ibid* at para 34.

subconscious racism, trial courts tend to resist more nuanced questions without some kind of guarantee that the questions would be an improvement over *Parks*.¹³⁵ This approach is unhelpful for several reasons. First, we have no way to evaluate properly the effectiveness of the *Parks* question, let alone determine whether a modification would be an improvement to it. Given that jurors are precluded from disclosing their deliberations, few options exist to assess the influence of racial prejudice on decision-making. Studies using mock jurors tend to be devalued by courts and academics alike because they cannot replicate the dynamics of a courtroom.¹³⁶ Second, appellate courts have cautioned against impossibly high evidentiary standards when assessing issues of racial prejudice. As McLachlin J noted in *Williams*, “It is extremely difficult to isolate the jury decision and attribute a particular portion of it to a given racial prejudice observed at the community level.”¹³⁷ Doherty JA in *Parks* also indicated that “[t]he existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts.”¹³⁸ It is not clear from the case law, what, if any, kind of proof, would suffice in this context. What research, outside of the courtroom, would indicate effective screening measures for subconscious racial bias in challenges for cause? Courts need to embrace a more flexible approach to a process that most concede is flawed, and such an approach must recognize the realities and challenges of uncovering subconscious biases. As McLachlin J asserted, “‘Concrete’ evidence as to whether potential jurors can or cannot set aside their racial prejudices can be obtained only by questioning a juror.”¹³⁹

¹³⁵ For example, Wein J recognized the influence of subconscious racism but was unwilling to permit questions that resembled those proposed in *Gayle*. There was “simply no assurance or evidence before [him] to show that the questions will assist in providing information that is valid;” see *McKenzie*, *supra* note 108 at para 39. See also *R v Muvunga*, 2013 ONSC 2770, OJ No 2272 (QL) (Sup Ct J), where Pomerance J acknowledged the importance of identifying subconscious racism and the need for flexible approaches to challenges for cause, but nonetheless suggested that “tradition should not be cast aside unless there is good reason to do so.” She held there was insufficient evidence to suggest that multiple questions would more effectively identify racial bias (at para 6). For an extensive judicial critique of the *Parks* question, see *R v Sinclair* (2009), 245 CCC (3d) 203 (Ont Sup Ct). While a full analysis of this complex decision is beyond the scope of this paper, it is worth noting that Murray J took issue with several aspects of the *Parks* inquiry, which he asserted must evolve in order to be relevant and useful. He also cast doubt on the assumption that jurors can put aside racial prejudices in reaching a verdict (i.e. that the attitudinal and behavioural components of the *Parks* question can be separated).

¹³⁶ See e.g. *Williams*, *supra* note 2 at para 35; Roach, *supra* note 18 at 423.

¹³⁷ *Williams*, *ibid* at para 35.

¹³⁸ *Parks*, *supra* note 1 at 338.

¹³⁹ *Williams*, *supra* note 2 at para 36.

Ironically, the narrow *Parks* question to which courts (and lawyers) have become so attached was never subjected to the rigorous testing that trial judges now require before they will entertain a modification. As mentioned at the beginning of this article, what is now known as the *Parks* question was proposed by one lawyer without any supporting materials. Why have we become so invested in a tradition with no evidentiary foundation to attest to its effectiveness, whose benefits are entirely speculative?

Our rigid and unqualified adherence to the *Parks* question reflects to some extent a discomfort with dealing with racism. Given its numerous shortcomings, the *Parks* question is principally symbolic. In theory, we may be able to screen out those whom Henry and Henry denominate the “Archie Bunker-type overt racists,”¹⁴⁰ but it is difficult to envision how this curt examination can identify more subtle forms of racism. A *Parks* inquiry enables us to claim that we are treating racism in the criminal justice seriously without taking any real action. We resist a more meaningful investigation because we would rather not know. Knowledge imposes a responsibility to act.

Our predominantly white judiciary needs to overcome its unease with issues of racism if we truly are committed to addressing systemic inequalities. Judges must recognize that liberal colour-blind ideology, while tempting, perpetuates rather than alleviates racism. Recognizing race and interrogating racism will not inject a racial overtone into an otherwise neutral process.¹⁴¹ Rather, racism is always at issue, whether or not we admit it. Challenges for cause based on racial prejudice are unsettling because they demand a race-consciousness that rarely is required by the criminal justice system or society at large. Indeed, such race-consciousness is usually discouraged, believed to be evidence of racist thinking. Race-consciousness requires a painful acknowledgement of whiteness and the privileges that extend to whites as a result of racial domination. From this perspective, it is not surprising that judges often worry that prospective jurors will find questions about their racial prejudice invasive or embarrassing; such discussions run counter to dominant cultural scripts that keep systems of racial subordination invisible and intact. Talking about race and racism is not racist, however. The true danger stems from

¹⁴⁰ Henry and Henry, *supra* note 109 at 348.

¹⁴¹ This concern has been raised repeatedly by trial judges (and in some cases, like *Parks* and *Spence*, by the Crown). In *Wilson*, *supra* note 23 at 99, the trial judge suggested, “nobody ever throws those statistics at you nor has those available but I always have the feeling that by raising the issue you may implant it in the jury’s mind and it may be even more prejudicial to a coloured accused.”

denying, ignoring, or minimizing the existence or extent of racism in society and the criminal justice system.

7. Conclusion

Rather than erring on the side of caution as appellate courts advise, many trial judges (and some appellate courts) are erring on the side of less information in their decisions on challenges for cause based on racial partiality. Instead, they use their discretion to remain wilfully ignorant about the nature of racism and how it influences decision-making. Without more direction from appellate courts, trial judges will be inclined to meet only the minimum requirements for challenges for cause and depressingly little change in a criminal justice system mired in racism.

Twenty years have passed since *Parks* was decided, but what indication do we have that racism in the criminal justice system has abated? Racialized men and women, particularly from Black and Aboriginal communities, continue to be disproportionately represented in the criminal justice process and in correctional facilities. Challenges for cause cannot fix all that is wrong with the system, but they do have an important role to play. The process fails, even symbolically, if accused persons are not allowed to challenge fully the racial biases of prospective jurors. Racialized accused receive the message that their right to be tried by an impartial jury and their right to be free from discrimination – *Charter* rights that many trial judges fail to incorporate into their analyses – deserve less protection than other considerations.

Appellate courts were instrumental in institutionalizing the right to challenge prospective jurors for cause based on racial prejudice and in ensuring that trial judges respected this right. Now, as we observe a wide range of approaches to the content of such challenges, we need appellate courts to provide unequivocal and consistent direction to trial judges about the types of questions that accused persons may be permitted (and even encouraged) to ask to root out more subtle forms of racism. Trial judges should not be able to rely on their discretion to evade these intellectually (and emotionally) thorny explorations. Without appellate intervention, trial judges will continue to cling to the narrow question accepted in *Parks* and *Williams* and to resist attempts to push the law forward in a way that recognizes the myriad ways in which racism undermines justice.

Judges are not the only ones who bear responsibility for initiating change in this context. To move forward, lawyers must initiate thoughtful, informed, and comprehensive requests to challenge for cause on behalf of their clients, and appeal unreasonable denials. If lawyers and judges

routinely grasp for the restrictive question in *Parks*, whether out of tradition, efficiency, or racial illiteracy, the law will remain stagnant and racism will flourish.